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The Shipping Act of 1984: Bringing the United States in Harmony with International Shipping Practices

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The Shipping Act of 1984: Bringing The United States in Harmony with International Shipping Practices

I. Introduction

The Shipping Act of 1984\(^1\) represents a significant change in America's perception of its role in international legal and commercial transactions. This change is exemplified in subsection 2 of the new Act's Declaration of Policy\(^2\) which asserts that the purpose of the legislation 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 . . . ."\(^3\) This policy statement illustrates Congressional recognition that the United States can no longer dictate its economic policies to other nations. This is particularly true in the area of international shipping where, under the ever narrowing interpretation of the regulatory statute that preceded the Shipping Act of 1984,\(^4\) the United States had attempted to impose its antitrust laws on a world that believed competition would not lead to increased efficiency in international shipping given the peculiar economic nature of the international ocean liner industry.\(^5\)

The Shipping Act of 1984 undoubtedly responds to the nonregulatory policies of other nations. It does not, however, adopt a


\(^{3}\) Id. (emphasis added). This Comment will focus on the second of the three policy statements contained in the Declaration of Policy. 1984 Act § 2, 46 U.S.C.A. § 1701 (West Supp. 1984). The Declaration of Policy states in its entirety:

The purposes of this chapter are—

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

(2) to provide an efficient and economic transportation system in the ocean commerce of the United States that is, insofar as possible, in harmony with, and responsive to, international shipping practices; and

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


nonregulatory stance. To what extent then does the new Act bring American shipping law in harmony with the policies of other nations? And to what extent did traditional antitrust philosophy prevent Congress from conforming United States law to international shipping practices? These are the topics addressed in this Comment.

To place the new Act in context, the Comment begins by outlining the development of ocean liner conferences and the economics of liner operations. It then describes the changes in case law that increased foreign carriers' exposure to antitrust liability and caused foreign governments to enact retaliatory "blocking" statutes in an effort to protect their nationals from the extraterritorial application of United States laws. The major portion of the Comment then analyzes the Shipping Act of 1984 and compares the provisions that are responsive to international shipping practices with those that remain in conflict with generally accepted shipping policies. Finally, to illustrate how the Act will operate, the key provisions are applied to a fact situation based on the shipping cases credited with provoking


7. A "carrier," or "common carrier," is defined as "a person holding itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation . . . ." 1984 Act § 3(6), 46 U.S.C.A. § 1702(6) (West Supp. 1984). A "carrier" must be distinguished from a "shipper." The latter is "an owner or person for whose account the ocean transportation of cargo is provided or the person to whom delivery is to be made." 1984 Act § 3(23), 46 U.S.C.A. § 1702(23) (West Supp. 1984).

8. A "blocking statute" restricts "the extent to which United States litigants can obtain evidence or production of commercial documents abroad for use in investigations or proceedings in the United States, and, secondly, the enforcement of United States judgments." Pettit and Styles, The International Response to the Extraterritorial Application of United States Antitrust Laws, 37 BUS. LAW. 697, 699 (1982) [hereinafter cited as Pettit & Styles].

foreign retaliation.

II. Background

A. Development of Liner Shipping Conferences

With the advent of steamships in the latter part of the nineteenth century and the resulting establishment of regular sailing schedules, ocean common carriers organized international shipping cartels, known as liner conferences, to protect themselves from the fierce competition that otherwise would have driven many carriers out of business. In the process of protecting their own members, these conferences also developed numerous predatory practices designed to achieve monopoly control.

Concurrent with these developments, the Sherman Antitrust and Clayton Acts were passed in the United States and antitrust philosophy rapidly gained popularity. In response to the predatory conduct of the liner conferences the United States Congress ordered an investigation. In 1914 what is now known as the Alexander Committee Report was issued.

