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ABSTRACT

This Article analyzes the significant issues facing the Presidential Advisory Commission on Ocean Conferences in Ocean Shipping. This Commission will assess the success of the Shipping Act of 1984 and will report to Congress on the need for changes in the 1984 Act and in United States regulatory policy regarding international ocean common carriers. Mr. Danas recommends that the Commission carefully examine the antitrust-exempt conferences, which international ocean common carriers have been organizing for over one hundred years for the purpose of self-regulation and rationalization. Mr. Danas suggests that the review of the continued existence of the liner conference system requires a recognition that the ocean transportation industry is changing into an international intermodal transportation industry that handles shipments in one continuous movement from origin to destination. The author emphasizes that the development of a post-1992 European Common Market and the adoption of Pacific Rim distribution techniques will further the trend towards integrated transportation companies and the use of full service logistics in international shipping. He suggests that the development of

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the international intermodal transporation company and the needs of shippers dealing with such companies must figure prominently in the Advisory Commission's treatment of those issues that Congress has required it to addess—tariff filing, antitrust immunity for ports, independent action on service contracts, and the existence of the conference system. Mr. Danas suggests a framework whereby the Commission may successfully integrate these issues into the task presently committed to it by Congress.

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I. INTRODUCTION

Changing trade relations and technology are forcing changes in the United States economy and many of its laws governing international commerce. Economic regulation of international ocean shipping represents the cutting edge of the inherent conflict in policies that must coordinate domestic and international concerns. Domestically, for example, the United States has maintained a strong policy against antitrust exemptions.[1] Internationally, however, the United States has allowed ocean carriers to join and form antitrust-exempt conferences for the purposes of economic self-regulation and the reduction of competition.[2] Accommodating the interests of its trading partners has been a major concern of the United States in justifying the different regulation of international ocean shipping.[3] National defense issues, in the form of promoting a strong merchant marine, have also been at the forefront of United States shipping policy.[4]

Antitrust exemptions in the ocean shipping industry have existed since 1916.[5] In 1984 Congress revised the international shipping laws conferring these exemptions.[6] The Shipping Act of 1984 (the 1984 Act) was compromise legislation, the result of six years of congressional efforts to revise the regulation of international shipping to accommodate changing technology and concepts of international law.[7] The 1984 Act was an un-

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1. "Immunity from the antitrust laws is not lightly implied." United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 348 (1963) (quoting California v. Federal Power Comm'n, 369 U.S. 482, 485 (1962)).

2. Shipping Act of 1984, Pub. L. No. 98-237, 98 Stat. 67 (codified as amended at 46 U.S.C. app. §§ 1701-1720 (Supp. V 1987)).

3. The Shipping Act of 1984, for example, declares that one of its purposes is "to provide an efficient and economic transportation system in the ocean commerce of the United States that is, insofar as possible, in harmony with, and responsive to, international shipping practices." 46 U.S.C. app. § 1701(2).

4. The third enumerated purpose of the 1984 Act is "to encourage the development of an economically sound and efficient United States flag liner fleet capable of meeting national security needs." 46 U.S.C. app. § 1701(3).

5. Shipping Act of 1916, ch. 451, § 1, 39 Stat. 728 (current version at 46 U.S.C. app. §§ 801-842 (Supp. V. 1987)). *See generally* FEDERAL MARITIME COMMISSION [F.M.C.], SECTION 18 REPORT ON THE SHIPPING ACT OF 1984 at 33-39 (Sept. 1989) [hereinafter SECTION 18 REPORT]; Fawcett & Nolan, *United States Ocean Shipping: The History, Development, and Decline of the Conference Antitrust Exemption*, 1 NW. J. INT'L L. & BUS. 537 (1979); Buderi, *U.S. Policy on Regulation of Liner Shipping in the 1980s: A View From Washington* (pts. 1 & 2), 17 J. MAR. L. & COM. 493 (1986), 18 J. MAR. L. & COM. 111 (1987).

6. Shipping Act of 1984, 46 U.S.C. app. §§ 1701-1720.

7. Initial attempts to revise United States shipping laws were introduced in Congress

easy political compromise between carriers and shippers: carriers would receive a strengthened exemption under the antitrust laws while shippers would gain new rate reduction tools.[8]

A key provision of the 1984 Act reflects the congressional uneasiness over the compromise; it provides for review of the 1984 Act by a Presidential Advisory Commission on Ocean Conferences in Ocean Shipping (Presidential Advisory Commission or Advisory Commission).[9] To be established five and one-half years after the statute's enactment, the Advisory Commission will study the success of the Shipping Act of 1984 and address the central issue underlying United States economic regulation of ocean common carriage: continued existence of the liner conference system.[10] The Advisory Commission will file with Congress its report recommending possible changes to the Shipping Act of 1984 and United States regulatory policy on international ocean common carriage.[11]

Congress has mandated that the Advisory Commission revisit the key issues of the 1984 Act's debates: tariff filing; antitrust immunity for ports; independent action on service contracts; and the existence of the conference system.[12] Over the past five years, rapid technological and economic changes have altered the focus of the Advisory Commission's

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in 1978. The following bills were introduced in the 96th through 98th Congress:
Senate Bills:
S. 1460, 1462, 1463, 96th Cong., 1st Sess., 125 CONG. REC. 17,551, 17,601-09 (1979);
S. 2585, 96th Cong., 2d. Sess., 126 CONG. REC. 9000, 9002-10 (1980);
S. 125, 96th Cong., 2d Sess. (1980);
S. 1593, 97th Cong., 1st. Sess., 127 CONG. REC. 19,352, 19,354-68 (1981);
S. 47, 504, 98th Cong., 1st Sess. (1983), 129 CONG. REC. 51,828 (daily ed. Mar. 1, 1983). S. 47 is also reprinted in *Hearing Before the Subcomm. on Merchant Marine of the Senate Comm. on Com., Science, and Transp. on S. 47*, 98th Cong., 1st Sess. 2 (1983) [hereinafter *Senate Hearings*].
House Bills:
H.R. 11,422, 95th Cong., 2d. Sess., 124 CONG. REC. 6331-32 (1978);
H.R. 4769, 96th Cong., 1st Sess., 125 CONG. REC. 18,392 (1979);
H.R. 6899, 96th Cong., 2d Sess. (1980);
H.R. 4374, 97th Cong., 1st Sess., 127 CONG. REC. 19,565 (1981);
H.R. 1878, 98th Cong., 1st Sess., 129 CONG. REC. (1983).

8. H.R. REP. No. 600, 98th Cong., 2d Sess. 42-43 (1984) [hereinafter CONF. REP.]; 130 CONG. REC. H1292 (daily ed. March 6, 1984) (remarks of Rep. Biaggi) [hereinafter Remarks of Biaggi].

9. 46 U.S.C. app. § 1717.

10. CONF. REP., *supra* note 8, at 43. *See infra* text accompanying notes 158-63, 187-91.

11. 46 U.S.C. app. § 1717(h).

12. 46 U.S.C. app. § 1717; CONF. REP., *supra* note 8, at 43.

mandate. The 1984 Act's legalization of through intermodal transportation and of the use of service contracts in ocean transportation has significantly altered how international freight moves.[13] These changes in the law may have provided an important impetus to a restructuring of the domestic transportation market in recent years. In addition, the transformation of world trading patterns, including the rise of the Pacific Rim and the forging of a borderless European Common Market of 320 million consumers by the end of 1992, has created new pressures on the transportation industry, and Congress, to examine transportation flows and the laws governing international shipping.

In advisory hearings held at the Federal Maritime Commission (F.M.C.) in April 1989, major shipper interests proposed that the antitrust exemptions in ocean shipping be eliminated and that the industry be deregulated in a manner similar to that experienced by the domestic transportation industry in the 1980s, with a contract system for large shippers and a tariff system for small and medium-sized shippers.[14] Thus, the Advisory Commission must focus on two key questions: first, the extent to which changes in United States trading patterns and corresponding changes in the structure and services provided by transportation companies have altered the need for a conference system in the 21st century; second, whether the Shipping Act of 1984 is ensuring the viability of the conference system. The Advisory Commission must look beyond the discrete issues that Congress identified in the early 1980s as important in order to determine what legal structures the international transportation industry will need for the next century. The Advisory Commission must also provide a blueprint for how transportation services will become part of a world trading system in the 1990s.

This Article is a survey of the key issues that the Presidential Advisory Commission has a mandate to study. Because the proposal of the major shippers to abolish the conference system is likely to be a key focus of the political debate on the Shipping Act, the Article also identifies and discusses those issues that the Advisory Commission should examine in considering the effect of that proposal on small and medium-sized shippers.

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13. *See* 46 U.S.C. app. §§ 1707(a), 1709(c)(2). *See infra* part III, section A.

14. Position of the Shipper Study Group and Advisory Committee on Amendments to the Shipping Act of 1984 (Mar. 24, 1989) [hereinafter Shipper Position Paper], *reprinted in* 3 F.M.C., SECTION 18 STUDY ADVISORY COMMITTEE: MEETING OF APRIL 6, 1989, at 3, 11-14 [hereinafter SECTION 18 PROCEEDINGS].

II. The Current Regulatory Scheme and the Need for Review

A. *The Historical Perspective*

In the late 1970s, the United States sought to loosen the regulatory reins on the transportation industry. Railroads, motor carriers, and airlines were substantially deregulated.[15]

Changes in economic thought as to the technological and competitive structure of the transportation industries as they existed in the United States resulted in major changes in government oversight of these industries. In the first half of the 20th century, the United States actively regulated the transportation industries under a public utility theory of regulation.[16] While private enterprise could retain control over transportation services (unlike in many other countries), the Government would have its say over market entry and rates in the transportation industry.[17]

Collective ratemaking and the rationalization of services have also been a hallmark of many modes of transportation, including ocean ship-

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15. The trend started with the railroad bankruptcies of the early 1970s, the most notable being the Penn Central bankruptcy that led to the creation of Conrail. In 1976 Congress sought to loosen railroad regulatory restrictions by passing the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31. Implementation of that act, however, was less speedy than Congress desired. In 1980, Congress enacted the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895.

The airline industry was substantively deregulated in 1977 and 1978. Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705. The air passenger market was deregulated in 1980. International Air Transportation Competition Act of 1979, Pub. L. 96-192, 94 Stat. 48 (1980).

The motor carrier industry was partially deregulated in 1980. Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793. This deregulation consisted of a reduction of regulatory market entry barriers and provision of a right to enter into domestic contractual agreements.

16. *Cf.* L. Sullivan, Handbook of the Law of Antitrust 744 (1977).

17. In many countries the perception of transportation as a public utility has led to state ownership and operation. Because state-owned carriers are often heavily subsidized, they can have an adverse effect upon the competitive posture of nonsubsidized private carriers. The Shipping Act of 1984 gives the Federal Maritime Commission authority to review the rate levels of such foreign "controlled carriers" operating in the United States trades. 46 U.S.C. app. §§ 1702(8), 1708. Section 19(1)(b) of the Merchant Marine Act of 1920 gives the F.M.C. authority to address restrictive shipping conditions in foreign trades resulting from the actions of foreign laws or vessel operators. 46 U.S.C. app. § 876(1)(b). The Foreign Shipping Practices Act of 1988 gives the F.M.C. additional authority to review the laws of foreign countries that may assist foreign flag carriers or impede the operations of United States flag carriers. Act of Aug. 23, 1988, Pub. L. No. 100-418, tit. X, §§ 1001-1003, 102 Stat. 1570 (codified at 46 U.S.C.A. app. § 1710(a) (West Supp. 1989)).

ping.[18] The argument is that economies of scale and cutthroat competition require competitor cooperation for the transportation industry to be profitable. High fixed capital costs and the derived demand nature of the industry have also been cited as reasons for group rate efforts.[19]

A crucial premise of the deregulation movements of the 1970s was the concept that pressures from competing modes of transportation could substitute for regulation and the cooperative efforts of each individual mode of transportation.[20] Historically, each mode of transportation has generally been regulated economically as a discrete entity. For example, regulation of the motor carrier industry primarily focused on competitive conditions in that market, rather than on developing a uniform set of regulations and federal policies encompassing the relationship between motor carriers and their competitors in the rail industry.[21] This separate regulation reflected, in part, market and technological distinctions between each mode of transportation. In a breakbulk era of shipping, the continuous transfer of manufactured goods from one mode to another as part of a single movement in a commercially acceptable period of time was not a common practice.[22]

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18. Shipping Act of 1984, 46 U.S.C. app. §§ 1701-1720 (Supp. V 1987). In the domestic surface transportation industries, rail and motor carriers were allowed to create rate bureaus. 49 U.S.C. § 10,706(a) (1982).

19. Ocean Common Carrier Position Paper on the Shipping Act of 1984, March 20, 1989, [hereinafter Carrier Position Paper], *reprinted in* SECTION 18 PROCEEDINGS, *supra* note 14, at 105-06. *See also* SECTION 18 REPORT, *supra* note 5, at 23-25.

20. *See, e.g.*, 49 U.S.C. § 10,505(f) (1982); American Trucking Ass'ns v. Interstate Com. Comm'n, 656 F.2d 1115, 1126 (5th Cir. 1981) (I.C.C. "was not arbitrary and capricious in finding and relying upon intermodal competition as a basis for its finding that regulation of TOFC/COFC service was not required to prevent abuses of market power by railroads").

21. For example, the Interstate Commerce Commission (I.C.C.) was initially created to regulate the railroad industry. Congress regulated the shipping industry next. Initial calls to have the industry regulated by the I.C.C. were rejected in favor of regulation by a separate agency. SECTION 18 REPORT, *supra* note 5, at 33-34. Although the motor carrier industry was placed under the regulatory jurisdiction of the I.C.C. pursuant to the Motor Carrier Act of 1935, ch. 498, 49 Stat. 543, the airline industry was regulated by the Civil Aeronautics Board until 1985. Civil Aeronautics Act of 1938, ch. 601, 52 Stat. 973.

22. Prior to containerization, the transshipment of breakbulk goods was a time-consuming process. Up to three days could be spent loading and unloading a ship. Containerships, in contrast, can spend as little as eight hours in port. *See generally* COMPTROLLER GENERAL, U.S. GEN. ACCT. OFF., PUB. NO. GAO/PAD-82-11, CHANGES IN FEDERAL MARITIME REGULATION 12 (1982) [hereinafter GAO Report]; SECTION 18 REPORT, *supra* note 5, at 46-47; Schmeltzer & Peavy, *Prospects and Problems of the Container Revolutions*, 1 J. Mar. L. & Com. 203 (1970); Tombari, *Trends in*

By the 1970s this situation had changed. Technological changes in how goods were shipped—"containerization"—made the interchangeable use of transportation modes increasingly prevalent.[23] The domestic transportation industry was thus ripe for a regulatory change. By 1980 legislation had been enacted that reduced government regulation of motor, rail, and air carriers.[24] The purpose of this deregulation was to foster substantial inter- and intramodal competition.[25]

United States regulation of international ocean transportation also found itself subject to pressures for regulatory changes in the late 1970s. The thrust of this deregulatory pressure, however, was almost exactly the opposite of that occurring in the domestic transportation market. Rather than the exchange of increased competition for a reduction in federal regulation—the basic tradeoff in the domestic industries—ocean shipping interests sought a stronger exemption from the antitrust laws to allow their collective activities, with less government regulation at the same time.[26]

The international nature of the ocean shipping industry explains this policy difference. As with other transportation modes, ocean transportation had until the 1970s been considered a separate industry for regulatory purposes.[27] The breakbulk aspect of the industry—indeed, the water mode of transportation—led to regulation of the maritime industry as

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Oceanborne Containerization and Its Implications for the U.S. Liner Industry, 10 J. MAR. L. & COM. 311 (1979); Agman, *Competition, Rationalization, and the United States Shipping Policy*, 8 J. MAR. L. & COM. 1 (1976).

23. *See supra* note 22.

24. *See* Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895; Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793; Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705.

25. For example, the Staggers Act of 1980 established a specific rail transportation policy of the United States Government, which, in part, was "to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public and the national defense." 49 U.S.C. § 10,101a(4) (1982).

26. SENATE COMM. ON COM., SCIENCE, AND TRANSP., THE SHIPPING ACT OF 1983, S. REP. NO. 3, 98th Cong., 1st Sess. 6-11 (1983); SECTION 18 REPORT, *supra* note 5, at 3.

27. In 1914 a congressional study and report on the liner conference system recommended that the I.C.C. regulate the liner conference system. This recommendation, by the Alexander Commission, was rejected in favor of regulation by a separate agency. *See* REPORT OF HOUSE COMM. ON THE MERCHANT MARINE AND FISHERIES, ON STEAMSHIP AGREEMENTS AND AFFILIATIONS IN THE AMERICAN FOREIGN AND DOMESTIC TRADE, H.R. DOC. NO. 805, 63rd Cong., 2d Sess. 419-420 (1914) [hereinafter Alexander Report]; H.R. REP. NO. 659, 64th Cong., 1st Sess. 27-32 (1916).

beginning and ending at the water's edge.[28]

Characterized by high fixed costs, relative ease of market entry, and cutthroat competition, in the 1870s steamship operators devised a self-regulatory system of cartels known as conferences to reduce some self-destructive tendencies of the industry.[29] The liner conference system, present in many of the major world trades, had counterparts in other transportation industries—in particular, the domestic rail and motor carrier industries.[30] However, whereas the ability of such domestic carriers to enter cartel arrangements was merely a limited aspect of a comprehensive regulatory scheme governing market entry and pricing mechanisms, the primary purpose of United States policy regarding the liner conference system has been to regulate the creation and operation of these cartels.[31]

The conference system has been allowed to exist in the United States trades in part because United States trading partners have sanctioned and fostered development of the conference system, despite arguments that the economics of the ocean shipping industry are no different from domestic transportation modes and that the industry thus does not need, nor merit, a strong exemption from the antitrust laws.[32]

In 1916 Congress accepted the recommendations of the Alexander Commission to allow the conference system.[33] Congress rejected on the grounds of international comity proposals for a strict regulation of the system similar to that of the domestic rail industry under the Interstate Commerce Act.[34] Instead, it allowed the liner conference system to operate in the United States trades, subject only to prior agency review and approval of the effects of the agreements on competition.[35] In 1961 the

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28. *Cf.* Friedmann and Devierno, *The Shipping Act of 1984: The Shift From Government Regulation to Shipper "Regulation,"* 15 J. MAR. L. & COM. 311, 318-19 (1984).

29. Agman, *supra* note 22, at 1; Bennathan & Walters, *Shipping Conferences: An Economic Analysis*, 4 J. MAR. L. & COM. 93 (1972); Llorca, *Antitrust Exemption of Shipping Conferences*, 6 J. MAR. L. & COM. 287, 287-91 (1975).

30. *See, e.g.*, 49 U.S.C. § 10,706 (1982 & Supp. V 1987).

31. *See* Friedmann & Devierno, *supra* note 28, at 316.

32. *See* Alexander Report, *supra* note 27; Letter from Brooks Hays, Asst. Sec. of State to Senator Engle (Aug. 15, 1961), *reprinted in* INDEX TO LEGISLATIVE HISTORY OF THE STEAMSHIP CONFERENCE/DUAL RATE LAW, S. DOC. NO. 100, 87th Cong., 2d Sess. 228-29 (1962); GAO Report, *supra* note 22, at 33; S. REP. NO. 3, *supra* note 26, at 7.

33. *See* SECTION 18 REPORT, *supra* note 5, at 25-27, 33-36.

34. *Cf.* SECTION 18 REPORT, *supra* note 5, at 33-34.

35. Shipping Act of 1916, ch. 451, 39 Stat. 728 (current version at 46 U.S.C. app. §§ 801-842 (1982 & Supp. V 1987)).

United States adopted a system of tariff filing.[36] This allowed agency policing of unreasonable rates and discriminatory practices.[37]

As with the domestic transportation industries, by the late 1970s technological and economic changes had created pressures for regulatory reform in the ocean shipping industry. The increasing containerization of the trades was transforming the conduct of ocean transportation.[38] In addition, the increasingly international activity of United States multinational corporations led the Department of Justice to assert a more activist international role. In the OPEC era of the 1970s, anything that looked and smelled like a cartel was subject to Justice Department scrutiny.[39] For the steamship industry, the result was a grand jury investigation that brought an indictment for price fixing and imposition of a restraint of trade on five corporations, two groups of shipping firms, and thirteen individuals. A plea of nolo contendere and a $5.4 million fine resolved the criminal proceeding. A subsequent class action was settled.[40]

The Shipping Act of 1984 had its genesis in the 1970s lawsuit. Carriers perceived a need for a stronger antitrust exemption—one that clarified their freedom to act collectively and avoided the regulatory burdens and lengthy court battles accompanying the existing system of regulation.[41] In addition, carriers wanted the right to offer through intermodal

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36. Act of Oct. 3, 1961, Pub. L. No. 87-346, 75 Stat. 762, 764-66 (codified at 46 U.S.C. § 817 (1982) (amended 1984)). For an overview of the legislative history of tariff filing in the international liner industry, see SECTION 18 REPORT, *supra* note 5, at 491-508.

37. *See, e.g.*, 46 U.S.C. §§ 815, 816 (1982) (amended 1984).

38. GAO Report, *supra* note 22, at 12; Schmeltzer & Peavy, *supra* note 22; Tombari, *supra* note 22; Agman, *supra* note 22, at 45-47.

39. S. REP. NO. 3, *supra* note 26, at 7-8. The Department of Justice and the Federal Trade Commission (F.T.C.) argued that the conference system antitrust exemption encouraged inefficiency by restricting market entry, limiting innovations, and requiring efficient conference members to price their services at the level of their least efficient members. *See Hearings Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary, on H.R. 1878*, 98th Cong., 1st Sess. 3 (1983) [hereinafter *House Judiciary Hearings*]. Some carriers hold similar views. *See, e.g., Hearings before the Subcomm. on Merchant Marine of the House Comm. on Merchant Marine and Fisheries, on H.R. 4374*, 97th Cong., 2d Sess. 184 (1982) [hereinafter *Regulatory Reform Hearings*] (statement of John R. Arwood, President Trans-Freight Lines, Inc.).

40. United States v. Atlantic Container Line, Crim. No. 79-00271 (D.D.C. filed 1979). A copy of the grand jury indictment is reprinted in *Hearing Before the Senate Comm. on the Judiciary, on S. 47 and S. 504*, 98th Cong., 1st Sess. 63, 70-87 (1983) [hereinafter *Senate Judiciary Hearings*] (attachment to testimony of Thomas E. O'Neill, National Association of Beverage Importers). *See also In re* Ocean Shipping Antitrust Litig., 500 F. Supp. 1235 (S.D.N.Y. 1980).

41. S. REP. NO. 3, *supra* note 26, at 6-11; 129 CONG. REC. S1487 (daily ed. Feb.

services to their customers, a right the Justice Department legally disputed on the grounds of conflicting agency jurisdiction between the Justice Department and the Federal Maritime Commission (F.M.C.) over such rates.[42]

Thus, in the late 1970s and early 1980s, the carrier industry initiated a lobbying effort to revise the 1916 Shipping Act.[43] The industry had three goals: the streamlining of the agreement approval process; a strengthening of the industry's antitrust immunity; and a right to offer through intermodal rates.[44] As a result of compromises with major shippers, carriers obtained only two of these goals: a through intermodal system and a streamlined antitrust approval process.[45] Whether their efforts achieved the other goal, a strengthened conference system, is subject to debate because shipper compromises included in the 1984 Act introduced concepts of contract carriage and independent action into the conference system.[46]

The focus of debate during the six years leading to passage of the Shipping Act of 1984 was the concept of open versus closed conferences. Simply stated, an open conference is one that must admit all trade participants as members.[47] A closed conference is one that may restrict and limit its membership.[48] An analysis of this debate requires a brief review

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22, 1983) (statement of Sen. Gorton); SENATE COMM. ON COM., SCIENCE, AND TRANSP., THE SHIPPING ACT OF 1982, S. REP. NO. 414, 97th Cong., 2nd Sess. 7-8 (1982).

42. *See* United States v. Federal Maritime Comm'n, 694 F.2d 793 (D.C. Cir. 1982). *See also* Pennsylvania v. I.C.C., 561 F. 2d 278 (D.C. Cir. 1977); Ex Parte No. 261, Tariffs Containing Joint Rates and Through Routes for the Transportation of Property Between Points in the United States and Points in Foreign Countries, 337 I.C.C. 625 (1970); 341 I.C.C. 246 (1972), 346 I.C.C. 688 (1974); 350 I.C.C. 361 (1975), 351 I.C.C. 490 (1976), 355 I.C.C. 913 (1977); United States v. Federal Maritime Comm'n, 655 F.2d 247 (D.C Cir. 1980). *See generally* O'Neill, *Jurisdictional Conflicts Between the Federal Maritime Commission and the Interstate Commerce Commissions*, 6 MAR. LAW. 51 (1981).

43. Friedmann & Devierno, *supra* note 28, at 319.

44. *Id.* at 316-19.

45. *See infra* part II, section B(1); text accompanying note 176-85.

46. *See infra* part III, section B(3), B(3)(a).

47. SECTION 18 REPORT, *supra* note 5, at 24. The Shipping Act of 1984 requires all conference agreements to provide for "reasonable and equal terms and conditions for admission and readmission . . . for any ocean common carrier willing to serve the particular trade or route" and to "permit any member to withdraw from conference membership upon reasonable notice without penalty." Shipping Act of 1984, 46 U.S.C. app. § 1704(b)(2)-(3).

48. SECTION 18 REPORT, *supra* note 5, at 24. *See also* Hanson, *Regulation of the Shipping Industry: An Economic Analysis of the Need for Reforms*, 12 J. L. & POL'Y

of Third World political events affecting ocean shipping in the early 1980s.

In 1983 enough signatory nations ratified the United Nations Code of Conduct for Liner Conferences (the UNCTAD Code) for it to be implemented.[49] The UNCTAD Code is a maritime promotional statute formed under the aegis of the United Nations Conference on Trade and Development (UNCTAD). The purpose of the UNCTAD Code is to assist developing countries in forming a shipping industry. The UNCTAD Code preserves forty percent of a given trade between two nations for the flag ships of each trading partner. It preserves the remaining twenty percent of the trade for independent third flag carriers.[50]

The purpose behind this 40-40-20 cargo reservation scheme is to preserve a trade for a given state and its trading partner while also recognizing the comity issues inherent in allowing some semblance of free trade.[51] In addition, the twenty percent market share reserved for third flag carriers is perceived as an interjection of competition into the trades.[52] Rates can be kept in check in a closed trade if independent carriers can enter the trade.[53]

While the United States and its major trading partners initially opposed the UNCTAD Code, the idea that shipowners should have greater ability to control, coordinate, and rationalize their services gave strong impetus for proposals to authorize closed conferences in the early 1980s. In other words, if the shipping industry were to achieve true rationaliza-

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INT'L BUS. 973 (1980).

49. UNCTAD, *United Nations Conference of Plenipotentiaries on a Code of Conduct for Liner Conferences, Final Act and Annexes*, U.N. Doc. TD/CODE/11/Rev. 1 (May 9, 1974), *reprinted in* 13 I.L.M. 910 (1974). *See also Council Regulation (EEC) No. 954/79 of May 15, 1979*, 22 O.J. EUR. COMM. (No. L 121) 1-4 (1979); Buderi, *supra* note 5, pt. 1, at 502-05; *id.* pt. 2, at 114-16; SECTION 18 REPORT, *supra* note 5, at 28-29.

50. UNCTAD, THE REGULATION OF LINER CONFERENCES (A CODE OF CONDUCT FOR THE LINER CONFERENCE SYSTEM) at 23, U.N. Doc. TD/104/Rev.1, U.N. Sales No. E.72.II.D.13 (1972).

51. *See* Kanuk, *The UNCTAD Code of Conduct for Liner Conferences: Trade Milestone or Millstone—Time Will Soon Tell*, 6 NW. J. INT'L L. & BUS. 357, 358 n.2 (1984); Buderi, *supra* note 5.

52. UNCTAD, PROTECTION OF SHIPPER INTERESTS, U.N. Doc. TD/B/C.4/174 (1978) [hereinafter UNCTAD, SHIPPER INTERESTS].

53. *See, e.g.*, Ellsworth, *Competition or Rationalization in the Liner Industry?* 10 J. MAR. L. & COM. 497, 515-17 (1979); Comment, *The Sinking Shipping Industry*, 5 NW. J. INT'L L. & BUS. 99, 102 (1983).

tion and profitability, its members all had to march to the same drumbeat.[54]

The arguments given for closed conferences included comity with trading partners and preservation of flag carriers. Since United States trading partners in many cases allowed closed conferences, the United States should also do so, if not as a matter of economics, then as a matter of political and diplomatic comity. Some made an economic argument that while a strong closed conference system could indeed result in less competition, it would enable carriers to obtain conference cohesion and stability, thus preserving its members' financial stability, including that of United States flag carriers.[55] If the United States wanted to maintain a strong merchant marine for national defense purposes or otherwise, a strong conference system would do so best.[56]

While many aspects of the Reagan Administration's antitrust legacy have been criticized as too lenient in allowing market concentration, the Reagan Justice Department and Federal Trade Commission consistently opposed any form of price fixing.[57] It is thus interesting that the Administration did not voice a strong opposition to the conference system, but instead assisted in the efforts to reform it. The Administration did object, however, to the Government's assisting a price fixing cartel in policing its members. It also favored the presence of independent carriers in the trades.[58]

Leading the debate against the demands for a stronger conference system were shipper interests that sought concessions from carriers in exchange for a strengthened antitrust immunity. The end result was com-

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54. *See, e.g.*, Kanuk, *supra* note 51, at 369-71. Other commentators called for the implementation of bilateral agreements in the international trades. *See, e.g.*, R. Daschbach, Chairman, Federal Maritime Comm'n, Remarks Before the Caribbean Shipping Associations, Santo Domingo, Dominican Republic (Oct. 23, 1979), *reprinted in* 11 J. MAR. L. & COM. 387, 393 (1980). A brief summary of United States bilateral maritime agreements with Brazil, Argentina, and the People's Republic of China is contained in SECTION 18 REPORT, *supra* note 5, at 94-96.

55. *See, e.g., Closed Conferences and Shippers' Councils in the U.S. Liner Trades: Hearings on H.R. 11422 Before the Subcomm. on Merchant Marine of the House Comm. on Merchant Marine and Fisheries*, 95th Cong., 2d Sess. 266-70 (1978) [hereinafter *Closed Conference Hearings*] (statement of John Evans, University of Wales Institute of Science and Technology). One-third of the world's conferences are open conferences. There are approximately 400 conferences worldwide. SECTION 18 REPORT, *supra* note 5, at 24.

56. *But cf.* GAO Report, *supra* note 22, at 18.

57. *See* Fox & Sullivan, *Antitrust—Retrospective and Prospective: Where Are We Coming From? Where Are We Going?*, 62 N.Y.U. L. REV. 936, 947-48 (1987).

58. *See House Judiciary Hearings*, *supra* note 39, at 3 (statement of James C. Miller III, Chairman, Federal Trade Commission).

promise legislation recognizing an open conference system and reflecting carrier, shipper, and Reagan Administration interests. The debate on the conference system was thus not resolved, and Congress mandated review of the issue again in 1990, timed for the beginning of a new administration.[59]

In the interim, there has been a five year experiment known as the Shipping Act of 1984. The Presidential Advisory Commission will not only revisit the issues and the debate resulting in the 1984 Act, but also examine the effectiveness of the 1984 Act itself. The Advisory Commission will have to address not only the questions of regulatory philosophy raised by the debates over the 1984 Act, but, more important, whether the nature of world trading patterns and the international transportation industry have changed over the past five years in such a manner as to require a fundamental re-evaluation of the way the industry is structured and regulated.

In some regards, the Advisory Commission faces a "chicken versus egg" question. Are changes in the industry the result of changes in the United States economy and trading patterns or of changes resulting from the Shipping Act of 1984? In addition, bearing in mind that Congress rarely revisits the Shipping Acts, the Advisory Commission must determine whether the 1984 Act is adequate to meet the economic challenges facing the United States over the next generation, challenges not fully comprehended when the 1984 Act was passed.

B. *The Shipping Act of 1984*

The Shipping Act of 1984 consists of three broad themes: the streamlined antitrust approval process for carriers; certain prohibited acts designed to protect the system of common carriage and prevent market abuses by shippers and carriers; and the market tools provided to shippers in exchange for the carriers' strengthened antitrust immunity. It is in these compromises that the Shipping Act of 1984 differs from its predecessors. It is also in these provisions that the dialogue may have been changed for the Presidential Advisory Commission.

1. Carrier Antitrust Immunity

The major benefit the 1984 Shipping Act provided to ocean common carriers was a clarification and streamlining of the approval process for ocean conference agreements.[60] The primary complaint of ocean common

59. 46 U.S.C. app. § 1717.

60. 46 U.S.C. app. §§ 1703-1706; Remarks of Biaggi, *supra* note 8.

carriers concerning the 1916 Shipping Act was the difficulty in obtaining antitrust exemptions for their agreements and the uncertainty as to the strength of those exemptions.[61]

Obtaining antitrust exemptions for conference agreements had been a lengthy and expensive process under the 1916 Shipping Act because the Supreme Court, in the case of *Federal Maritime Commission v. Aktiebolaget Svenska Amerika Linien*,[62] had imposed a public interest standard for the F.M.C.'s review and approval of such agreements. The so-called *Svenska* standard often meant years of administrative proceedings and then judicial appeals before an agreement could be considered fully effective.[63]

Carriers had argued that this process impeded the rationalization effects that were the primary benefit of the conference system. They sought a repeal of the *Svenska* standard and a streamlined agreement approval process.[64]

The Shipping Act of 1984 provided ocean common carriers with the expedited agreement approval process they had sought. The 1984 Act models F.M.C. review of conference agreements on that portion of the Hart-Scott-Rodino Act governing pre-merger clearance of proposed acquisitions and mergers.[65] The 1984 Act requires the F.M.C. to review agreements promptly. Unless special problems are encountered, the F.M.C. has only a forty-five day period in which to review a proposed agreement.[66] Agreements take effect automatically, unless the F.M.C. takes affirmative action rejecting an agreement on the grounds that it does not meet statutory criteria, or unless the F.M.C. seeks to block the agreement on the grounds that it is substantially anticompetitive.[67]

While the F.M.C. may seek additional information from filing persons, it may do so only when necessary to its statutory purpose.[68] Filing persons may request an expedited approval of an agreement.[69] In addi-

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61. Friedmann & Devierno, *supra* note 28, at 316-19.

62. 390 U.S. 238 (1968).

63. *See also* Carnation Co. v. Pacific Westbound Conference, 383 U.S. 213 (1966); Sabre Shipping Corp. v. American President Lines, 285 F. Supp. 949 (S.D.N.Y. 1968), *aff'd on other grounds sub nom.*, Japan Line, Ltd. v. Sabre Shipping Corp., 407 F.2d 173 (2d Cir. 1969).

64. Friedman & Devierno, *supra* note 28, at 324-34.

65. CONF. REP., *supra* note 8, at 30.

66. Shipping Act of 1984, 46 U.S.C. app. § 1705(c).

67. 46 U.S.C. app. §§ 1705(c), (g), (h).

68. 46 U.S.C. app. §§ 1705(c); (d); CONF. REP., *supra* note 8, at 30-31.

69. 46 U.S.C. app. § 1705(e); CONF. REP., *supra* note 8, at 30.

tion, the F.M.C. may not limit the term of effectiveness of an agreement.[70]

For ocean common carriers and conferences, two of the most significant aspects of the 1984 Act's revised antitrust exemption process are the new general standard under which agreements are reviewed and the limited role of the Justice Department in the approval process.

Under section 6(g) of the 1984 Act, the F.M.C. may seek an injunction if it determines that an agreement "is likely, by a reduction in competition, to produce an unreasonable reduction in transportation service or an unreasonable increase in transportation cost."[71] This standard of review allows the F.M.C. to review agreements other than on the basis of a contravention of specific statutory prescriptions, but establishes a threshold for a prompt approval of most generally accepted joint conduct in ocean shipping.[72] In addition, the 1984 Act shifted the burden of proof from the proponent carriers to the F.M.C. in applying the general standard.[73]

Equally important for conference advocates was the fact that the F.M.C. was given sole responsibility for enforcing the general standard.[74] The F.M.C., rather than the Justice Department, represents the F.M.C.'s interests in district court actions seeking an injunction against carrier actions.[75] Congress intended this limitation on the Justice Department's role in reviewing conference agreements and enforcing the general standard in order to give carriers room to develop new and innovative cooperative ventures for dealing with rapidly changing technologies and customer needs.[76]

Congress was also specific on what factors the F.M.C. could consider as causing a substantial reduction in competition.[77] Congress noted that the pro-competitive provisions of the 1984 Act, the shippers' legal tools discussed below,[78] would serve to offset the potential reductions in competition that some conference agreements could present.[79] A mere reduction in service, or an increase in costs, is not unreasonable under the 1984 Act.[80]

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70. 46 U.S.C. app. § 1705(f); CONF. REP., *supra* note 8, at 30.
71. 46 U.S.C. app. § 1705(g), (h).
72. CONF. REP., *supra* note 8, at 32.
73. 46 U.S.C. app. § 1705(g), (h).
74. CONF. REP., *supra* note 8, at 32.
75. 46 U.S.C. app. § 1705(h); CONF. REP., *supra* note 8, at 32.
76. CONF. REP., *supra* note 8, at 32-33.
77. *Id.* at 32-37.
78. *See infra* notes 121-23 and accompanying text.
79. CONF. REP. *supra* note 8, at 34-35. *See infra* part II, section B(3).
80. CONF. REP., *supra* note 8, at 34.