The Report concluded that while monopolistic abuses did occur and regulation of the shipping industry was necessary, the confer-
ence system was essential to the smooth operation of international ocean shipping. 17 As a result, Congress passed the Shipping Act of 1916 18 under which the United States Shipping Board (now the Federal Maritime Commission) 19 was given authorization to grant limited antitrust immunity to the liner conferences. 20

Developments during the 1960's and 1970's, however, made the 1916 Shipping Act obsolete. Case law increasingly restricted the antitrust immunity granted under the Act. 21 And, when the worldwide economy fell into a general recession in the 1970's and foreign carriers inundated the comparatively lucrative 22 United States trade, 23 many international conferences that thought they were protected under the 1916 Act found themselves, under the new case law, accused of violating United States antitrust laws. These carriers were suddenly held liable for acts which, at one time, would have been immunized from antitrust prosecution. 24

Compounding the irritation of this expansion of antitrust liability was the fact that acts considered illegal under United States law were often legal in the carrier's home nation. Foreign governments were shocked to see their nationals subject to United States jurisdiction, United States discovery procedures, and attempts by United States courts to enforce their judgments abroad. 25 Unlike the United

18. See supra note 4.
19. The Federal Maritime Commission is frequently referred to throughout the text as the Federal Maritime Commission, the FMC, or the Commission.
22. MERCHANT MARINE AND FISHERIES COMMITTEE REPORT, supra note 14, at 6, 1984 U.S. CODE CONG. & AD. NEWS at 171 ("The American economy not only generates the largest single portion of the world's ocean cargoes; but the size of the market, coupled with the U.S. free trade philosophy, also made these routes the most accessible and lucrative.").
23. The term "United States trade" refers to the sea lanes leading in and out of United States ports.

For many years now the United States has sought to exercise jurisdiction over foreigners in respect of acts done outside the jurisdiction of that country. This is not in accordance with international law and has led to legislation on the part of other states, including the United Kingdom, designed to protect their nationals from criminal proceedings in foreign courts where the claims to jurisdiction by those courts are excessive and constitute an invasion of sovereignty. Id. at 631, quoted in Pettit & Styles, supra note 8, at 698. See also British Threaten Retaliation over Shipping Antitrust Judgments, [July-Dec.] ANTITRUST & TRADE REG. REP. (BNA) No. 922, at A-31 (July 12, 1979).
States, most foreign countries traditionally do not apply their antitrust laws to international shipping. Indeed, many countries tolerate and even support conference activity. In response to the extraterritorial application of United States antitrust laws, a number of countries passed blocking statutes which limited the use of United States discovery procedures within their borders and prohibited enforcement of antitrust judgments.

The failure of United States courts to consider the fact that these carriers may not have been violating any law in their own countries, and the failure of the United States Government to intervene, particularly in private treble damage actions, has significantly injured United States foreign relations. United States carriers have also been affected. Foreign carriers hesitate to enter into conference agreements with United States carriers for fear of antitrust reprisals. Conferences complying with United States antitrust laws do not have powers equal to foreign conferences and therefore find it more difficult to compete. And, as a result of foreign blocking statutes, the only carriers punished for antitrust violations are United States carriers.

The basis for these conflicting approaches to international ship-
ping regulation lies in the contradictory economic assumptions made by the United States and other nations regarding operation of the international liner industry.

B. Economics of Liner Operation

Prior to passage of the Shipping Act of 1984 and the investigations that led up to it, the restrictions placed on international shipping by the United States Congress and United States courts stemmed from the antitrust philosophy that competition leads to more efficient use of resources and lower prices for consumers. The lack of European regulation of international shipping, on the other hand, was based on the recognition that in certain situations cartels can contribute to efficiency and price stability. It was inevitable that these opposing philosophies and the ensuing regulations would come into conflict in the area of liner conferences. This is particularly true given the multinational nature of the cartels and the economic structure of the international liner industry.

Cartelization is essential to efficient operation of the liner industry because of the nature of liner operations. Liners are common carriers which carry a wide variety of goods on regular routes at published freight rates. They cater to shippers who ship quantities of goods which are neither large enough to fill a tramp vessel nor frequent enough to induce a shipper to lease or buy his own vessel. The essential characteristic of liner shipping which sets it apart from all other forms of ocean transport is that liners sail on a scheduled 

33. Antitrust enforcement by the United States Government has two major purposes with respect to international commerce. The first is to protect the American consuming public by assuring it the benefit of competitive products and ideas produced by foreign competitors as well as domestic competitors. The second major antitrust enforcement purpose is to protect American export and investment opportunities against privately imposed restrictions.
DEPARTMENT OF JUSTICE, ANTITRUST DIVISION, ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS 4-5, reprinted in PERSPECTIVES, supra note 27, at 182-83.
35. Kryvoruka, supra note 26, at 84; Sletmo & Williams, supra note 26, at 268.
36. “Significant to these organizations [i.e., liner conferences] was and is the fact that, regardless of the trade in which they operate, these cartels demonstrate relatively little indication of dominance by business organizations representing any single nation.” MERCHANT MARINE AND FISHERIES COMMITTEE REPORT, supra note 14, at 5, 1984 U.S. CODE CONG. & AD. NEWS at 170.
37. “It is not by chance that conference agreements have existed for more than a hundred years in the liner industry, whereas repeated attempts to organize other shipping markets such as tankers and tramps have failed.” Sletmo & Williams, supra note 26, at 11. But see Garvey, supra note 11 (author’s basic premise is that conferences do not need special antitrust protection because their rates would respond to demand).
38. See “Liners” supra note 6.
39. See “tramp ship” supra note 11.
date and at a scheduled time,\footnote{Shippers rely on the regular sailing schedules liners offer because: (1) they cannot afford the expense of having their merchandise stored in a warehouse until an entire shipload has accumulated; (2) manufactured goods are often subject to quick obsolescence; and (3) the volume each individual shipper wishes to transport is not very large in comparison to the capacity available on today's modern, particularly containerized, vessels. See \textsc{Sletmo} \& \textsc{Williams}, supra note 26, at 17-19. See also infra text accompanying note 49.} even if it means sailing with a half-empty ship.\footnote{Id. at 9.} It is this unique combination—guaranteed supply of shipping capacity paired with fluctuations in shipper demand—that justifies granting liner conferences antitrust immunity. To understand this point, it is essential to understand the economic structure of liner operations.

Once a liner is scheduled to sail it is immediately faced with substantial fixed costs.\footnote{The only costs to a carrier that may vary, and hence the only place where rates might be lowered, are those directly connected with the loading and unloading of different types of commodities. United Nations Conference on Trade and Development, The Liner Conference System Report by the UNCTAD Secretariat para. 15, U.N. Doc. TD/B/C.4/62/Rev.1 (1970).} In order to break-even, each carrier must either attract enough cargo to fill at least eighty percent of its capacity or risk charging shippers uncompetitive prices per unit shipped.\footnote{\textsc{Merchant Marine and Fisheries Committee Report}, supra note 14, at 14, 1984 U.S. Code Cong. \& Ad. News at 179.} Reducing prices has not been found to increase shipper demand since the market for liners is price inelastic.\footnote{Markets are termed "price inelastic" when they are insensitive to price levels and changes. \textsc{Sletmo} \& \textsc{Williams}, supra note 26, at 63.}

Ensuring that a liner is at complete or near complete utilization on the scheduled sailing date is especially crucial given the volume involved. The amount of space wasted on a half-empty liner (an amount which corresponds directly to lost revenue) dwarfs the wasted space on a half-empty airfreight carrier, truck, or boxcar. "The problem is considerably more serious than for domestic and/or air common carriers since the unit (the ship) in which the service is 'produced' is much larger in relation to total annual traffic volume than the units in which domestic carriers 'produce' their services."\footnote{Id. at xxix.} In addition, the capacity is large even in relation to the total trade volume, not to mention the relation to individual cargo from several hundred shippers.\footnote{Id. at 42.} Shipping at less than 100 percent capacity means a great deal of lost revenue. And the capacity-to-volume-of-trade problem has increased substantially since the 1960's because of the advent of containerization.\footnote{Id. at xxviii.}

"Containers" are twenty to forty foot long trailers identical to those drawn by trucks on highways.\footnote{Id. at 9.} Ships built to carry containers
can be loaded and unloaded faster, meaning they can spend more time at sea. The result is a significant increase in productivity.