Instead, Congress stated that the F.M.C. must consider an agreement's effect on market share, the increase in costs to shippers, the reduction in frequency or quality of service to shippers, the agreement's effect on United States foreign policy and international comity, and the agreement's efficiency-creating aspects.[81] The F.M.C.'s market share analysis is not limited just to ocean common carrier direct service in a trade, but also includes a consideration of alternative means of transport, such as alternative liner routings, bulk carriers, charter operators, or air freight carriers.[82]

Congress also specified that the F.M.C. not engage in a public utility or Interstate Commerce Commission ratemaking analysis in determining whether the effect of a conference agreement would be unreasonable on shippers.[83] For an agreement to be unreasonable in its effect on shippers, it must have the potential of causing a meaningful and material change in costs or services, weighed with the efficiencies inherent in the agreement or the potential of new market entrants who will compete with the conferences.[84]

As under the 1916 Shipping Act, agreements authorized by the 1984 Act are entitled to an exemption from the antitrust laws.[85] The type of agreements authorized under the 1984 Act are similar to those previously allowed under the 1916 Act.[86] Under the 1984 Act, ocean common carriers may control, regulate, or prevent competition in international ocean transportation by discussing, fixing, or regulating transportation rates, including through rates, cargo space accommodations, and other conditions of service;[87] by pooling or apportioning traffic, revenues, earnings, or leases;[88] by allotting ports or restricting or otherwise regulating the number and character of sailings between ports;[89] by limiting or regulating the volume or character of cargo;[90] and by regulating or prohibit-

81. *Id.* at 34-36.
82. *Id.* at 35.
83. *Id.*
84. *Id.* As a practical matter the F.M.C. has not had occasion to seek an injunction under the section 6(g) standard in the five years since enactment of the 1984 Act. The F.M.C. attributes this to overtonnaging in the United States trades, which reduces the possibility of unreasonable rate increases. In addition, independent action and F.M.C. negotiations with conferences have precluded the need for enforcement actions. *See* SECTION 18 REPORT, *supra* note 5, at 113-19.
85. Shipping Act of 1984, 46 U.S.C. app. § 1706.
86. 46 U.S.C. app. § 1703; CONF. REP., *supra* note 8, at 28.
87. 46 U.S.C. app. § 1703(a)(1).
88. 46 U.S.C. app. § 1703(a)(2).
89. 46 U.S.C. app. § 1703(a)(3).
90. 46 U.S.C. app. § 1703(a)(4).

ing the use of service contracts.[91] In addition, ocean common carriers may also engage in exclusive, preferential, or cooperative working arrangements among themselves or with one or more marine terminal operators or nonvessel operating common carriers (NVOCCs).[92]

Thus, agreements filed under the Shipping Act of 1984 are exempt from an application of the antitrust laws.[93] To provide greater predictability for ocean common carriers, any activity or agreement within the scope of the 1984 Act undertaken with a reasonable basis to conclude that it is pursuant to an agreement on file and in effect at the time the activity occurs, or is exempt from a filing requirement, is exempt from the antitrust laws, whether the 1984 Act permits or prohibits the activity itself.[94] Congress has stated that the "reasonable basis to conclude" test is an objective one and that the actual belief of the parties at the time of the conduct will not control.[95]

The 1984 Act provides an even broader antitrust exemption for ocean common carriers. First, the 1984 Act specifically provides that any determination by an agency or court resulting in a denial or removal of the antitrust laws does not remove or alter the immunity for the period before the determination.[96] Second, the 1984 Act eliminates the threat of private antitrust suits against carriers and provides remedies for violation only through the 1984 Act itself. Under section 7(c)(2) of the 1984 Act, no person may recover damages under section 4 of the Clayton Act after obtaining injunctive relief under section 16 of the Clayton Act for conduct prohibited by the 1984 Act.[97]

The Shipping Act of 1984 provides for important exceptions to the antitrust immunity it confers.[98] For example, the 1984 Act does not extend antitrust immunity to any agreement with or among domestic surface, water, or air carriers with respect to transportation within the United States.[99] Similarly, no antitrust immunity exists for any discussion or agreement among common carriers subject to the 1984 Act that regards the inland divisions of through rates within the United States,

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91. 46 U.S.C. app. § 1703(a)(7).
92. 46 U.S.C. app. § 1703(a)(5).
93. 46 U.S.C. app. § 1706.
94. 46 U.S.C. app. § 1703(a)(2); CONF. REP., *supra* note 8, at 37.
95. CONF. REP., *supra* note 8, at 37.
96. 46 U.S.C. app. § 1706(b).
97. 46 U.S.C. app. § 1706(b)(1).
98. 46 U.S.C. app. § 1706(b)(2).
99. 46 U.S.C. app. § 1706(c).

although such an immunity may exist for the inland portions of such rates.[100]

2. Protection Against Market Abuses

The Shipping Act of 1984 contains enumerated prohibitions against certain practices of both carriers and shippers. Congress incorporated most of these prohibitions from the 1916 Act.[101] They are primarily designed to achieve two key goals: preservation of the common carriage system of ocean transportation, as reflected in the tariff and service contract system created by the 1984 Act; and prevention of carrier abuse of market power.[102]

In furtherance of the system of common carriage it embodies, the 1984 Act prohibits both shippers and carriers from deviating from the tariff or contract rates applicable to any given shipment.[103] In addition, carriers may not discriminate against or show preference to shippers.[104] An exception to this rule exists for service contracts, although the "essential terms" provision of contract filing preserves some aspects of the common carriage element of service contract movements.[105]

The other key prohibitions contained in the 1984 Act address the question of conference abuse of market power.[106] Prohibitions on the use of "fighting ships,"[107] deferred rebates,[108] and loyalty contracts[109] have

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100. 46 U.S.C. app. § 1706(c)(2).

101. Friedmann & Devierno, *supra* note 28, at 335.

102. The majority of prohibited acts contained in the statute address the problem of rebating, that is, the question of deviation from the applicable filed tariff or contract rate. The policy goal is to protect against discrimination. *See, e.g.*, City of New Orleans v. Hansen & Tidemann, Inc., 391 F. Supp. 910, 918 (E.D. La. 1972). Other prohibitions in the 1984 Act address the use of market tools employed by carriers to limit market entry, for example, the use of loyalty contracts or fighting ships. *Cf.* Friedmann & Devierno, *supra* note 28, at 335-38.

103. *See, e.g.*, 46 U.S.C. app. § 1709(b)(1); (b)(1), (2), (4).

104. *See, e.g.*, 46 U.S.C. app. § 1709(a)(1), (2), (3), (4), (6); (c)(1).

105. *See, e.g.*, 46 U.S.C. (b)(6); (b)(11); CONF. REP., *supra* note 8, at 40. Congress's desire to preserve a semblance of common carriage even as regards the service contract provisions of the Shipping Act are seen in the essential terms provisions of the 1984 Act. Under section 8(c) of the 1984 Act, 46 U.S.C. app. § 1707(c), service contracts are confidentially filed with the F.M.C., but summaries of their essential terms filed in tariff format with the F.M.C. must be made available to all "shippers similarly situated." Congress stated that it expected the F.M.C. to be cognizant of the common carrier concepts upon which the Shipping Act is based when administering the essential terms provisions of the service contract portions of the 1984 Act. *See* H. REP. NO. 611, 97th Cong., 2d Sess. 26, pt. 1, at 26 (1982).

106. *See, e.g.*, 46 U.S.C. app. § 1709(a)(2),(3); § 1709(b)(5), (10), (11), (12), (13), (14); § 1709(c)(1),(3).

107. 46 U.S.C. app. § 1709(b)(7). A " 'fighting ship' [is] a vessel used in a particular

their antecedents in provisions of the 1916 Act.[110] Each of these devices is a means by which a carrier or conference can limit market entry or restrict shippers' freedom of choice.[111]

The 1984 Act also specifically addresses prohibitions on conferences' attempts to interfere with their members' right to offer intermodal services.[112] The 1984 Act contains specific prohibitions against joint ocean carrier negotiations with domestic inland carriers, as well as the use of through intermodal services and technology.[113]

Penalties for engaging in any prohibited act may range from $5,000 to $25,000 for knowingly and willfully committed violations.[114] Each day of a continuing violation constitutes a separate offense.[115] In addition, the F.M.C. may suspend the tariffs of a carrier, including the right to use

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trade by an ocean common carrier or group of such carriers for . . . excluding, preventing, or reducing competition by driving another ocean common carrier out of that trade." 46 U.S.C. app. § 1702(10).

108. 46 U.S.C. app. § 1709(b)(8). A deferred rebate is "a return by a common carrier of any portion of the freight money to a shipper as a consideration for that shipper giving all, or any portion, of its shipments to that or any other common carrier, or for any other purpose, the payment of which is deferred beyond the completion of the service for which it is paid, and is made only if . . . the shipper has complied with the terms of the rebate agreement . . . ." 46 U.S.C. app. § 1702(9).

109. 46 U.S.C. app. § 1709(b)(9). A loyalty contract is "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." 46 U.S.C. app. § 1702(14). The F.M.C. has taken the position that loyalty contracts are illegal unless some form of Justice Department approval of the agreement has been demonstrated, for example, through the use of the business review letter process. 46 C.F.R. § 580.16(b) (1989). The Justice Department has stated that loyalty contracts between a single carrier and shipper will most likely survive antitrust scrutiny. Letter from Charles F. Rule, Acting Asst. Att'y Gen., Dept. of Justice, to Chemical Manufacturers Association, *reprinted in* 24 Shipping Reg. (P&F) 199 (1987). *See generally* Friedmann & Devierno, *supra* note 28, at 335-36.

One key question is whether conferences can prohibit their members from exercising independent action in entering into loyalty contracts. Under the 1984 Act, conferences have such a right regarding service contracts. 46 U.S.C. app. § 1703(a)(7). The F.M.C. has ruled that conferences have a similar authority regarding loyalty contracts, notwithstanding the fact that loyalty contracts are distinguished from service contracts under the 1984 Act. *Agreement Provisions on Loyalty Contracts*, 24 Shipping Reg. (P&F) 1395 (1988) (F.M.C. Dkt. Nos. 87-26, 88-1). An appeal of the decision is currently pending before the United States Court of Appeals for the District of Columbia Circuit.

110. Friedmann & Devierno, *supra* note 28, at 335.

111. *Id.* at 336-37.

112. 46 U.S.C. app. § 1709(c)(2), (4).

113. 46 U.S.C. app. § 1709(c)(4).

114. 46 U.S.C. app. § 1712.

115. *Id.*

any applicable conference tariffs, for a period of up to twelve months should a carrier engage in any conduct resulting in deviations from the applicable tariff or service contract rates.[116] Handling cargo under a suspended tariff subjects a carrier to potential penalties of up to $50,000 for each shipment.[117]

3. The Shipper Compromises and the Changed Dialogue

While the 1984 Act's provisions for a streamlined agreement approval process represent a major victory for carriers in strengthening the conference system, reducing legal costs, and otherwise accomplishing the shipping industry's legislative goals of the late 1970s, these provisions basically are revisions to the Shipping Act of 1916.[118]

It is in the new marketing tools, and the limits placed on conference powers, that the Shipping Act of 1984 represents a marked departure from previous shipping statutes. These provisions have generated the greatest controversy and will command the greatest attention of the Presidential Advisory Commission.

These provisions include a mandatory right of independent action by conference members,[119] the right to enter into service contracts with shippers,[120] and the right for shippers to form shippers' associations.[121] While each of these provisions are important legal tools enabling shippers to obtain lower rates, they have also raised key questions as to the strength of, and continued need for, the conference system.

a. Independent action

The right of independent action is one of the most controversial provisions of the 1984 Act.[122] It is the antithesis of a closed conference system and reflects a free market system that tolerates, but does not necessarily sanction, cartels.[123]

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116. 46 U.S.C. app. § 1712(b)(1).
117. 46 U.S.C. app. § 1712(b)(3).
118. CONF. REP. *supra* note 8, at 28-30.
119. 46 U.S.C. app. § 1704(b)(8); CONF. REP., *supra* note 8, at 29.
120. 46 U.S.C. app. § 1707(c).
121. 46 U.S.C. app. § 1702(24).
122. *See* part III, section B(4)(a).
123. Conferences argue that mandatory independent action is inconsistent with the concept of conferences because it undermines a conference's ability to stabilize rates. *Hearings Before the Subcomm. on Merchant Marine of the Senate Comm. on Com., Science, and Transp. on S. 1593 and S. 125*, 97th Cong., 1st Sess. 206 (1981) (statement of Henry De La Trobe, Vice Chairman, Council of European and Japanese Shipowners' Associations). Independent action, however, has been a fundamental feature of

Simply stated, independent action is the right of any conference member to act independently of the conference upon giving the conference timely notice of its action. Under the 1984 Act, each conference must allow its members the right of independent action on tariff rate and service items on ten calendar days notice.[124] When a conference member chooses to exercise its right, the conference may choose to adopt the action. The right does not extend, however, to service contract matters.[125]

The mandatory right of independent action existed in the ocean shipping industry prior to 1984, but only for inter-conference agreements, that is, agreements between two or more conferences. The right to exercise independent action was not mandatory as between a conference and its members.[126] In the domestic transportation market, however, the mandatory right of independent action existed in rate bureau agreements among carriers authorized under the Interstate Commerce Act.[127] The purpose was to ensure carrier competition notwithstanding their ability to act collectively pursuant to an exempt agreement under the antitrust laws.[128] Inclusion of such a provision in the Shipping Act of 1984 was one method of limiting the antitrust immunity enjoyed by conferences, although it was opposed by carrier interests.[129] The introduction of independent action into the conference system was an implicit congressional decision to treat the conference system similarly to the domestic transportation system, despite conscious past decisions that the two systems be treated differently.[130]

b. Service contracts

Service contracts will be a key focal point of Advisory Commission examination. The Shipping Act of 1984 has allowed, for the first time, the right of shippers and carriers to contract outside of a tariff. A service contract is a contract between a shipper and an ocean common carrier or

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domestic transportation industry rate bureaus. *See infra* note 127.

124. 46 U.S.C. app. § 1704(b)(8); CONF. REP., *supra* note 8, at 29.

125. CONF. REP., *supra* note 8, at 29-30.

126. 46 U.S.C. § 814 (1982) (amended 1984). Some conferences, however, did allow independent action prior to 1984. SECTION 18 REPORT, *supra* note 5, at 657.

127. 49 U.S.C. § 10,706(d)(2)(C) (1982).

128. *See, e.g.*, VON KALINOWSKI, BUSINESS ORGANIZATIONS: ANTITRUST LAWS AND TRADE REGULATIONS § 57.03(1) (1989).

129. *See supra* note 123.

130. *See* Friedmann & Devierno, *supra* note 28, at 340-44. Friedman and Devierno argue that conferences, unlike the motor carrier industry, may limit indpendent action since the Shipping Act of 1984 does not specifically prohibit conference interference with an independent carrier action. *Id.*

conference in which the shipper makes a commitment to provide a certain minimum quantity of cargo over a fixed period of time, and the ocean common carrier or conference commits to a certain rate or rate schedule and a defined service level.[131]

Under the 1916 Act, as amended, carriers and shippers could enter into either time/volume or dual rate contracts.[132] A time/volume rate is a tariff rate giving the shipper a rate reduction in exchange for a certain percentage of cargo over time.[133] A dual rate contract, on the other hand, is a form of requirements contract. In exchange for committing all or a fixed percentage of its cargo, the shipper receives a reduced freight rate.[134]

Early versions of the Shipping Act of 1984 proposed to retain dual rate contracts as a form of loyalty contract.[135] Since such contracts are often disfavored under the antitrust laws, however, Congress ultimately prohibited their use unless in conformance with the antitrust laws.[136]

Congress instead preferred the service contract as a method of interjecting competition into ocean shipping. Carriers would have volume commitments from shippers in exchange for service and rate guarantees. Shippers would be able to negotiate their own service needs on the basis of their ability to bargain with carriers and conferences. As enacted, the service contract provided benefits for carriers, shippers, free trade advocates, and advocates of a common carrier system. Competition existed because shippers and carriers could negotiate their own contracts outside of the tariff system. Elements of common carriage were preserved, however, because service contracts were confidentially filed with the F.M.C. and their essential terms made publicly available to similarly-situated shippers.[137] Both shippers and carriers could make long-term marketing plans based on known shipping commitments. Conferences retained an element of control over the system by being allowed to prohibit their members' use of service contracts.[138]

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131. 46 U.S.C. app. § 1702(21); CONF. REP., *supra* note 8, at 29.

132. 46 U.S.C. 813a (1982), *repealed*, Act of Mar. 20, 1984, Pub. L. No. 98-237, § 20(a), 98 Stat. 88.

133. 46 C.F.R. § 536 (1983); 46 C.F.R. § 580 (1988). *See* Friedman & Devierno, *supra* note 28, at 347-48.

134. 46 U.S.C. 813a (1982) (repealed 1984).

135. S. 47, *supra* note 7, § 7(a)(1); H.R. 1878, *supra* note 7, § 6 (1983).

136. Shipping Act of 1984, 46 U.S.C. app. § 1709(b)(9). *See also House Judiciary Hearings*, *supra* note 39, at 9 (statment of James C. Miller III).

137. H.R. REP. NO. 53, *supra* note 137, at 17. *See also* S. REP. NO. 3, *supra* note 26, at 16, 21; H.R. REP. NO. 611, *supra* note 105, pt. 1, at 25-26.

138. 46 U.S.C. app. § 1703(a)(7). Congress explicitly stated that conferences do not

c. Shippers' associations

Shippers' associations were a last-minute compromise in the 1984 Act.[139] They have proven controversial in practice.[140] Congress intended that shippers' associations would provide a competitive alternative for the small and medium-sized shipper to obtain volume rate discounts and enter into service contracts. Shippers' associations have existed in the domestic transportation industry since the turn of the century[141] and were explicitly granted an exemption from regulation under the Interstate Commerce Act from 1942 through 1986, when Congress deregulated the intermodal intermediary market in the Surface Freight Forwarder Act of 1986.[142] Prior to 1984, however, the F.M.C. refused to distinguish between shippers' associations and nonvessel operating common carriers (NVOCCs), and it required them to file tariffs.[143] The 1984 Act recog-

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have to provide their members with a right to independent action on service contracts. *See* CONF. REP., *supra* note 8, at 29-30.

139. None of the bills preceding the final version of the Shipping Act of 1984 contained any provisions recognizing shippers' associations. For a listing of these bills, see *supra* note 7.

140. A substantial number of regulatory proceedings have been initiated at the F.M.C. concerning the role of shippers' associations in the international trades. *See* Status of Shippers' Associations Under the Shipping Act, 1984, 49 Fed. Reg. 21,799 (F.M.C. 1984); Order Denying Petition for an Amended Statement of Policy Concerning the Status of Shippers' Associations, 50 Fed. Reg. 7225 (F.M.C. 1985) (petition brought by the American Institute for Shippers' Associations, Inc.) [hereinafter AISA Petition]; Petition for Rulemaking Concerning Shippers' Associations, 50 Fed. Reg. 6249 (F.M.C. 1985) (brought by the Associated Latin American Freight Conferences and Others); *In re* Petition of U.S. Atlantic-North Europe Conferences and the North Europe-U.S. Atlantic Conference for a Rule Regarding the Term "Shipper," 23 Shipping Reg. (P&F) 1381 (F.M.C. Order 1986); Interpretation and Statement of Policy on the Use of Business Review Letters by Conferences, 53 Fed. Reg. 43,696 (F.M.C. 1988).

141. The first reported Supreme Court decision involving shippers' associations was Interstate Commerce Comm'n v. Delaware, Lackawanna & W. R.R., 220 U.S. 235 (1911), in which the Court held that it was unlawful for common carriers to discriminate against associations of shippers on the basis that they are freight consolidators.

142. 49 U.S.C. § 10,562(3) (1982), *repealed by* Surface Freight Forwarder Deregulation Act of 1986, Pub. L. No. 99-521, § 6(d)(1), 100 Stat. 2994. The exemption from regulation existed to distinguish shippers' associations from surface freight forwarders. The latter were accorded a common carrier status under the law because they offered their services to the general public. Shippers' associations, by way of contrast, are membership-limited organizations. *Senate Hearings*, *supra* note 7, at 69, 70 (testimony of Ronald N. Cobert, General Counsel, American Institute for Shippers' Associations, Inc.).

143. *Senate Hearings*, *supra* note 7, at 70. An NVOCC is a freight intermediary that holds itself out to the general public to provide ocean common carrier services. In general, NVOCCs consolidate less-than-containerload freight of small shippers. Thus, they hold themselves out as a carrier when dealing with the shipper, but act as a shipper

nized shippers' associations as being allowed to participate in the international trades.[144]

In some ways, the 1984 Act's shippers' association provisions illustrate the conflicting goals the Advisory Commission will have to reconcile. When Congress initially contemplated changes to the regulation of the conference system, one alternative was the possible use of shippers' councils in the United States trades as a means of offsetting or counterbalancing the collective power of the conferences.[145] Shippers' councils, which exist in many United States trading partner countries, are shipper trade groups that discuss freight rates and transportation services with carriers and conferences. While shippers' councils may recommend the use or nonuse of a given carrier, they do not engage in the actual operational aspects of transportation shipments.[146]

The UNCTAD Code strongly advocated the use of shippers' councils as a means of protecting shippers' interests and limiting the power of conferences.[147] Early versions of the Shipping Act of 1984 contained provisions authorizing the creation of United States-based shippers' councils. These councils would have had an exemption from the United States antitrust laws similar to that provided to the conferences.[148]

Opposition to the proposed antitrust immunity for shippers' councils led to the recognition of shippers' associations in the 1984 Act to provide small and medium-sized shippers some negotiating power with confer-

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in tendering freight to ocean common carriers. Because NVOCCs assume common carrier obligations in dealing with shippers, they are required to file tariffs with the F.M.C. A creation of F.M.C. regulations, NVOCCs were first statutorily recognized in the Shipping Act of 1984. 46 U.S.C. app. § 1702(17).

144. 46 U.S.C. § 1702(24); CONF. REP., *supra* note 8, at 27-28.

145. *See, e.g.*, S. 47, *supra* note 7, § 7(d); 129 CONG. REC. S1779 (daily ed. Feb. 28, 1983) (comments of Sen. Gorton); Comment, *supra* note 53, at 99. *See generally* Danas, *Deregulation of the Liner Conference System: The Creation of Countervailing Power in Shippers as a Means to Control Oligopoly Market Power*, 6 NW. J. INT. L. & BUS. 373 (1984).

146. *See Closed Conference Hearings*, *supra* note 55, at 233 (statement of Bengt Jobin, European National Shippers' Council); *Hearings on S. 1593 Before the Subcomm. on Merchant Marine of the Senate Comm. on Com., Science, and Transp.*, 97th Cong., 1st Sess. 252 (1981) [hereinafter *Gorton Hearings*] (Testimony of J.F. Muheim, European National Shippers' Council).

147. UNCTAD, SHIPPER INTERESTS, *supra* note 52; UNCTAD, CONSULTATION IN SHIPPING, U.N. Doc. TD/B/C.4/20/Rev.1, U.N. Sales No. 68.II.D.1 (1967); UNCTAD, THE EFFECTIVENESS OF SHIPPERS' ORGANIZATIONS, U.N. Doc. TD/B/C.4/154 (1976).

148. *See, e.g.*, S. 47, *supra* note 7, § 4(c), *Senate Hearings*, *supra* note 7, at 12; S. 1593, *supra* note 7, § 5(d)(1); Danas, *supra* note 145, at 400-11.

ences.[149] In addition to defining shippers' associations as entities distinct and separate from ocean freight forwarders and NVOCCs, the 1984 Act gave associations an explicit right to enter into service contracts and specifically prohibited ocean carriers from refusing to negotiate with them.[150]

Notwithstanding the fact that shippers' associations have a long history in the domestic transportation market, and the fact that the statutory definition provides that they will consolidate and distribute freight, two types of shippers' associations have developed in the international trades since 1984.[151] One is the traditional, domestic full service shippers' association, which physically consolidates and distributes freight for its members. It may engage in physical transportation operations and own its own equipment, terminal facilities, and warehouses.[152]

The second type of association, unique to the international trades, is the rate negotiator shippers' association. This type of shippers' association negotiates freight rates and service contracts for its members, but actual shipments, invoicing, and payment are handled directly between the shipper and the carrier.[153]

Shippers' associations have been controversial. Associations, especially rate negotiator associations, have claimed that conferences and carriers have discriminated against them.[154] Such discrimination has allegedly consisted of requiring unreasonable evidence of the association's bona fide status prior to entering into service contract negotiations.[155] Associations have also alleged more subtle forms of discrimination, such as selectively offering independent action to the larger members of the associa-

149. 46 U.S.C. app. § 1702(24); CONF. REP., *supra* note 8, at 27-28.

150. 46 U.S.C. app. § 1707(c); 46 U.S.C. app. § 1709(b)(13). NVOCCs were also statutorily recognized for the first time. 46 U.S.C. app. § 1702(17). *See supra* note 143.

151. F.M.C., REPORT OF THE INVESTIGATORY OFFICER FACT FINDING NO. 15, PRACTICES OF VARIOUS ENTITIES OPERATING AS INTERMEDIARIES FOR THE TRANSPORTATION OF GOODS IN THE UNITED STATES WATERBORNE FOREIGN COMMERCE 16-17 (Sept. 2, 1988) [hereinafter FACT FINDING 15], *reprinted in* 24 Shipping Reg. (P&F) 1197 (1988).

152. FACT FINDING 15, *supra* note 151, at 15-16.

153. *Id.* at 17.

154. *Id.* at 33-34; Statement of Position on the Shipping Act of 1984 Submitted by the Shippers' Association Study Group [hereinafter Shippers' Asocation Position Paper], *reprinted in* SECTION 18 PROCEEDINGS, *supra* note 14, at 33, 37-39; SECTION 18 REPORT, *supra* note 5, at 136-38.

155. FACT FINDING 15, *supra* note 151, at 33-34; F.M.C., Interpretation and Statement of Policy on the use of Business Review Letters by Conferences, 53 Fed. Reg. 43,696 (1988); Shippers' Association Position Paper, *supra* note 154, at 39-40.

tion in order to undermine the association's freight base.[156]

Early F.M.C. surveys indicate that associations have been slow to develop in the international trades but are increasing their market presence.[157] The Advisory Commission will have to determine whether this slow growth is the result of a lack of shipper interest, depressed freight rates, carrier discrimination, management flaws in associations, regulatory impediments, or inherent lead times related to penetrating the international markets.

Shippers' associations are a long-established player in the domestic transportation market. The Advisory Commission, in reviewing the conference system and the 1984 Act, must carefully examine the role of shippers' associations in the international trades. As the only entity that has had the same legal status under both the Interstate Commerce Act and the Shipping Act, associations illustrate a basic question for the Advisory Commission: should United States regulation of the international transportation industry be coordinated more with the United States domestic transportation laws, or should the industry remain unique?

III. An Agenda for the Advisory Commission

Section 18 of the Shipping Act of 1984 requires the Presidential Advisory Commission to examine and report to Congress on conferences in ocean shipping.[158] The report shall specifically address whether the United States would be best served by a prohibition of conferences or by closed or open conferences.[159] In addition, the 1984 Act mandates the F.M.C. to study and report on three key issues: the need for tariff filing in the international trades; the continued need for marine terminal antitrust immunity; and the need for tariffs based on volume and mass of shipment.[160] The F.M.C. will then submit its report to the Advisory Commission.[161]

To assist in the preparation of its section 18 report, the F.M.C. asked

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156. Shippers' Association Position Paper, *supra* note 154, at 40; Fact Finding 15, *supra* note 151, at 34.

157. Bureau of Economic Analysis, U.S. Fed. Maritime Comm'n, Section 18 Study, Summary of 1987 Survey Results 17-18 (1987); Section 18 Report, *supra* note 5, at 135.

158. 46 U.S.C. app. § 1717(f).

159. *Id.*; Conf. Rep., *supra* note 8, at 43.

160. 46 U.S.C. app. § 1717(c)(3).

161. 46 U.S.C. app. § 1717(c)(1). The F.M.C.'s report will also be submitted to the Department of Transportation, the Justice Department, and the F.T.C., each of which will have 60 days to furnish an analysis of the impact of the 1984 Act to Congress and to the Advisory Commission. 46 U.S.C. app. § 1717(c)(2).

representatives of the key segments of the international transportation community to form study groups. Separate study groups for shippers, shippers' associations, ports, NVOCCs, ocean freight forwarders, and carriers and conferences assisted the F.M.C. in preparing industry surveys and comments on industry survey results. In addition, each group selected members who were appointed to a thirty-two member section 18 advisory committee, which held two public meetings with the F.M.C. on the progress of the F.M.C. reports.[162] As part of the section 18 advisory process, each study group presented position papers on the Shipping Act of 1984.[163]

In the course of the F.M.C. advisory process, a group of large international shippers called for an abolition of the conference system, citing major changes in world trading patterns and the international and domestic transportation industries.[164] As did the Alexander Commission of 1914, the Advisory Commission is examining United States regulation of the liner shipping industry at a time of fundamental changes in the domestic United States transportation system and in United States trading patterns and the world economy. The Alexander Commission laid a foundation for the regulation of the ocean liner industry for the majority of this century. The Advisory Commission should perform the same function for the 21st century. It should identify and provide Congress with a blueprint of the direction the industry is heading and how it should be regulated in the 21st century. It should determine how transportation fits into the changing world trading patterns and the competitiveness of global corporations of the next century.

The Advisory Commission may determine that the 1984 Act is an admirable piece of legislation that needs no changes, or only a few adjustments, to ensure a smoothly functioning international transportation industry in the next century. On the other hand, the Advisory Commission may determine that the statute is inadequate and that either a stronger conference system, or no conference system, must be adopted. The Advisory Commission's job is to put the discrete provisions of the 1984 Act into the broader perspective of the international economic arena.

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162. One public meeting of the Advisory Committee was held on March 24, 1988. The second meeting was held on April 6, 1989. *See* F.M.C., Notice of Meeting of Section 18 Study Advisory Committee, 54 Fed. Reg. 10,049 (Mar. 9, 1989).

163. Position papers were submitted by shippers, shippers' associations, NVOCCs, carriers and conferences, ocean freight forwarders, nonport marine terminal operators, and ports. Replies and surreplies were also allowed by the F.M.C. SECTION 18 PROCEEDINGS (pts. 1 & 2), *supra* note 14.

164. Shipper Position Paper, *supra* note 14, at 5-14.

A. *The Consolidated Intermodal Transportation Industry and the Emerging Trading Blocs of Europe and the Pacific Rim*

Two broad economic trends frame the Advisory Commission's mandate: the simplification of trading patterns and the consolidation and interconnection of the world transportation market. The trend since 1984 has been towards consolidation and integration of the domestic and international United States transportation markets. Similar trends are affecting United States trading partners. At the same time, Europe and the Pacific Rim nations have emerged as strong regional trading blocs having a substantial influence on the United States economy. Interpretation of these trends will determine whether the 1984 Act is deemed a success or failure and also will determine the future of the conference system.

Since 1984 a system of integrated international transportation networks serviced by multimodal, multinational transportation conglomerates has begun to develop. This trend can be attributed both to changes in the law promoting the development of through multimodal intermodal transportation and to changing worldwide economic patterns.

International trade, especially imports, became an important segment of the United States economy in the 1980s. At approximately the same time the Shipping Act of 1984 was implemented, the United States trade deficit began to worsen significantly.[165] The cause of this trade deficit is a source of political dispute. Some argue that it results from the United States budget deficit; others argue that it results from unfair trading practices by foreign competitors.[166] Whatever the cause, the trade deficit obviously affects ocean shipping, its profitability, and its stability. It will thus affect any analysis of the success or failure of the Shipping Act of

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165. The Commerce Department reported that in 1988, the United States merchandise trade deficit was $137.3 billion, a $33 billion reduction from the previous year. The improvement was attributed to a 27% increase in exports in 1987, to $322.2 billion. Imports in 1988 also increased to $459.6 billion. In 1987 the United States experienced a record trade deficit of $170.3 billion. 6 Int'l Trade Rep. (BNA) 223 (Feb. 2, 1989). *See also* SECTION 18 REPORT, *supra* note 5, at 41-46.

166. *See, e.g.*, Holmer, *The Office of the Trade Representative: Recent Legal Developments*, 20 INT'L LAW. 1351 (1986); McMinn, *Competitiveness in America: Is Protectionism the Answer?*, 87 DEP'T ST. BULL. 56 (Aug. 1987); Yeutter, *U.S. Trade Policy and the Trade Deficit*, 87 DEP'T ST. BULL. 20 (1987); White, *Trade Effects of the Tax Reform Act of 1986*, 12 CAN.-U.S. L.J. 289 (1987); Kubarych, *Trade Policy and the Dollar*, 18 N.Y.U. J. INT'L L. & POL. 1113 (1986); Stewart, *Existing Remedies and the Trade Deficit: The Promise of Reform Through Judicial Review*, 18 N.Y.U. J. INT'L L. & POL. 1165 (1986); Niskanen, *The Uneasy Relation Between the Budget and Trade Deficits*, 8 CATO J. 507 (1988); Stern, *Budget Policy and the Economy*, 8 CATO J. 521 (1988).

1984. Since 1984 the shipping industry has seen major bankruptcies,[167] depressed rates, and rate wars.[168] Conferences have also experienced differing fortunes, depending on the fate of their trades.[169] Determining whether these events resulted from inadequacies in the Shipping Act of 1984 or from general trade conditions will be the job of the Presidential Advisory Commission.

One result of these changing and uncertain market conditions has been a trend by conferences in both the Atlantic and Pacific trades to consolidate their operations, pursuant to the new freedoms allowed by the Shipping Act of 1984. There are now four major conferences in these two trades.[170] Underlying this effort at increased rationalization is the desire to control freight. One visible means by which the United States trade imbalance with newly-industrialized countries has affected steamship operators and conference policies is that Hyundai cars imported to the United States may be carried on Hyundai-built steamships operated by the Hyundai Line. In the post-1984 era, the control of freight for the entire transportation movement has become increasingly important to the success of the international transportation company.[171]

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167. For example, on November 24, 1986, United States Lines, Inc. and United States Lines (S.A.) Inc., each filed a petition for reorganization under Chapter 11 of the United States Bankruptcy Code. Combined, these two corporations operated one of the largest container lines and cargo shipping companies in the world. *See In re* McLean Indus., 87 Bankr. 830 (S.D.N.Y. 1987). Prudential Lines, Inc., was placed in involuntary Chapter 11 bankruptcy on September 12, 1985. *See In re* Prudential Lines, Inc., 69 Bankr. 439 (S.D.N.Y. 1987).

168. Conferences claim that rates have fallen 25% since 1984, and as much as 40% when adjusted for inflation. Shippers dispute these claims. Armbruster, *Shiplines Report Rates Off Sharply*, J. COM., Sept. 1, 1989, at 1A, col. 1. The F.M.C. has noted rate instability in some trades, but has attributed that instability to changes in trading patterns and exchange rates. SECTION 18 REPORT, *supra* note 5, at 155-204.

169. For example, the weaker dollar in 1988 and 1989 contributed to a decline in demand for imports into the United States. This, in turn, resulted in a weakening of rates of the inbound trades from Pacific Rim countries to the United States West Coast, adversely affecting the stability of the Asia North American Eastbound Rate Agreement. A subsequent agreement to reduce capacity in the trade by 10% assisted the conference in stabilizing rates. *See Pacific Carriers' Revenue Strategy*, AMERICAN SHIPPER 14 (Jan. 1989); *Pacific Capacity Reduction Plan*, AMERICAN SHIPPER 16-18 (Jan. 1989).

170. As of August 1, 1989, in the Pacific trades these conferences were the Asia North American Eastbound Rate Agreement and the Transpacific Westbound Rate Agreement. In the North Atlantic trades, these conferences are the North-Europe-USA Rate Agreement and the USA-North Europe Rate Agreement. AMERICAN SHIPPER 10 (July, 1989). *See also* SECTION 18 REPORT, *supra* note 5, at 108-13.

171. *See generally* Bowman, *Partnershipping*, WORLD TRADE 34 (Fall 1989); Canna, *Full Service Logistics*, AMERICAN SHIPPER 56 (June 1989).

Emergence of the unified, borderless European Common Market at the end of 1992 has also placed increased emphasis on the ability of carriers to control freight at its source. The crucial competitive importance of such control in the global transportation market has not been lost on carriers in Europe, where the creation of a single common market and the elimination of national transportation barriers has led to a wave of mergers and acquisitions in Europe; this may result in several giant transportation conglomerates operating multiple modes of transportation, including trucks, air carriers, and ocean fleets.[172]

The advantages of such mergers are many: they permit a single carrier to offer one-stop door-to-door transportation services to its customers.[173] In addition, other value added services may be provided that aid the shipper in the manufacture, sale, and shipment of its goods.[174] However, the effective operation of such transportation giants requires the existence of large unitary markets with few regulatory barriers to the multimodal operation of equipment. The emerging single European market presents the potential for such a market. In Europe, differing national laws, state ownership of carriers, and geography have limited development of an integrated intermodal market. To create such a market, the European Community has adopted or proposed the elimination of internal cabotage laws and harmonization of paperwork requirements. Key to accomplishing these goals is a loosening of cross-border truck transportation restrictions and an application of general European Community antitrust regulations to transportation, including ocean transportation.[175]

Technological changes and the Shipping Act of 1984 have created a similar environment in the United States domestic transportation market. Simply stated, the containerization of freight and the elimination of regulatory barriers to through intermodal shipments have initiated major

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172. Gish, *Safety in Numbers*, WORLD TRADE 67 (Fall 1989); Stoner, *Nedlloyd Consolidates Strength as EEC Transport Leader*, TRAFFIC WORLD, July 17, 1989, at 32.