To fill this enormous capacity in the face of price-inelastic and fluctuating demand and high fixed costs, carriers operating in a free market system would be forced to reduce their prices below cost in response to cut-throat competition. The result is that most carriers would either merge with larger companies or go out of business.

Liner conferences were organized specifically for the purpose of preventing this type of self-destructive competition. Their methods include setting uniform rates, limiting the number of sailings in a trade, chartering space on one another's vessels, pooling revenue...

50. Not only would carriers compete with each other, competition would come from other sources as well. Liner conferences are not monopolies. SLETMO & WILLIAMS, supra note 26, at 194. In today's market they must compete with air freight, tramp ships, and non-liner vessels. Id. at xxxii. In addition, a substantial number of state-controlled and subsidized carriers have entered the United States liner market. The Soviet Union lines, for example, "increased their penetration of the U.S. liner market from 0.4 percent of total tons carried in 1971 to 2.9 in 1976." Id. at 118. The offer of rates by state-subsidized carriers significantly below the costs of American-flag carriers caused Congress to take action in the form of the Controlled Carrier Act, which was enacted in 1978 and amended in 1979. The Controlled Carrier Act was continued, with minor amendments, as § 9 of the Shipping Act of 1984, 46 U.S.C.A. § 1708. Controlled Carrier Act of 1979, 46 U.S.C. § 817 (1982) (amending 1916 Act, 46 U.S.C. § 817, amended by 1984 Act, 46 U.S.C.A. § 1708 (West Supp. 1984)). For a detailed background on the problem of state-controlled carrier competition in the U.S. trades, see S. REP. NO. 1260, 95th Cong., 2d Sess. 1, reprinted in 1978 U.S. CODE CONG. & AD. NEWS 3536.

Specialization resulting from the use of containers has also increased competition among conferences. Shippers on the Gulf coast, for example, can now pack a container truck and send it to the Atlantic coast if they do not like the prices offered by Gulf coast operators. See supra text accompanying note 49.

But see Garvey, supra note 11, 1-10. Some economists do not agree that shipping conferences prevent destructive competition. They question the underlying assumption that the liner shipping market is inelastic and instead assert that demand is responsive to rate changes (there are alternate methods now—air freight, tramps, non-conference ships), that competition in the industry will not result in an ultimate all-powerful monopoly, and that the cost of industry stability is high and ultimately borne by the consumer. Id.

51. The first conference was formed in 1875 to participate in the United Kingdom-Calcutta trade as a response to severe competition that arose with the opening of the Suez Canal in 1869. United Nations Conference on Trade and Development, The Liner Conference System Report by the UNCTAD Secretariat para. 8, U.N. Doc. TD/B/C.4/62/Rev.1 (1970). See also D. MARX, INTERNATIONAL SHIP CARRIERS: A STUDY OF SELF-REGULATION BY SHIPPING CONFERENCES 3 (1953)[hereinafter cited as MARX]. ("Historically it seems that most conference agreements were prompted by the necessity of stopping, or at least of avoiding, the insanity of cutthroat competition . . . .").

52. In order to enforce the agreement on rates effectively the members also agree to follow the same rules and regulations for calculating freight charges, payment of freight, acceptable packaging for different commodities, issue of bills of lading and uniform rates of commission to agents or brokers. These rules are necessary because charging uniform rates by itself may not fully eliminate rate competition between the member lines.


53. JUDICIARY COMMITTEE REPORT, supra note 10, at 18, 1984 U.S. CODE CONG. & AD. NEWS at 238.

54. Id.
and harmonizing sailing schedules and ports of call.\textsuperscript{55} The basic purpose of this self-regulation is to minimize losses or maximize profits by ensuring as complete a use of vessel capacity as possible at rates sufficient to allow a profit.\textsuperscript{56}

Because of these economic factors, the competition oriented antitrust approach to trade cannot be successfully applied to the international liner shipping industry. The laissez faire approach of nations other than the United States permits the industry to operate with increased efficiency. It is for this reason that other nations have chosen a nonregulatory approach as opposed to the proreregulatory stance of the United States.

Within the past decade Congress began to acknowledge the economic practicalities of this nonregulatory point of view and incorporated much of its philosophy in the Shipping Act of 1984. This change in Congressional attitude did not come, however, until numerous court cases in the 1960's and 1970's heaped increasingly restrictive interpretations upon the antitrust immunity provisions of the Shipping Act of 1916. The confusion in United States shipping law and the conflicts between it and foreign laws obfuscated the boundary of antitrust liability.\textsuperscript{57}

III. Case Law and Foreign Reaction

United States antitrust laws were not applied extraterritorially to foreign carriers when the Shipping Act of 1916 was first enacted. From 1916 to the late 1970's, however, a series of developments occurred in American case law that permitted American courts to hold foreign carriers liable for antitrust violations. First, the courts determined under what conditions they had jurisdiction to apply antitrust laws extraterritorially. Second, in cases involving violations of the Shipping Act of 1916, the courts determined that a plaintiff could seek a remedy under antitrust laws rather than the Shipping Act. Third, the courts narrowed the extent of antitrust immunity granted

\textsuperscript{55} Id.
\textsuperscript{56} Id.
\textsuperscript{57} Id. For the shipper, conferences offer the following advantages: (1) the ability to offer fixed and relatively stable rates published in advance, permitting shippers to calculate their costs and know before transporting how much to charge for their goods; (2) uniform rates; (3) the ability to serve ports with low cargo movements (and therefore low sources of revenue), as well as ports with substantial cargo movements because the losses incurred in servicing one port can be offset against the profits earned from another; and (4) competition among conferences for better service to the shipper, all other variables being uniform. United Nations Conference on Trade and Development, The Liner Conference System Report by the UNCTAD Secretariat paras. 27, 28, 30, & 32, U.N. Doc. TD/B/C.4/62/Rev.1 (1970).
\textsuperscript{58} Since 1961, "[a]ntitrust standards rather than commercial maritime standards have had a disproportionate weight in processing maritime agreements in the foreign commerce of the United States." MERCHANT MARINE AND FISHERIES COMMITTEE REPORT, supra note 14, at 9, U.S. CODE CONG. & AD. NEWS at 174.
under section 15 of the 1916 Act. And fourth, to assist in antitrust investigations, United States courts claimed jurisdiction to order foreign nationals to submit to United States discovery and enforcement procedures.

These developments in United States case law are described below to illustrate how the persistent export of United States antitrust philosophy provoked foreign governments into passing retaliatory legislation that, in turn, induced Congress to rethink United States international shipping policy.

A. Extraterritorial Application of United States Antitrust Laws

The United States v. Aluminum Co. of America (Alcoa) decision of Judge Learned Hand marked the beginning of the extraterritorial application of United States antitrust laws. Alcoa involved two agreements entered into outside the United States by a Canadian aluminum company (once a subsidiary of the Aluminum Company of America) and several European companies; no American was a party to the agreement. The purpose of the alliance was to limit the sale of foreign aluminum in the United States so that the Aluminum Company of America would not need to compete with imports. In an action brought under section 1 of the Sherman Act, Judge Hand determined that the United States courts could impose antitrust liabilities upon persons outside the allegiance of the United States if (1) those persons intended their actions to have an affect on United States imports; and (2) their actions actually affected United States imports in contravention of United States law.