173. *See supra* notes 171-72.

174. *See supra* note 171. "Value added" services are the equivalent to the concept of full service. In essence, if the shipper desires a service, the carrier will provide it or, if a problem arises, the carrier will manage it. More common features of value added service are the provision of electronic data interchange and warehousing services, which are especially important for just-in-time manufacturers who desire to maintain low inventory levels. *See generally It's New. It's Here . . . It's Value Added . . . Now on Sale in the USA*, CONTAINERISATION INT'L 55-61 (Sept. 1988).

175. A keystone to the European Community's proposal of a unified internal market is the elimination of crossborder barriers to transportation. This primarily means deregulation of the European transportation industry. *See generally* C. DEGLI ABBATI, TRANSPORT AND EUROPEAN INTEGRATION (1986).

changes in the United States transportation market. Prior to 1984, the legal ability of ocean carriers to offer through intermodal rates was uncertain. The Justice Department opposed the ability of conferences to establish through intermodal rates because of different regulatory standards under the Interstate Commerce Act and the Shipping Act of 1984. A major concern of the Justice Department was the potential of "domestic spillover" of anticompetitive activity of conferences providing such services.[176]

As previously noted, the ability to move manufactured commodities easily and quickly from one mode of transportation to another had been improving in the United States since the late 1950s.[177] At that time, containerization, the movement of freight using containers or trailers that can be placed either on a rail flatcar or a motor carrier chassis, began to increase.[178] In November 1981 the Interstate Commerce Commission deregulated rail-provided TOFC/COFC traffic, and intermodal rail-motor shipments increased.[179]

The Shipping Act of 1984 has provided an analogous regulatory freedom for ocean carriers and conferences to take advantage of these technological innovations. Ocean carriers and conferences can offer through rates, although only individual carriers, and not conferences, can establish the inland divisions with rail and motor carriers.[180] Through in-

176. *See supra* note 42.

177. *See* GAO Report, *supra* note 22, at 12.

178. *See* Tombari, *supra* note 22, at 311.

179. Carriers Involved in the Intermodal Movements of Containerized Freight, 46 Fed. Reg. 32,257 (I.C.C. 1981) [hereinafter Intermodal Movement].

180. 46 U.S.C. app. § 1707(a),(c). Under sections 8(a) and (c) of the 1984 Act, carriers and conferences may offer rates on through transportation routes or through intermodal movements, but shall not be required to state separately or otherwise reveal in tariff filings the inland divisions of a through rate. Under the Shipping Act, a " 'through rate' means the single amount charged by a common carrier in connection with through transportation." 46 U.S.C. app. § 1702(25). " '[T]hrough transportation' means continuous transportation between origin and destination for which a through rate is assessed and which is offered or performed by one or more carriers, at least one of which is a common carrier, between a United States point or port and a foreign point or port." 46 U.S.C. app. § 1702(26). The 1984 Act prohibits conferences or groups of two or more carriers from negotiating with truck, rail, or air operators on any matters pertaining to rates or services on the United States segment of a movement. 46 U.S.C. app. § 1709(c)(4).

The 1984 Act also does not extend an antitrust immunity "to any agreement with or among air carriers, rail carriers, motor carriers, or common carriers by water not subject to [the 1984 Act] with respect to transportation within the United States," or "to any discussion or agreement among common carriers that are subject to [the Shipping Act] regarding the inland divisions (as opposed to the inland portions) of through rates within

termodal, rather than port-to-port, rates have become the competitive norm, as ocean carriers offer Keelung to Dubuque rates under a single tariff or service contract. To facilitate these shipments, steamship companies contract with rail carriers to offer double stack train services, whereby the rail carrier operates the train in the name of the steamship company.[181]

Such joint operations have aided the development of the multimodal transportation company in the United States. Rail carriers have purchased steamship companies.[182] Steamship companies have purchased domestic United States shippers' agents to ensure better marketing of their services.[183] This activity complements rail and steamship carrier acquisition of motor carriers.[184]

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the United States." 46 U.S.C. app. § 1706(b)(1)-(2).

An inland division is "the amount paid by a common carrier to an inland carrier for the inland portion of through transportation offered to the public by the [ocean] common carrier." 46 U.S.C. app. § 1702(12). An inland portion is the charge to the public by an ocean common carrier for the nonocean portion of through transportation. 46 U.S.C. app. § 1702(13).

181. As of January 1988, 10 steamship companies had weekly double stack eastbound departures from the United States West Coast. Of 76 total weekly trains, only 28 were operated by actual rail carriers. TRAFFIC WORLD, Apr. 18, 1988, at 6-7.

182. CSX purchased SeaLand Services in 1986. *Joint Application of CSX Corp. and Sea-Land Corp.*, 23 Shipping Reg. (P&F) 1671 (I.C.C., Fin. No. 30,900 (Sub.-No. 1) (1987)). The combined corporation offers through ocean/rail services. *See generally Hintz at the Helm*, CONTAINERISATION INT'L 30-37 (July 1988); *CSX/Sea-Land Intermodal Rolls Out*, CONTAINERISATION INT'L 48-49 (July 1988).

183. Prior to deregulation of the surface freight forwarder industry, a shippers' agent was an entity exempt from regulation as a surface freight forwarder provided it acted as an agent of the shipper in consolidating or distributing pool cars and it provided the service for the shipper only at a terminal in which the service was performed. 49 U.S.C. § 10,62(4) (1982) *repealed by* Surface Freight Forwarder Deregulation Act of 1986, Pub. L. No. 99-521, 100 Stat. 2993. *See* Travellers Indemn. Co. v. Alliance Shippers, 654 F. Supp. 840 (N.D. Cal. 1986). As a practical matter, shippers' agents act in the domestic rail market as "travel agents" for rail carriers. The agents act as retailers of the wholesale rail services that they purchase. The leading example of a steamship/shippers' agent acquisition was that of American President Companies/National Piggyback, Inc. *See generally* Kursar, *American President Domestic: A Matter of Organization*, TRAFFIC WORLD Apr. 18, 1988, at 8-10.

184. Examples of major rail-motor carrier acquisitions include the Union Pacific Railroad purchase of Overnite Transportation Co., *see* 4 I.C.C. 2d 36 (Final Decision, Fin. No. 31,000 1987), and the Burlington Northern Railroad's acquisition of six regional motor lines. Such acquisitions have been limited due to regulatory uncertainties over the legal standards that the I.C.C. must apply in authorizing rail/motor mergers. The Union Pacific and Burlington Northern acquisitions were allowed to proceed only as a result of temporary enabling legislation enacted by Congress. *See* Regular Common Carrier Conf. v. United States, 820 F.2d 1323 (D.C. Cir. 1987) (invalidating I.C.C.

The result is the creation of multimodal transportation giants that offer coordinated and consolidated through transportation services to domestic and international shippers. The trend to provide integrated through intermodal service is likely to continue, even if the trend towards multimodal companies does not. This trend may have a significant impact upon the future of the conference system.

At issue is whether an antitrust-exempt conference system can be reconciled with the existence of a deregulated domestic transportation system if most international freight moves under through intermodal rates under the control of a single multimodal carrier. At this time the multimodal carrier is the exception, not the norm. However, integrated point to point through movements offered by conference carriers in conjunction with domestic carriers are a significant aspect of the international market. While current law does not allow conferences to negotiate jointly and establish the domestic inland portion of such through intermodal rates, the rate charged to the public for the through movement can be agreed upon by the conference members. The existing system thus provides shippers with an opportunity to establish their own rate structures as competitive alternatives to a carrier's through rate, while still allowing the conference system to rationalize some aspects of intermodal services.[185]

Should the Advisory Commission determine that the trend towards integrated carrier systems will continue, thus leaving a handful of giants dominating the world market, there may be serious arguments against allowing a strengthened conference system under the theory that it will have an undue influence over domestic competition. On the other hand, if United States trading partners, especially the European Community, continue to allow the conference system, there is an argument for political comity in favor of continuance of the conference system, an argument that has been persuasive for over seventy years.[186]

B. *The Advisory Commission's Mandate*

The Advisory Commission has, of course, a specific mandate to examine certain issues that were of primary concern to Congress in 1984.

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approval of rail/motor acquisitions under exemption authority and requiring review under acquisitions authority). *See also* Norfolk Southern Corporation-Control-North American Van Lines, Inc., 1 I.C.C. 2d 842 (Fin. No. 30,500) *remanded sub nom.* International Bhd. of Teamsters v. Interstate Com. Comm'n, 801 F.2d 1423 (D.C. Cir. 1986).

185. 46 U.S.C. app. § 1709(c)(4). *See supra* note 180.

186. *Cf.* GAO Report, *supra* note 22, at 18.

The Commission's overriding mandate is to study and make recommendations concerning conferences in ocean shipping. The study is to address specifically whether the nation would be best served by prohibiting conferences or by maintaining closed or open conferences.[187]

The Advisory Commission's perception of the changing transportation market and world trading patterns, their source, their direction, and their impact on the United States, will determine the recommendations it makes to Congress. These trends must be put in the perspective of the conference system, whose key justification is that it provides rate and service stability to shippers.

1. The F.M.C. *Section 18 Report*

In this regard, Congress has provided additional guidance for the Advisory Commission. In staff reports ordered by the Shipping Act of 1984, Congress required the F.M.C. to collect and analyze information on the impact of the 1984 Act on international ocean shipping, including data on increases and decreases in the level of tariffs; changes in the frequency and type of common carrier services available through specific ports or geographic regions; the number and strength of independent carriers in various trades; and the length, time, frequency, and cost of major regulatory proceedings before the F.M.C..[188]

In addition, the F.M.C. was required to submit a report based on this data to the Presidential Advisory Commission, Congress, the Department of Transportation, the Justice Department, and the Federal Trade Commission.[189] These latter three government agencies will then furnish their own analysis of the impact of the 1984 Act to Congress and the Advisory Commission.[190] Each of the agency reports must specifically address: 1) the advisability of adopting a system of tariffs based on volume or mass of shipment; 2) the need for antitrust immunity for ports and marine terminals; and 3) the continuing need for the statutory requirement that tariffs be filed with and enforced by the F.M.C..[191]

On September 20, 1989, the F.M.C. published its *Section 18 Report*

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187. 46 U.S.C. app. § 1717(f).

188. 46 U.S.C. app. § 1717(a).

189. 46 U.S.C. app. § 1717(c). During the five-year time period between enactment of the 1984 Act and submission of the *Section 18 Report* to Congress, the F.M.C. was also required to consult with the Department of Transportation, the Justice Department, and the F.T.C. annually concerning data collection. 46 U.S.C. app. § 1717(b).

190. These reports are due within 60 days after the F.M.C. submits its report. 46 U.S.C. app. § 1717(c)(2).

191. 46 U.S.C. app. § 1717(c)(3).

on the Shipping Act of 1984.[192] The 697-page report contains explicit conclusions concerning the issues that Congress required the F.M.C. to study.[193] It also contains a wealth of data providing a snapshot of the international ocean liner industry as it has operated under the 1984 Act.

In general, the F.M.C. concluded that the Shipping Act of 1984 has not had a substantial impact on rates or service levels in the United States oceanborne trades.[194] The events that have occurred in the trades since 1984 can, in general, be attributed to general United States economic trends in international trade that predate enactment of the Shipping Act of 1984.[195] The 1984 Act has been successful in one of its primary goals—reducing the length and cost of processing conference agreements at the F.M.C..[196] This, in turn, has freed F.M.C. resources to expand its enforcement efforts against industry malpractices and restrictive shipping policies of foreign governments.[197]

The F.M.C. concluded that the negative consequences feared by those opposed to a strengthening of the conference system did not occur.[198] While "superconferences" have formed, they have not raised rates, curtailed services, or reduced the level of independent competition. Indeed, the F.M.C. could not discern any direct impact on rate levels, service frequency, or strength of independent competition in the United States trades as a direct result of the Shipping Act of 1984.[199]

In addition, the F.M.C. noted that the introduction of service contracts into the United States regulatory scheme has had a substantial impact on how freight moves in the United States trades.[200] The F.M.C. stated that it is unclear whether service contracts have caused a decrease in tariff rates.[201] It also found independent action to have had an important impact on the trades.[202] In general, the F.M.C. stated that these provisions of the 1984 Act, when used, were marketing tools that reflected market

192. SECTION 18 REPORT, *supra* note 5.

193. *See generally Executive Summary*, SECTION 18 REPORT, *supra* note 5, at 7-13.

194. SECTION 18 REPORT, *supra* note 5, at 8-9, 155-373.

195. *Id.* at 8-9, 155-56, 203-04, 263-65.

196. *Id.* at 7-8, 101-22, 375-83.

197. *Id.* at 7.

198. *Id.* at 7-9, 155-56.

199. *Id.* at 8-9, 192-95, 203-04, 263-65. The Advisory Commission did conclude that rates have been less stable in some trades, that the number of independent carriers had increased in three of five trades studied, and that significant capacity was added to the trades. It could not, however, conclude that these changes were statistically significant or related to the 1984 Act. *Id.* at 200, 243, 328.

200. *Id.* at 609-10.

201. *Id.* at 637.

202. *Id.* at 664, 676.

conditions rather than created them. While it found rate instability in many of the United States trades and increased capacity in others, the F.M.C. concluded that these events were related to trade flows and that the 1984 Act had a minimum impact on rate structure or stability.[203]

The *Section 18 Report* implies that the negative consequences of a strengthened conference system that opponents of that system had feared did not occur under the Shipping Act of 1984 for two simple reasons. First, the international liner trades remain overtonnaged. The F.M.C. found that capacity increased under the 1984 Act and that the role played by independents, including the percentage of high-valued cargo carried by them, also increased. This added competition to the United States trades.[204] Second, any rate instability in the trades could be attributed to this surplus capacity responding to international trends in supply and demand and changes in currency exchange rates.[205]

The *Section 18 Report* concluded that the current tariff system that allows the use of volume/mass and commodity rates should be retained.[206] The F.M.C. also recommended retention of the current tariff filing system.[207] It suggested that the question of antitrust immunity for ports is a political question rather than an economic one.[208]

The *Section 18 Report* in general favored maintaining the status quo of the Shipping Act of 1984, including retention of the open conference system. The report's conclusions, however, raise several important questions for the Presidential Advisory Commission. If the conference system allowed under the 1984 Act has not enhanced or detracted from rate stability, would a closed conference system accomplish this goal? Alternatively, are there compelling reasons to maintain the conference system if rate and service levels are responsive to general trade conditions rather than carrier efforts at rationalization? Finally, are the new provisions in

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203. *Id.* at 18-20, 653-55.

204. *See, e.g., id.* at 8-9, 19, 21, 156, 177.

205. *Id.* at 8-9, 19, 155-56, 203-05.

206. The F.M.C. noted that while there is little industry support for adopting an exclusive volume/mass tariff system, a system based on per container lump sum rates is gaining shipper support. The F.M.C. argued against changing the current tariff system because the system, while simplifying tariff filing, could distort the existing transportation system by: 1) reducing the movement of low-valued cargo in United States trades; 2) increasing the impact of independent action on conferences; 3) causing a distortion in the choice of ports, including cargo diversion to Canada; and 4) complicating the establishment of intermodal rates. *Id.* at 10, 389, 395-432.

207. The F.M.C. in essence concluded that tariff filing is necessary to its enforcement functions and to prevent discrimination in shipping. *Id.* at 11, 489-90, 559-606.

208. *Id.* at 10-11, 436-37, 469-81.

the 1984 Act beneficial or detrimental to the conference system?[209]

In addressing these questions, the Presidential Advisory Commission will focus on the interrelationship between service contracts, independent action, intermodalism, and tariffs. The *Section 18 Report* noted that under the 1984 Act, service contracts have significantly impacted some segments of the international trades.[210] For some commodities, in some trades, the port-to-port tariff rate has become a "paper" rate.[211] Most major commodities instead move under service contract rates.[212] These rates can be eleven to twenty-five percent lower than the applicable tariff rate.[213]

Similarly, independent action, while not utilized on a generalized basis, may result in rate reductions of up to fifty percent.[214] In addition, independent action may be more frequently used in overtonnaged trades with large "superconferences."[215] The F.M.C. suggests that independent action may have an important influence on service contract rates because tariff rates often form the basis of service contract rates.[216]

The *Section 18 Report* noted that the majority of service contracts provide for both port-to-port and through intermodal services.[217] In a separate conclusion, the F.M.C. also noted that economic trends in through intermodalism predating the 1984 Act have tended to concentrate liner services to the coastal regions closest to the foreign origin or

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209. The *Section 18 Report* addressed some aspects of these questions by comparing service and capacity level changes in the U.S./Far East trades as opposed to similar service patterns experienced by the closed conferences in the Europe/Far East trades. The report found that changes in service characteristics in the two trades are similar. Nonetheless, while container capacity in both trades increased by 70 to 75%, the number of voyages in the United States trades increased, while those in the European trades declined. The report suggested that the closed conference system may be able to expand capacity in a more cost-efficient manner. *Id.* at 260-63.

210. *Id.* at 609.

211. *Id.* at 635-37.

212. The *Section 18 Report* stated that virtually all automobile, bus, and truck components, as well as automobile panel parts, moved under service contracts in 1988. More than 60% of audio and over 40% of video electronic equipment from Japan to the United States moved under service contracts. *Id.* at 637-38.

213. *Id.* at 633-35. For example, in October 1988 the Atlantic North Europe Conference (ANEC) tariff port-to-port rate for a 40 foot container of engines was $7,026. The intermodal point-to-point service contract rate for a 40 foot container was $2,308. *Id.* at 636.

214. *Id.* at 676.

215. *Id.* at 201, 658.

216. *Id.* at 655.

217. *Id.* at 619, 622.

destination points.[218] While the *Section 18 Report* stated there is no strong evidence that "load centers" have developed,[219] these two conclusions support the inference that through intermodalism in a contract environment is now a significant factor in the United States international transportation marketplace.

The *Section 18 Report* recognized that larger shippers may be able to take greater advantage of these market innovations than smaller shippers.[220] In examining the questions of simplified tariff rates, continued tariff filing and enforcement, and port antitrust immunity in the context of a strengthened conference system, the Presidential Advisory Commission should also examine the other ramifications of these issues. Should international rate structures remain distinct from those used in the domestic marketplace, or should the deregulated contract system of carriage in the domestic marketplace be adopted for the international trades?[221] Should state sovereignty in the context of local economic development allow port antitrust immunity to provide regional trading zones? Finally, do changing world trading patterns and transportation systems still require a system of common carriage to protect the small and medium-sized shipper?[222]

2. Tariff Filing and FAK Rates

During the 1984 debates, opponents of the conference system opposed tariff filing on the grounds that it merely serves to reinforce the conference system. The Reagan Administration argued that if it allowed antitrust exempt conferences, the Government should not assist them in monitoring their members' activities through a system of tariff filing.[223] Tariff filing has been an important function of the F.M.C. in the international trades since 1961.[224] The use of filed tariffs is viewed as inherent to a system of common carriage. To ensure there is no discrimination against shippers, the oversight agency must review tariffs and police rates.[225]

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218. *Id.* at 264.

219. *Id.*

220. *Cf. id.* at 578-81.

221. *See infra* text accompanying notes 244-58.

222. *See infra* part III, section B(2)(b).

223. *House Judiciary Hearings*, *supra* note 39, at 7-8 (testimony of James C. Miller III); *Regulatory Reform Hearings*, *supra* note 39, at 510 (testimony of Drew Lewis, Secretary of Transportation); *Senate Judiciary Hearings*, *supra* note 40, at 11-12, 19-22 (testimony of Thomas Campbell, Federal Trade Commission).

224. *See supra* note 36.

225. *Regulatory Reform Hearings*, *supra* note 39, at 375-83 (supplemental testi-

Opponents of tariff filing argued, however, that all the system really does in a conference environment is strengthen the conference. If every carrier and conference knows what other carriers or conferences are charging, rate competition will never occur. Carriers should join the conference because, if they remain independent, the conference will merely monitor their rates and meet or beat them. If tariffs do not exist, however, then rate uncertainty will exist, and thus some competition will enter into the system.[226]

Tariff filing has been an important part of the United States system of regulated common carriage. The policy behind it is one of nondiscrimination by providing information and uniformity of rates and services to shippers.[227] Many other countries, however, do not use a tariff filing system in order to ensure adherence to common carriage principles.[228] Since deregulation in the early 1980s, it has also not been a significant part of the domestic United States intermodal transportation system.[229]

Current law does not require common carriers in the international trades to file tariffs or enter into service contracts providing for FAK or per container rates. Instead, each carrier or conference makes its own decision as to its rate structure. While concepts of common carriage do

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mony of Council of American Flag Ship operators). *See* SECTION 18 REPORT, *supra* note 5, at 491-500.

226. *See supra* note 223; SECTION 18 REPORT, *supra* note 5, at 500-08.

227. *See, e.g.*, 49 U.S.C. §§ 10,761(a), 10,762; Louisville & Nashville R.R. v. Maxwell, 237 U.S. 94 (1915). Similar provisions are found in the 1984 Act. *See* 46 U.S.C. app. §§ 1707(a), 1709(b); Costa Line Cargo Services v. McGraw-Edison Co., 623 F. Supp. 51 (S.D.N.Y. 1985).

228. *See, e.g.*, Letter from G.J.M. Verhaar, Secretary General, European Shipper's Councils to R.V. Collins, President, Draco Marines Ltd. (Apr. 28, 1989), *reprinted in* SECTION 18 PROCEEDINGS, *supra* note 14, at 195. *Regulatory Reform Hearings*, *supra* note 39, at 510 (testimony of Drew Lewis, Secretary of Transportation). SECTION 18 REPORT, *supra* note 5, at 535-41.

229. Under the Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793, surface motor carrier services are subject to several different legal classifications. Motor common carrier service is provided pursuant to a tariff filed with the I.C.C. 49 U.S.C. §§ 10,761, 10,762 (1982 & Supp. V 1987). Motor contract carriage is provided pursuant to a written bilateral contract between the motor carrier and shipper. 49 U.S.C. § 10,527. Motor carrier services provided within a commercial zone are exempt from I.C.C. economic regulation. 49 U.S.C. § 10,526(b).

Under the Staggers Rail Deregulation Act of 1980, intermodal rail carrier services have been exempted from I.C.C. regulation. Intermodal Agreement, *supra* note 179. In general, rail carrier intermodal service is provided pursuant to written contracts negotiated between the rail carrier and shipper. *See generally* Co-Operative Shippers v. Atchison, Topeka and Santa Fe Ry., 613 F. Supp. 788 (N.D. Ill. 1985), *rev'd*, 840 F.2d 447 (7th Cir. 1988).

not allow discrimination between shippers, the current tariff system, which provides that rates must be published on a commodity, weight, or measure basis, may allow discrimination based on such transportation characteristics as bulk, weight, density, and value.[230] Such discriminatory treatment is often justified on the grounds that different transportation characteristics justify different rates.[231]

The question of FAK or per container rates, tariff filing, and service contracts are intertwined with continuance of the conference system and a common carriage system of transportation. These questions address the key issues of discrimination and efficiency.

Adoption of a tariff system based on volume or mass of shipment may be justified if technology and insurance factors have changed traditional transportation pricing mechanisms. For example, if a container has a given capacity and volume, and an ocean carrier can carry only a limited number of containers, then the cost to the carrier in handling the shipment could arguably be predicated on the cost of moving the container, not the value of the service to the shipper. Simply stated, if all goods move in forty-foot containers, and the cost of moving each container is the same, it should not make a difference to the carrier if one container contains scrap paper and another contains Cartier watches or a mixture of freight, as long as the carrier's dollar liability for loss and damage to the two shipments is the same.[232]

On the other hand, if the demand for liner services is a derived demand, then the liner operator may seek to justify its pricing on a value of service basis on the theory that, while average costs to the carrier may be predictable, higher value commodities must subsidize lower value com-

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230. 46 C.F.R. § 580.6 (1989). As a practical matter, the per container or FAK rate may already be here to stay. An FAK rate is usually expressed in terms of a specific amount of cargo per weight of mixed cargo. Usually, the carrier will require that the container not contain more that a certain percentage of cargo. Containerload rates are in general rates per 100 pounds of a commodity, calculated to fill a container. Schmeltzer & Peavy, *supra* note 22, at 219. The F.M.C.'s *Section 18 Report* found that most industry participants preferred the current tariff rating system as providing maximum flexibility. SECTION 18 REPORT, *supra* note 5, at 531-34.

231. Carrier Position Paper, *supra* note 19, at 119-20. *See generally* SECTION 18 REPORT, *supra* note 5, at 403-27.

232. *See* Schmeltzer & Peavy, *supra* note 22, at 218-21, 222-25; Agman, *supra* note 22, at 13-17; SECTION 18 REPORT, *supra* note 5, at 396-97. Under the Carriage of Goods by Sea Act, ch. 229, 49 Stat. 1207 (1936) (codified as amended at 46 U.S.C. app. §§ 1300-1315 (Supp. V 1987)), the ocean carrier's liability on the ocean movement segment is limited to $500 per package or customary freight unit for loss or damage to any shipment, absent shipper declaration of a higher value on the bill of lading. Thus, most shippers insure their freight moving internationally. 46 U.S.C. app. § 1304(5).

modities in order to maintain the latter's presence in the market, and thus the basis for the average rate. In this latter situation, an average rate established without regard to the value of the service may force low value commodities out of the international market. This, in turn, could cause service disruptions or further overcapacity in the trades.[233]

As a practical matter, the containerload rate already has significant international acceptance due to the advent of service contracts and through intermodal transportation. Many international and domestic transportation contracts are drafted in terms of per container rates, although such rates in general reference the contents of the container, either on a commodity or FAK basis. However, controversy over a statutory requirement for the use of FAK rates may arise if the major shippers' proposal to eliminate the antitrust exemption for conferences is adopted and the exemption is replaced by a contract and tariff system with larger shippers using contracts and smaller shippers using tariff rates. The question is whether a cost-efficient method will exist for small and medium-sized shippers to utilize mass or volume rates. At the heart of this question is whether common carriage should be retained in the international trades.[234]

a. Service contracts and the tariff filing issue

Any analysis of the tariff filing issue will require the Advisory Commission to examine carefully the new role of service contracts in the international market. Congress did not anticipate in 1984 that service contracts would assume the important and controversial role they now play in the international shipping industry.[235] But Congress did recognize

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233. SECTION 18 REPORT, *supra* note 5, at 397-400; 401-03; 410-15.

234. Supplemental Shipper Position Paper, *reprinted in* SECTION 18 PROCEEDINGS, *supra* note 14, at 151-52. *See also* Schmeltzer & Peavy, *supra* note 22, at 218-21. The use of per container rates is controversial in the domestic economy as well. Some ocean and motor carriers allege that the use of per container rates creates an incentive for the shipper to overload the container in violation of federal and state highway weight limitations. In two separate petitions, the American Trucking Association and steamship conferences have asked the F.M.C. to establish maximum container weight limits or to eliminate the use of per container rates for certain high density commodities. Ocean carriers contend that they have been unable to eliminate unilaterally the use of per container rates. *See* Maximum Container Weights; Filing of Petition for Rulemaking, 54 Fed. Reg. 35,246 (F.M.C. 1989) (Petition No. P3-89); Elimination of "Per Container" Rates; Filing of Petition for Rulemaking, 54 Fed. Reg. 35,246 (F.M.C. 1989) (Petition No P4-89).

235. Indeed, Congress thought that it would be primarily the large shipper that would use a service contract. H.R. REP. No. 137, *supra* note 53, at 17. *See also* S. REP. No. 3, *supra* note 26, at 16, 21 (1983) (allowing large and small shippers to negotiate

that service contracts would introduce an inherent tension undercutting two basic premises of the 1984 Act: a strong conference system and the system of common carriage.[236] Congress recognized that the tensions between conferences and service contracts could undermine the conference system.[237] It therefore gave conferences the right to limit or prohibit the use of service contracts.[238] Congress also authorized the Advisory Commission to examine whether independent action should be allowed on service contracts.[239] Congress was concerned that service contracts and tariff rates could result in a two tier rate structure in ocean shipping, one for large shippers, and one for small shippers.[240]

Introduction of service contracts in the international trades modeled similar developments in the domestic markets, where shippers enter into rail or motor carrier contracts to ensure intermodal transportation needs. A major distinction exists, however, between the use of contracts in the domestic and international markets. Domestically, contracts are confidential and, with few exceptions, are not filed with any federal agency.[241] Internationally, contracts are filed confidentially at the F.M.C., but their essential terms, including rates, are made available to other similarly situated shippers.[242]

The service contract provisions of the Shipping Act of 1984 have been extensively utilized. The F.M.C.'s *Section 18 Report* indicated that for some commodities, service contracts account for the vast proportion of shipments, and, in some cases, the point-to-point service contract rate will be lower than the tariff port-to-port rate for the same commodity.[243]

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service contracts); H.R. REP. No. 611, *supra* note 105, pt. 1, at 25-26.

236. *See supra* note 235.

237. *Cf.* CONF. REP., *supra* note 8, at 29-30.

238. *Cf.* Shipping Act of 1984, 46 U.S.C. app. § 1703(a)(7) (The Shipping Act applies to agreements limiting service contracts.).

239. CONF. REP., *supra* note 8, at 43.

240. *Cf.* Shipper Position Paper, *supra* note 14, at 23-24.

241. Intermodal rail and motor carrier contract transportation is exempt from rate regulation by the I.C.C., and such contracts are thus confidential. *See* Intermodal Movement, *supra* note 179; 49 U.S.C. § 10,526. Regulated rail contracts are filed with the I.C.C., but on a confidential basis. 49 U.S.C. § 10,713. *See generally* 49 U.S.C. § 10,762.

242. 46 U.S.C. app. § 1707(c).

243. For example, the F.M.C. stated that only 10% of the United States ANEC's total tonnage of roadmaking equipment parts moved under port-to-port tariff rates in 1985. The remainder moved under conference service contracts. It noted that the ANEC's 1985 port-to-port tariff rate was $3,317 for a 40-foot container. The intermodal point-to-point service contract rate for the same commodity was $2,420. SECTION 18 REPORT, *supra* note 5, at 633-37. *See also* BUREAU OF ECONOMIC ANALYSIS, FED.

The impact of service contracts on the way shippers buy ocean liner services has also been substantial. Some shippers have reportedly reduced the size of, or have spun off, their transportation departments. Shippers have entered into long-term contracts with one or more carriers or conferences for their ocean transportation needs, in some cases contracting with a single carrier to provide virtually worldwide ocean transportation services.[244]

As anticipated by Congress, large shippers have embraced the use of service contracts. These shippers argue that service contracts can be easily identified from the "confidential" contract summaries on file with the F.M.C.. They thus argue that service contracts should be totally confidential.[245] Congress, however, specifically authorized the filing of essential terms with the intent that similarly situated shippers could obtain the same terms. By doing so, Congress sought to preserve some elements of common carriage that would protect smaller shippers.[246]

Carriers and shippers have used service contracts differently than anticipated by Congress. They have negotiated contracts that provide the shipper a guaranteed market rate, rather than invoking the statutory obligation to offer similar essential terms to similarly situated shippers.[247] Conferences do not like such service contract provisions because they detract from conference cohesion and rate stability.[248]

Tariff rates and confidential contracts represent the two sides of a key issue facing the Advisory Commission. Shipper interests who argue for

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MARITIME COMM'N, SECTION 18 STUDY, STATUS REPORT AS OF SEPT. 30, 1987, at 33 (1987). The F.M.C. stated that 17,103 service contracts were filed with the F.M.C. since 1984. SECTION 18 REPORT, *supra* note 5, at 619.

244. DuPont recently entered into a five year, multitrade loyalty contract with Orient Overseas Containerline (OOCL), under which it guarantees 25% of its tonnage over a five year period in exchange for OOCL's guarantee of price and service in both the Atlantic and Pacific trades. *See* Beargie & Canna, *DuPont/OOCL Sign 5-Year Multitrade Loyalty Contract*, AMERICAN SHIPPER 54 (Sept. 1989); *DuPont Sees a Problem in Service Contracts*, AMERICAN SHIPPER 14 (Mar. 1989). *See Are Traffic Departments on the Way Out?*, AMERICAN SHIPPER 53 (July 1987); *Kaiser A & C Spins Off Traffic Unit*, AMERICAN SHIPPER 50 (July 1987).

245. Shipper Position Paper, *supra* note 14, at 15-16.

246. *See supra* note 234.

247. These contract clauses are called most favored shipper or "Crazy Eddie" clauses. *See infra* part III, section B(4)(b). The F.M.C.'s Bureau of Domestic Regulation has estimated that "Me-Too" contracts comprise about two percent of all contracts filed with the F.M.C. SECTION 18 REPORT, *supra* note 5, at 621. Service Contracts, Order Denying Petition of North Europe Conferences, F.M.C. No. 88-16, at 6 (Served Sept. 5, 1989).

248. *See* Carrier Position Paper, *supra* note 19, at 111-12.

confidential contracts and independent action are in essence arguing against a conference and common carriage system, where the primary regulatory goal is to avoid rate discrimination. Carriers and conferences seeking to limit the right of shippers to enter into such contracts are in essence arguing against the free market relationships present in most other markets.[249]

b. Consolidators and tariff rates

In weighing these positions, the Advisory Commission must also examine the protections that Congress gave the small and medium-sized shipper to compete with major shippers in the international trades. There are currently two market mechanisms whereby the international small and medium-sized shipper can obtain a volume rate discount similar to that of a large shipper: the nonvessel operating common carrier (NVOCC) and the shippers' association. The NVOCC is strictly an ocean industry creation. The shippers' association, a new entity in the international trades since 1984, has a long history in the domestic market.[250]

Theoretically, both NVOCCs and shippers' associations should allow small shippers to obtain freight rates similar to those obtained by larger shippers. However, whether NVOCCs and shippers' associations can protect small and medium-sized shippers from discrimination in a contract carriage system depends on the role they would play in marketing a carrier's services in the emerging transportation markets. To date, that role has been unclear. The F.M.C.'s *Section 18 Report* indicated that shippers' associations and NVOCCs combined accounted for only six percent of the service contracts filed with the F.M.C. in the five year period since 1984.[251]

Reliance on NVOCCs and shippers' associations as an alternative to a tariff system of common carriage may be misplaced, given a fundamental difference between the current domestic and international transportation markets. In general, ocean carriers prefer to act as direct retailers of

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249. *Compare* Shipper Position Paper, *supra* note 14, at 15-16 *with* Carrier Position Paper, *supra* note 19, at 111-12.

250. An NVOCC is a "common carrier that does not operate the vessels by which the ocean transportation is provided and is a shipper in its relationship with an ocean common carrier." 46 U.S.C. app. § 1702(17). *See also infra* part II, section B(3)(c).

251. The F.M.C. indicates that 33 shippers' associations negotiated 175 service contracts between 1984 and 1988, and that 136 NVOCCs executed 884 service contracts during the same time period. SECTION 18 REPORT, *supra* note 5, at 136, 161. Both shippers' associations and NVOCCs have complained that ocean common carriers have discriminated against them in service contract negotiations. *Id.* at 141, 142.

their services.[252] Many domestic transportation companies, especially railroads, currently act as wholesalers of intermodal services, extensively relying on third parties to market and sell their services.[253] In the domestic marketplace, the small and medium sized shipper has a wealth of choices. In general, there is more than enough price competition, because the small shipper can deal with truckers, shippers' agents, shippers' associations, brokers, or freight forwarders to obtain competitive transportation services.

These options are arguably less available in the international market. Only one mode of transportation—ocean shipping—is available to ship overseas. (Air cargo is in general too expensive.) Thus, the shipper cannot deal with competing modes but must use the ocean carrier. In addition, the intermediaries that consolidate less-than-containerload (LCL) cargo to provide volume rate discounts to the shipper are in direct competition with the ocean carrier. Rather than acting as friendly retailers, international intermediaries are perceived as contributing little to the carriers' bottom line. Both shippers' associations and NVOCCs have complained of ocean common carrier and conference discrimination in negotiating service contracts.[254] Finally, because intermediaries in the international and domestic markets have until recently operated in their own spheres, many intermediaries may not have the expertise to establish their own international intermodal network to provide rates and services competitive with those of the ocean carriers.

The common carriage system contained in the 1984 Act is structured to consider the impact of freight rates on the overall global competitiveness of United States goods. Once transportation is no longer a fixed cost, but instead is treated as part of the corporate bottom line, it becomes important that it be provided quickly, efficiently, and at low cost, because transportation costs can be a barrier to market entry.[255]

Thus, in determining what type of rate structure is necessary for the international ocean transportation system, the Advisory Commission will have to determine whether equivalent freight rates should be available for large and small shippers for either the through transportation move-

252. Schmeltzer & Peavy, *supra* note 22, at 218-21.

253. *Id. See also* Hoffman, *Make-It-or-Break-It Time Nears for Third Parties*, TRAFFIC WORLD, June 12, 1989, at 6; LaMourie, *Intermodal Third Party Relationships Taking Shape*, AMERICAN SHIPPER 50 (May 1989).

254. SECTION 18 REPORT, *supra* note 5, at 136, 142. There may be some merit to these complaints. *See* California Shipping Line v. Yangming Marine Transp., F.M.C. No. 88-15 (NVOCC awarded reparations of $260,731, and $15,000 fine imposed on carrier due to carrier discrimination).

255. *Cf.* Shipper Position Paper, *supra* note 14, at 9-11.

ment or only the ocean portion. Absent the existence of a truly independent and competitive international intermodal intermediary industry, or the introduction of stronger protections from carrier discrimination against intermediaries, small and medium-sized shippers may find that a tariff system provides them with the best source of rate information in the international trades, and the best protection against discrimination.

c. Can an international tariff system co-exist with a deregulated domestic transportation market?

One final question that the Advisory Commission must examine in evaluating the tariff question is whether the existing tariff structure is compatible with domestic deregulation. The prevalence of pocket rates provides an example of the problems inherent in through transportation involving a regulated international and a deregulated domestic transportation market. In this situation, ocean carriers allegedly negotiated through intermodal rates with shippers but did not file those rates until the shipment was tendered on board the ship, even if the shipper had actually consigned the shipment to the carrier's agent several weeks earlier. The practice was possible because the international carrier's domestic rates, due to deregulation, did not have to be filed until the ocean segment of the movement commenced. In essence, the ocean carrier manipulated domestic transportation market prices in creating a rate for its through movement. The effect of such a practice was allegedly discriminatory—shippers of the same commodities paid different rates. The F.M.C. promulgated regulations prohibiting the practice by requiring the applicable tariff rate to be the one in effect on the date the carrier constructively received the shipment.[256]

Rate discrimination is now an accepted practice in the deregulated domestic contract market. Congress had sent mixed messages on the acceptability of such discrimination in the international transportation market.[257] There are clear policy arguments against United States companies' competing against one another on the basis of underlying transportation costs in a world market. The concept of common carriage is thus intrinsic to the Shipping Act of 1984.[258] Yet, the 1984 Act's ser-

256. *See* Rule on Effective Date of Tariff Changes, 54 Fed. Reg. 20,127 (1989) (to be codified at 46 C.F.R. 580.5(d)(3)), *reprinted in* 25 Shipping Reg. (P&F) 37 (F.M.C. No. 88-19) (1989). Implementation of the regulation has been stayed pending disposition of a petition for reconsideration. 54 Fed. Reg. 29,0346 (1989).

257. *See supra* text accompanying notes 101-05.

258. H.R. REP. No. 53, *supra* note 105, at 17; H.R. REP. No. 611, *supra* note 137, pt. 1, at 25-26.

vice contract provisions introduced an element of rate discrimination in the international trades, and service contracts are popular. Coordinating the through intermodal international and domestic markets thus requires a basic reconciliation between the policies of the deregulated domestic market and the regulated international market.

3. Ports and the New Marketplace

The Advisory Commission must also address the role of ports in the new marketplace.[259] Prior to 1984, ports enjoyed a protected status from some forms of carrier discrimination because of geographic location. A port could expect that, under F.M.C. interpretations of the Shipping Act of 1916 and the Merchant Marine Act of 1920, cargo would move through the port to which it was geographically and economically the closest, that is, "naturally tributary."[260] Antitrust immunity was given to ports to ensure geographic rationalization, especially since they dealt with carriers that also had such protection.[261]

Technological changes, however, introduced the concept of regional load centers, each competitive by geographic region, leading to a specific port to act as the chief gateway to interior sections of the United States, with other ports continuing to operate by servicing niche markets. The concept of the "naturally tributary" port has thus fallen into disrepute.[262]

This development underlies the question of continued antitrust immunity for ports. If ports compete with one another for load center status, then an antitrust exemption may be counterproductive. The Advisory Commission has a mandate to study this issue.[263]

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259. The agency "reports shall specifically address . . . the need for antitrust immunity for ports and marine terminals." 46 U.S.C. app. § 1717(c)(3)(B).

260. *See* Shipping Act of 1916, 46 U.S.C. §§ 815, 816 (1982) (amended 1984); Merchant Marine Act of 1920, ch. 250, 41 Stat. 988, 992 (1920). Containerization of port facilities led to carrier absorption of overland transportation rates in order to secure faster turnaround time at the facilities. The F.M.C. generally upheld such cargo diversion when it was found to be cost justified. *See* Investigation of Overland and OCP Rates and Absorptions, 12 F.M.C. 184 (1969); *see also* Boston Shipping Ass'n v. Federal Maritime Comm'n, 706 F.2d 1231, 1237-40 (1st Cir. 1983).

261. Port Auth. of New York and New Jersey v. New York Shipping Ass'n, 23 Shipping Reg. (P&F) 21 (1985) (F.M.C. Nos. 84-6, 84-8). *Regulatory Reform Hearings*, *supra* note 39, at 130-36 (testimony of American Association of Port Authorities). Position Paper of the American Association of Port Authorities, *reprinted in* SECTION 18 PROCEEDINGS, *supra* note 14, at 80-81 [hereinafter A.A.P.A. position paper].

262. *See generally* Bowman, *Creative Marketing Strategies Aid Budget-Conscious Ports*, TRAFFIC WORLD, Sept. 12, 1988, at 10.

263. In its *Section 18 Report*, the F.M.C. concluded that the historical antecedents

The question of port innovation and the future role of ports in United States world trade bears heavily not only on the future of an antitrust immunity for marine terminal operators, but also upon such questions as tariff filing and coordination between the domestic and international intermodal markets. Since 1984 the United States port industry has been highly innovative, seeking many different ways to preserve and increase the regional market share of ports. Ports have sponsored, developed, or engaged in such joint ventures as inland terminals,[264] export trading companies,[265] shippers' agents, and shippers' associations[266] in an attempt to attract the traffic of the small and medium-sized importer and exporter. Such innovations may introduce a new intermediary in the marketplace that can assist small and medium-sized shippers to obtain the benefits of volume international intermodal transportation services. The port antitrust immunity may be justified if ports utilize their antitrust immunity to compete or work with other transportation providers.

The Advisory Commission must also examine several other laws and legal doctrines affecting port authority antitrust immunity. For example, port authorities may claim the benefit of the state action doctrine in order to protect their activities from antitrust scrutiny.[267] Port authorities

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justifying the initial granting of an antitrust exemption to port authorities no longer exist. It also concluded that an antitrust exemption for publicly owned ports is unnecessary, while such an exemption for privately owned ports cannot be justified by economic theory. The F.M.C. in essence stated that continuance of the port antitrust exemption is thus a political question. SECTION 18 REPORT, *supra* note 5, at 435-81.

264. For example, the Port Authority of Virginia has developed an "inland port" in Front Royal, Virginia, as a means to divert cargo from the Ports of Baltimore and New York/New Jersey to the Virginia Ports of Hampton Roads. The inland port, located 235 miles from the port in Norfolk, a chief competitor of the Ports of Baltimore and New York/New Jersey, is situated at the juncture of several major interstate highways and rail carrier lines. *See generally* Hoffman, *East Coast Port Competition for Midwest Freight Heats Up*, TRAFFIC WORLD, Sept. 12, 1988, at 6.

265. For example, the Port Authorities of New York/New Jersey and Virginia each have their own export trading companies. Bowman, *Creative Marketing Strategies Aid Budget-Conscious Ports*, TRAFFIC WORLD, Sept. 12, 1988, at 10, 11-12; *Port Authorities Move More Than Cargo*, 109 BUSINESS AMERICA 31 (1988).

266. For example, the Port Authority of Seattle operates a shippers' agent service that arranges for motor carrier service on shipments to and from Seattle. *See* Hoffman, *supra* note 264, at 12. The Port of Portland, Oregon, has been a major force in developing and operating the Columbia River Shippers Association. *See Dept. of Justice Business Review Letter Re Columbia River Shippers Association*, 24 Shipping Reg. (P&F) 929 (1988).

267. *See, e.g.*, Parker v. Brown, 317 U.S. 341 (1943) (state market competition restricting); Interface Group, Inc., v. Massachusetts Port Auth., 816 F.2d 9, 12-13 (1st Cir. 1987) ("[A]ntitrust laws do not reach restraints of trade imposed by *state*, rather

may also claim exemption for their actions under the Local Government Antitrust Immunities Act.[268] Finally, port authorities may also obtain the protection of Department of Commerce Export Trade Certificates of Review,[269] or Justice Department business review letters.[270] Each of these statutory tools provides innovative exemptions from the antitrust laws. Yet, they do not necessarily provide the explicit exemption for cooperative agreements that the Shipping Act of 1984 provides.

4. Other Issues: Rate Instability, Trade Malpractices, and Conference Cohesion. Has the New Marketplace Undermined the Concept of Common Carriage?

Given the strong shipper opposition to a continuation of the conference system, it is not likely that the Advisory Commission will recommend adoption of a closed conference system. However, it is possible that the Advisory Commission will recommend continued legal recognition of the conference system and merely provide for a fine tuning of the Shipping Act of 1984. The Advisory Commission may make such a recommendation because, in many respects, its review of ocean conferences is ill-timed. It comes prior to the expiration of the Uruguay Round on the GATT, which, for the first time, will address trade in services.[271] The Advisory Commission's report will be issued two years before completion of the borderless European Common Market.[272] It arrives a decade before the next century at a point where the structural aspects of United States trade, the trade and budget deficits, cannot clearly be described as either permanent fixtures on the economic landscape or merely transitory political problems that will be resolved in the near future.

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than private parties" (emphasis in original)); Capital Freight Serv. v. Trailer Marine Transp., 704 F. Supp. 1190 (S.D.N.Y. 1989).

268. 15 U.S.C. §§ 34-36 (1988).

269. 15 U.S.C. §§ 4011-4021.

270. 28 C.F.R. § 50.6 (1989).

271. Ministerial Declaration of Punta Del Este, of September 20, 1986, *reprinted in* LAW AND PRACTICE UNDER THE GATT III.A.2 (K. Simmonds & B. Hill eds. 1989). *See* Reinstein, *Services in the Uruguay Round: The U.S. Viewpoint*, in CONFLICT AND RESOLUTION IN US-EC TRADE RELATIONS AT THE OPENING OF THE URUGUAY ROUND 207 (S. Rubin & M. Jones eds. 1989).

272. The Advisory Commission's report is due at the end of 1990. 46 U.S.C. app. § 1717(h). The deadline for the borderless European Common Market is January 1, 1993. The European Council set the guideline on March 29 and 30, 1985, in Brussels. *See generally* COMMISSION OF THE EUROPEAN COMMUNITIES, COMPLETING THE INTERNAL MARKET: WHITE PAPER FROM THE COMMISSION TO THE EUROPEAN COUNCIL (1989); *Single European Act*, arts. 18, 19, 30 O.J. EUR. COMM. (No. L 169) 8 (1987).

In addition, political comity, which has served the conference system well for over a century, is a strong and valid consideration for the continuation of the conference system. If the trading partners of the United States continue to support the conference system, then it may be necessary to keep it.[273]

Congress may have anticipated that the Advisory Commission would

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273. United States trading partners such as the major Western European nations are likely to maintain their support for the conference system. *See, e.g.,* Diplomatic Note of April 12, 1989 from the Consultative Shipping Group, *reprinted in* SECTION 18 PROCEEDINGS, *supra* note 14, at 179. Some restrictions on the system have been imposed, however, and some conference activities approved by the F.M.C. are under scrutiny by the European Economic Community (EC). *See supra* notes 146, 175 and 186.

In recent years, however, the EC has been more aggressive in applying its general competition laws to the conference system and maritime transportation companies. For example, in 1986 the EC adopted four regulations that clarified the right to offer shipping services in the EC. Three of these regulations addressed the right to offer shipping services in the European trades. *Council Regulation (EEC) No. 4055/86, Applying the Principle of Freedom to Provide Services to Maritime Transport Between Member States and Between Member States and Third Countries*, 29 O.J. EUR. COMM. 14 (No. L 378) (1986); *Council Regulation (EEC) No. 4057/86, On Unfair Pricing Practices in Maritime Transport*, 29 O.J. EUR. COMM. 14 (No. L 378) (1986); *Council Regulation (EEC) No. 4058/86 Concerning Coordinated Action To Safeguard Free Access to Cargoes in Ocean Trades*, 29 O.J. EUR. COMM. 21 (No. L 378) (1986). The fourth regulation, *Council Regulation (EEC) No. 4056/86, Laying Down Detailed Maritime Transport*, 29 O.J. EUR. COMM. 4 (No. L 378) (1986), applied the competition rules of the Treaty of Rome to the ocean liner industry but provided a block exemption for liner conference activities. *See* Bayer, *Antitrust Comes to Maritime Transport in the European Economic Community*, 34 FED. BAR NEWS & J. 299 (1987); FMC Hearings, April 6, 1989, at 37-47 (Comments of Heinz Hilbrecht, First Secretary, Transportation, Energy, and Environmental Policy, Delegation of the European Community).

Whle the EC antitrust exemption for the liner conference system is similar to that of the United States, the possibility of conflict may increase. The Eurocorde Agreement is an example of such a conflict. Originally approved by the F.M.C. as a discussion agreement between North Atlantic Conference Carriers and independent ocean common carriers, the Eurocorde Agreement has been challenged several times by European shippers who contend that the activities of Eurocorde are outside the scope of the EC's exemption for liner conference activities and have an adverse effect on through intermodal transporation services. In December 1988 the EC adopted regulations that implemented the provisions of Council Regulation No. 4056/86. *Regulation No. 4260/88, On The Communications, Complaints and Applications and the Hearings Provided for in Council Regulations No. 4056/86*, 31 O.J. EUR. COMM. (No. L 376) (1988). *See* Unsworth, *British Shippers Allege North Atlantic Price-Fixing*, J. COM., Sept. 30, 1987, at 1A; Barnard, *EC Watchdogs Sudenly Notice Shipping*, J. COM., Oct. 13, 1987, at 1A; Sonter, *European Shippers Renew Calls for Investigation of Eurocorde*, TRAFFIC WORLD, Aug. 7, 1989, at 43; Canna, *EC Opposes Blanket OK to Eurocorde*, AMERICAN SHIPPER, Dec. 1989, at 9; Canna, *EC and FMC Compare Notes*, AMERICAN SHIPPER, Jan. 1990, at 14.

recommend retention of the conference system. Congressional desire to retain the conference system may be discerned from the discrete provisions of the Shipping Act of 1984 that Congress specifically authorized both the F.M.C. and the Advisory Commission to reexamine. Several of these provisions have already been discussed. Congress stated that it expected the Advisory Committee to examine tariff filing and the right of independent action on service contracts.[274] There are other issues even more intimately related to the operation of an open conference system and the current operation of the Shipping Act of 1984. These issues include the general right to independent action,[275] the right to use market rate clauses in service contracts,[276] and the definition of "shipper" under the 1984 Act.[277] Resolution of these issues may have a substantial impact on the success of the current conference system and the Shipping Act of 1984. The Advisory Commission can be expected to address each of them.

Carriers argue that these provisions represent new aspects of the 1984 Act that were designed to ensure that conferences do not become too strong but have instead unduly weakened the conference system.[278] They argue that these three provisions of the 1984 Act are the prime cause of the rate instability that has existed in the international trades.[279] Thus, carriers argue that these provisions of the 1984 Act must be weakened or eliminated. Shippers have argued exactly the opposite: that if the open conference system is preserved, these "shipper protections" must be strengthened, not weakened. In examining these provisions, the Advisory Commission must focus on whether they have contributed to rate instability or industry malpractices. Since 1984 the F.M.C. has had to initiate two major investigations of industry rebating malpractices, one in the North Atlantic trades, and the other in the TransPacific trades. These three provisions may in some way have fostered the environment allowing these malpractices.[280]

a. Independent action

Carriers object to independent action because it appears to have worked exactly as intended: if a member of a conference wants to offer a

274. *See supra* part III, section B(2); *infra* part III, section (B)(4)(a).
275. *See supra* part II, section B(4)(a), *infra* part III, section (B)(4)(a).
276. *See infra* part III, section B(4)(b).
277. *See infra* part III, section B(4)(c).
278. Carrier Position Paper, *supra* note 19, at 109-18.
279. *Cf.* Carrier Position Paper, *supra* note 19, at 109-10.
280. Shipper Position Paper, *supra* note 14, at 7-14.

rate or service different from that offered by the conference, it simply takes independent action.[281] Independent action can mean an increase in rates, but since 1984 carriers contend that it has in general forced conferences to decrease rates.[282]

Independent action cannot be discussed without consideration of the question of service contracts. Although conferences have the right to prohibit independent action on service contracts, the issue is one for specific review by the Advisory Commission. Whether independent action applies to conference rules on loyalty contracts is also controversial.[283] Rate negotiator shippers' associations have also complained that some carriers will negotiate with the association and then "steal" its largest member. In a conference setting this may occur because the conference will negotiate service contract conditions with a shipper, and then a conference member, privy to the conference negotiations, will exercise independent action to secure its own separate contract with the shipper at a lower rate.[284]

A strong conference system would appear to require an ability of the conference to discipline its members and assure adherence to the conference rate. Independent action may undermine this goal. Conference members must choose to exercise independent action, however, in order to make the statutory provision effective. Shippers argue that conferences have imposed barriers and have otherwise misused independent action.[285] Conferences, on the other hand, complain that independent action is too frequently and easily exercised. They would impose additional barriers to its use.[286] As with the use of such contract terms as the "Crazy Eddie" clause, discussed below, the exercise of independent action by conference members may indicate that carriers may not necessarily want to adhere

281. 46 U.S.C. app. § 1704(b)(8); Carrier Position Paper, *supra* note 19, at 109-10.

282. Carrier Position Paper, *supra* note 19, at 109. The F.M.C. concluded that independent action has a tendency to be used in trades that are overtonnaged with a large number of independent carriers and subject to rate instability as a result of changing trade conditions. Market conditions, not independent action, determine ultimate rate levels. SECTION 18 REPORT, *supra* note 5, at 653-55.

283. *See supra* note 109.

284. Shippers' Association Position Paper, *supra* note 154, at 40.

285. Shipper Position Paper, *supra* note 14, at 17-18. Shippers argue, for example, that conference members may discuss proposed independent action before the 10 day notice period commences, and that conference members will collectively discuss independent actions after the fact.

286. Carrier Position Paper, *supra* note 19, at 109-10. Carriers argue that a 60 day notice period for independent action should be permitted and that in the event of shorter notice periods, the conferences should be able to require an independent action proposal to be tabled at least one meeting before notice of the action is given.

to the conference line.

b. Market rate service contracts and the question of Crazy Eddie

The continued dominance of New York City in maritime circles manifests itself in the term "Crazy Eddie," ascribed to certain market rate provisions written into some service contracts. As the use of service contracts significantly increased in 1985 and 1986, carriers and shippers began writing market rate clauses into their service contracts. One of these clauses was known as a "most favored shipper" clause.[287] The other was known as a "Crazy Eddie" clause, after a New York electronics retailer who promised that he would not be undersold.[288]

Most favored shipper clauses guarantee that the shipper will obtain the lowest market rate on any shipped commodity offered by the carrier in either its tariffs or service contracts.[289] Crazy Eddie clauses promise the shipper that the carrier will meet any rate offered by any other carrier to any other shipper in that market.[290]

In the first two years after enactment of the Shipping Act of 1984, the number of service contracts proliferated at the same time that rates were decreasing. Carriers were alarmed by this decline. In 1986 the International Council of Containership Operators petitioned the F.M.C. to prohibit the use of these market rate contracts. It also asked the F.M.C. to prohibit the use of de minimus liquidated damages clauses in service contracts.[291] The carriers' argument was that the use of market rate contracts combined with minimum damages provisions for a breach of contract creates rate instability because shippers will be tempted to obtain market rate clauses, or will breach their contracts, in order to obtain the lowest possible rate.[292] The carriers argued to the F.M.C. that this was not the intent of Congress in authorizing the use of service contracts.[293]

The F.M.C. initially agreed to prohibit the use of Crazy Eddie clauses, but not most favored shipper clauses.[294] It subsequently stated that it would not prohibit the use of either form of market rate clause.[295]

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287. *Service Contracts—"Most Favored Shipper" Provisions*, 24 Shipping Reg. (P&F) 1351, 1352-53 & n.2 (1988) (F.M.C. No. 88-7) [hereinafter *Crazy Eddie Rule*].

288. *Id.*

289. *Id.*

290. *Id.*

291. *Id.* at 1355.

292. *Id.*; F.M.C., Notice of Proposed Rulemaking, 53 Fed. Reg. 87675, 8776-77 (1988).

293. *Crazy Eddie Rule*, *supra* note 287, at 1355.

294. *Id.*

295. *Id.* at 1353.

It also held that it lacked jurisdiction to dictate acceptable liquidated damages clauses.[296]

The Crazy Eddie question illustrates several fundamental questions facing the Advisory Commission. One question is whether the use of market rate clauses in service contracts generates rate and conference instability. Another question is whether a contract system is compatible with a common carriage system of transportation. The use of market rate contracts is a common practice in the deregulated domestic transportation market.[297] In the domestic marketplace, however, such contracts are confidential, and, with few exceptions, there are no mechanisms analogous to the similarly-situated shipper provisions of the 1984 Act. The use of such contracts, combined with independent action, may thus act at cross-purposes with a conference system whose aim is to facilitate rate stability.[298] Different regulatory philosophies will determine the ultimate fate of Crazy Eddie. Either the existing system of market self regulation, allowing carriers to exercise their own self-help mechanisms, such as prohibiting the use of service contracts, will be retained, or the F.M.C. can be authorized to regulate the content of service contracts with possible prohibition of the use of most favored shipper clauses. Alternatively, the essential terms provisions of the 1984 Act may be eliminated, creating a market environment similar to the deregulated domestic market.

c. Who is a shipper?

A final issue that the Advisory Commission must address is the question of who is a shipper under the Shipping Act of 1984. This has been a subject of controversy since the first days of the 1984 Act.[299] The issue transcends mere technical interpretation of the 1984 Act's definitional provisions. It addresses the future structure of the intermediary market in the international trades and how ocean transportation services will be

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296. *Crazy Eddie Rule*, *supra* note 287.

297. *Id.* at 1358.

298. *Cf. Carrier Position Paper*, *supra* note 19, at 111-12.

299. The following proceedings have addressed the question of who is a shipper under the Act: *In re* Petition for an Amended Statement of Policy Concerning the Status of Shippers' Associations, *reprinted in* 22 Shipping Reg. (P&F) 1629 (1985) (denying request to restrict membership in shippers' associations to owners of goods shipped by the association); *In re* Petition of the U.S. Atlantic-North Europe Conference and the North Europe-U.S. Atlantic Conference for a Rule Regarding the Term "Shipper", *reprinted in* 23 Shipping Reg. (P&F) 1381 (F.M.C. 1986) [hereinafter North European Petition] (denial of request to restrict the term "shipper" to persons for whose account transportation is provided); FACT FINDING 15, *supra* note 151. *See also Definition of Shipper and Availability of Mixed Commodity Rates*, 54 Fed. Reg. 40,891 (1989) (proposed rule; F.M.C. No. 89-20).

provided to the small and medium-sized shipper. Over the past five years, the domestic and international intermediary markets have been merging, at the same time that fundamental changes have occurred in the domestic intermediary market.[300] These changes have a significant bearing on how small and medium-sized shippers purchase international ocean transportation services. The F.M.C. has been less than effective in accommodating the changes in the current intermediary environment.

Under the Shipping Act of 1984, small and medium-sized shippers who do not want to use the higher rates available from the direct retail services of a steamship company may utilize the services of an NVOCC or join a shippers' association. Unlike in the domestic market, these intermediaries are limited in the services they can offer in conjunction and competition with ocean carriers.[301]

For example, a service contract under the 1984 Act is a contract between an ocean common carrier and a shipper or a shippers' association.[302] Nonvessel operating common carriers, which are defined as being shippers, but are not ocean common carriers, are legally entitled to enter into service contracts.[303] However, they must resell the terms of these service contracts to the public under tariff rates.[304] They cannot offer or enter into service contracts with other shippers, the only comparable marketing tool being a time/volume rate offered pursuant to a tariff.[305]

Shippers' associations do not face this legal obstacle. They do not hold themselves out to the general public, and therefore need not file tariff rates when they enter into service contracts on behalf of their members. However, early in the history of the Shipping Act of 1984, the question arose as to the scope of shippers' association membership.[306] The F.M.C. held that membership in a shippers' association by an intermediary that resold its service contract or other transportation terms to the general public did not alter the legal status of a shippers' association. The F.M.C. based its conclusion on the grounds that such intermediaries are defined as shippers under the 1984 Act.[307]

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300. *See supra* part III, section B(2)(b)..

301. *See, e.g.*, FACT FINDING 15, *supra* note 151. *See also supra* part III, section B(2)(b).

302. 46 U.S.C. app. §§ 1702(21), 1707(c).

303. 46 U.S.C. app. § 1702(17).

304. FACT FINDING 15, *supra* note 151, at 22-25.

305. NVOCCs Position Paper on the Shipping Act of 1984, *reprinted in* SECTION 18 PROCEEDINGS, *supra* note 14, at 97, 99 [hereinafter NVOCC Position Paper].

306. *See* AISA Petition, *supra* note 140, at 7,225-28.

307. *Id.* Under the Interstate Commerce Act, shippers' associations were treated as exempt from regulation as freight forwarders because they were nonprofit and member-

A strong argument can be made that the legal standards applicable to intermediaries operating in the international transportation market should be the same as for those operating in the domestic transportation market if an integrated transportation system is to develop. The 1984 Act may be inadequate for this purpose. The problem is an inexact definition of the term "shipper" and a failure of Congress and the F.M.C. to accommodate the international regulatory structure to the domestic marketplace. Under the Shipping Act of 1984, a "shipper" is defined as "an owner or person for whose account the ocean transportation of cargo is provided, or the person to whom delivery is to be made."[308] The first and third definitions are fairly clear. There must be either a beneficial interest in the shipped cargo or a future acceptance of responsibility for the cargo. This comports with common legal principles concerning liability for the payment of freight charges.[309]

However, "the person for whose account the ocean transportation of cargo is provided" has an inexact meaning, although its source, from case law interpreting the previous shipping acts, is clear.[310] Simply stated, it is unclear whether the language contemplates that nonbeneficial interest shippers, for example, someone responsible for paying the freight

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ship-based. Other intermediaries, including shippers' agents and property brokers, were also exempt from freight forwarder regulation due to the nature of the services they provided. 49 U.S.C. § 10,562(4) (1982) *repealed by* Surface Freight Deregulation Act of 1986, Pub. L. No. 99-521, 100 Stat. 2993. Each, however, served the general public, and the I.C.C. thus held that they could not belong to associations. *See* Sunshine State Shippers and Receivers Assoc.—Investigation of Operations, 350 I.C.C. 391 (1975). *See also* Columbia Shippers and Receivers Assoc. v. United States, 301 F. Supp. 310, 318-19 (D. Del. 1969) (addressing situation in which members' activities create a bona fide shippers' association); Freight Forwarders Inst. v. United States, 263 F. Supp. 460, 465 (S.D.N.Y. 1967) (rejecting requirement of joint and several liability of shipper assocation members). In examining its statute, the F.M.C. concluded that NVOCCs, statutorily defined as shippers, could be members of a shippers' association, notwithstanding the I.C.C. precedent and the fact that many domestic intermediaries were joining international associations. *See* AISA Petition, *supra* note 140.

308. 46 U.S.C. app. § 1702(23).

309. *See, e.g.*, Southern Pac. Transp. v. Commercial Metals Co., 456 U.S. 336 (1982) (liability remains even if carrier violates agency credit regulations); States Marine Int'l v. Seattle-First Nat'l Bank, 524 F.2d 245 (9th Cir. 1975) (shipper primarily liable for freight charges); O'Boyle Tank Lines, Inc. v. Beckham, 616 F.2d 207 (5th Cir. 1980) (shipper presumed primarily liable in the usual case).

310. The 1916 Act did not define the term "shipper." The language contained in the 1984 Act, however, was used in discussing who was a shipper in the cases of Norman G. Jensen, Inc. v. F.M.C., 497 F.2d 1053, 1056 (8th Cir. 1974), and Compagnie Generale Transatlantique v. American Tobacco Co., 31 F.2d 663 (2d Cir. 1929). *See also* FACT FINDING 15, *supra* note 151, at 36.

charges, may exist, or whether the language merely clarifies those situations where an entity acts as an agent of a shipper.

This uncertainty affects the role of intermediaries in the international trades. For example, under Interstate Commerce Commission decisions interpreting the shippers' association provisions, analogous to those of the 1984 Act, contained in the Interstate Commerce Act since 1942, non-beneficial interest intermediaries, even if they were legally "shippers", could not join shippers' associations on the grounds that to do so would be to change the membership status of an association to that of one holding itself out to the general public.[311]

The F.M.C. has refused to adopt a similar restriction on international shippers' associations.[312] It based its decision on the ambiguity of the 1984 Act's definition of the term "shipper". Since NVOCCs were defined as shippers under the 1984 Act, and NVOCCs were intermediaries similar to those under the Interstate Commerce Commission decisions, the F.M.C. determined that it could not adopt a restrictive policy.[313]

This decision has created uncertainty in the intermediary market.[314] Many carriers have complained that intermediaries not traditionally considered shippers have sought to sign service contracts. Ocean freight forwarders are supposedly the worst offenders. These intermediaries allegedly resell the terms of the service contract to their customers, without filing a tariff with the F.M.C. and without acting as an NVOCC.[315]

The F.M.C. has also declined requests to amend the definition of "shipper" on the grounds that the proposed definition would have limited the universe of shippers to those being the owners and receivers of shipped goods and NVOCCs.[316] Shippers' associations would have been excluded from the definition, a result opposed by shippers' association interests and the Justice Department.[317]

The F.M.C. has been actively investigating the changing role of intermediaries in the international trades. Fact Finding Investigation No. 15 concluded that the definition was not causing major problems in the international trades.[318] It did, however, note that the F.M.C.'s earlier refusal to declare who could belong to a shippers' association had been

311. *See supra* note 307.
312. *See* AISA Petition, supra note 140, at 7,228.
313. *Id.* at 7,227-28.
314. *Cf.* FACT FINDING 15, *supra* note 151, at 35-37.
315. *Id.* at 23-25, 31.
316. Northern European Petition, *supra* note 299, at 1381.
317. *Id.*
318. FACT FINDING 15, *supra* note 151, at 40.

"misinterpreted."[319] The F.M.C.'s report sent a clear signal that any intermediary signing service contracts in the international trades and reselling their terms to the general public was acting as an NVOCC and should file a tariff. The F.M.C. has also taken under advisement recommendations to initiate certain regulatory changes.[320]

In making its recommendations to Congress concerning regulation of the international shipping industry, the Advisory Commission should clarify the status of who is, and who is not, a shipper under the 1984 Act and the role of intermediaries in marketing ocean services. The Comission should address, for example, whether ocean retail service should be resold through intermediaries in a manner similar to that which has developed in the domestic marketplace.

Deregulation in the 1980s has forced major changes in the domestic intermediary market. Shippers' agents purchase rail services wholesale and retail them directly to the shipper. Motor carrier property brokers do the same in the trucking industry. Shippers' associations operate in both the rail and motor intermodal market. These entities are subject to little or no regulation. They may act merely as an agent for the shipper and do not assume common carrier liability. In many ways they are like travel agents, acting either as agents or independent contractors depend-

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319. *Id.* at 35.

320. *Id.* at 39-43. The F.M.C. has initiated investigations of malpractices in the North Atlantic and TransPacific trades. These investigations have focused on rebating activities that have in some circumstances involved unlicensed NVOCCs. Possible Malpractices in the TransAtlantic Trades, 52 Fed. Reg. 12,064 (F.M.C. 1987) (Fact Finding No. 16); Rebates and Other Malpractices in the Trans-Pacific Trades, 54 Fed. Reg. 18,595 (F.M.C. 1989) (Fact Finding No. 18).

In Definition of Shipper and Availability of Mixed Commodity Rates, 54 Fed. Reg. 40,891 (1989) (No. 89-20) [hereinafter Definition of Shipper] (to be codified at 46 C.F.R. pts. 58-81) (proposed Oct. 4, 1989), the F.M.C. attempted to address the untariffed NVOCC issue. As proposed, the rule would limit the definition of "shipper" to those entities responsible for paying freight charges. The definition would thus not include agents of shippers. The proposed rule would also limit the availability of mixed commodity rates to those entities defined as shippers under the F.M.C.'s new regulations. Finally, the rule would require the identification of the legal status of such entities as shippers on ocean carriers' shipping documents, including a listing of commodities shipped and an NVOCC tariff number if the shipper is an NVOCC. The rule has thus met with substantial opposition. *See, e.g.*, Comments of the American Institute for Shippers' Assocations, Inc. (F.M.C. No. 89-20, Dec. 4, 1989); Comments of the Household Goods Forwarders Association of America, Inc. (F.M.C. No. 89-20, Dec. 1, 1989); Comments of Worldwide Shippers Association, Inc. (F.M.C. No. 89-20, Nov. 14, 1989); comments of American President Lines, Ltd. and American Consolidation Services, Ltd. (F.M.C. No. 89-20, Nov. 17, 1989); Beargie, *Middlemen, FMC Finds it Difficult to Sort the Good from the Bad*, AMERICAN SHIPPER, Jan. 1990, at 22.

ing on the transaction involved.[321]

The competitiveness of domestic intermediaries, not constrained by tariff rates, resulted in the deregulation in 1986 of the domestic analogue of the NVOCC, the surface freight forwarder.[322] While retaining common carrier status, surface freight forwarders are no longer bound by a filed tariff rate.[323] They have injected additional competition into the domestic railroad and motor carrier markets.

The carrier industry has resisted intermediary competition in the international trades. Direct retailers of their services, carriers perceive little value in the services of NVOCCs and shippers' associations.[324] Carriers have stated that the legal treatment of NVOCCs and shippers' associations should be as a different class of shipper from the treatment of beneficial interest shippers.[325] The shipper definition question goes to the heart of the structure of the emerging international intermodal transportation market. Who is a shipper, and whether an intermediary can service a market position as both shipper and transportation provider, are crucial in determining whether the small and medium-sized shipper will be protected in a tariff or contract regulatory system, and whether the conference system should be retained.

As an alternative, the Advisory Commission may choose to clarify the nature of the operations and services that each intermediary provides in the international market. For example, it could recommend that NVOCCs be licensed and bonded by the F.M.C., or that shippers' associations be certified.[326]

IV. CONCLUSION

The purpose of this Article is not to reach or dictate conclusions for the Presidential Advisory Commission and Congress. Those conclusions

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321. FACT FINDING 15, *supra* note 151, at 18-22.

322. *See supra* note 142.

323. *Id.*

324. *See* Schmeltzer & Peavy, *supra* note 22, at 218-21.

325. Carrier Position Paper, *supra* note 19, at 115-17.

326. NVOCCs have requested that provisions be adopted providing for industry licensing and bonding of NVOCCs. NVOCC Position Paper, *supra* note 305, at 98. Shippers' associations have opposed licensing, certification, and bonding for associations. Shippers' Association Position Paper, *supra* note 154, at 39. In Definition of Shipper, *supra* note 310, the F.M.C. proposed regulations that would limit the definition of "shipper" and would require identification of shipper status, including NVOCC or shippers' association status, when a mixed commodity rate is used. In that proceeding, the F.M.C. stated that it may adopt proposed regulations at a future date that would govern the activities of shippers' associations, if such regulations are warranted.

should be made only after a complete public record has been developed. However, by identifying the issues that have arisen over the five year experience of the Shipping Act of 1984 and the broader context in which the Advisory Commission should examine this experience, this Article should provide a framework within which the Advisory Commission, and Congress, can evaluate what United States regulatory policy for the shipping industry should be for the next century.

This framework has one basic point. The transportation industry still often thinks of itself as it developed in the early 20th century, segmented by mode of transport and by domestic and international market. The economic reports and studies requested by Congress for the Advisory Commission will, of necessity, reflect this perception. It is doubtful, however, that this perception will accurately reflect the industry as it develops in the next century.

If the Advisory Commission on Conferences in Ocean Shipping is to achieve a lasting mandate, one that will not require the formation of another commission in the year 2000, then it must consider the changes occurring in both the domestic and international markets and decide to what extent United States shipping laws will accommodate and anticipate these changes. The Advisory Commission should squarely address the role of common carriage in the international trades and the question whether domestic transportation deregulation and the Shipping Act of 1984 can be further coordinated. The Advisory Commission should address whether regulation of ocean shipping and domestic transportation can be combined in a single regulatory agency. Finally, the Advisory Commission should remember that United States shipping policy is merely a subset of United States diplomatic, national defense, and international trade policy. While this Article has focused on the commercial and international trade issues that are the primary concerns of the carriers and shippers who deal with the Shipping Act on a day-to-day basis, the Advisory Commission cannot forget the diplomatic and national defense aspects of United States maritime policy. A strong merchant marine has been a historic aspect of United States maritime policy and, to the degree that the conference system affects this, the Advisory Commission has a mandate to study it.

Similarly, comity with United States trading partners has always been a significant aspect of the Shipping Acts. It will remain one. But diplomatic comity in recent years has often been synonymous with international trade issues. If, as recently suggested, the GATT is dead in the

face of a tripolar trading world,[327] then the Advisory Commission may well conclude that political comity is also dead. Rather than continue the conference system, the Advisory Commission may choose to recommend bilateral shipping agreements between the major trading blocs, or inclusion of UNCTAD on a tripolar basis.

Finally, many of the issues facing the Advisory Commission present policy questions with strong theoretical economic and political overtones. It will be difficult for the Advisory Commission to ignore these aspects of its mandate. In listening to the rhetoric surrounding the Shipping Act of 1984, however, the Advisory Commission should not lose sight of the fact that the creation of the conference system over one hundred years ago was the result of the combination of changing technology and the individual business decisions of ocean common carriers to act collectively. Now, over one hundred years later, the Advisory Commission should look at the emerging world trading patterns, and the behavior of the shipping industry under the Shipping Act of 1984, and ask itself the very practical question of whether the combination of changing technology and the individual decisions of carriers will lead to the eventual demise of the conference system.

327. *GATT Trade Negotiations at "Dead End," Should Be Abandoned,* U.S. Economist Says, 6 Int'l Trade Rep. (BNA) at 180 (Feb. 8, 1989) (Comments of Lester Thurow, Professor of Economics, Massachusetts Institute of Technology).