This "effects doctrine," as Judge Hand’s pronouncement in Alcoa came to be known, is the basis for the United States Department of Justice Antitrust Division’s actions concerning international commerce. This doctrine is explicitly stated in the Division’s publication, Antitrust Guide for International Operations: “The U.S. antitrust laws . . . are not limited to transactions which take place within our borders. When foreign transactions have a substantial and foreseeable effect on U.S. commerce, they are subject to U.S. law regardless of where they take place.”

This doctrine is the primary cause of irritation and concern between the United States and foreign governments because all extraterritorial applications of United States antitrust laws stem from the

59. 148 F.2d 416 (2d Cir. 1945).
60. Sherman Act, ch. 647, § 1, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. § 1 (1982)). Section 1 of Title 15 bars “[e]very contract, combination . . . or conspiracy in restraint of trade or commerce among the several States, or with foreign nations . . . .”
61. 148 F.2d at 443-44.
Alcoa pronouncement.\textsuperscript{63} Although foreign governments recognize that the United States is not the only country to claim jurisdiction over foreign conduct affecting matters within its borders,\textsuperscript{64} they point out that the United States is the only country to regularly exercise that jurisdiction.\textsuperscript{65}

The quarrel with the effects doctrine lies not only with the extraterritorial exercise of United States jurisdiction, but with the manner in which United States courts have applied the doctrine. Notwithstanding the Antitrust Division's statement that application of United States jurisdiction to international antitrust matters "should avoid unnecessary interference with the sovereign interests of foreign nations,"\textsuperscript{66} most United States court determinations have failed to consider the interrelationship of anticompetitive conduct and the public policy and national interests of the other countries.\textsuperscript{67}

Until passage of the Shipping Act of 1984, neither case law nor statutes affecting the extraterritorial application of United States antitrust laws required any consideration of the concerns of other nations in the event of a conflict of laws. This general insensitivity on the part of United States Government and courts eventually led to the enactment of self-protective and retaliatory legislation by America's trading partners.\textsuperscript{68}

B. A Question of Jurisdiction: Antitrust Laws vs. the Shipping Act of 1916

The international shipping industry first became embroiled in the controversy concerning extraterritorial application of United States antitrust laws when uncertainty arose over whether the courts or the Federal Maritime Commission had jurisdiction to assess penalties in the event a carrier violated the Shipping Act of 1916. Under section 15 of the 1916 Act,\textsuperscript{69} any rate-fixing or other preferential or cooperative conference agreements expressly in conformance with

\textsuperscript{63} Also, the fact that the United States antitrust laws are criminal statutes creates problems because (1) "Common Law states generally prefer, and International Law generally prescribes, limited extraterritorial jurisdiction in matters of criminal law . . . ." Huntley, \textit{supra} note 26, at 215; and because (2) "the panoply of criminal law is not used on [the European] side of the Atlantic to enforce competition rules." \textit{Id.}


\textsuperscript{65} Id. See \textit{supra} notes 26 & 34.

\textsuperscript{66} \textbf{DEPARTMENT OF JUSTICE, ANTITRUST DIVISION, ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS} 6, reprinted in \textit{PERSPECTIVES, supra} note 27, at 184 (footnote omitted).

\textsuperscript{67} Cira, \textit{supra} note 5, at 265. Some assert that the courts should not be involved in this type of foreign policy decision making. \textit{Id.} at 269-70. \textit{But see} Timberlane Lumber Co. v. Bank of America, 549 F. 2d 597 (9th Cir. 1976) (for discussion of the case see \textit{infra} note 99).

\textsuperscript{68} \textit{See infra} text accompanying notes 110-19.

\textsuperscript{69} 46 U.S.C. § 814 (1982).
the requirements of the Act and approved by the Federal Maritime Commission were immune from antitrust liability. When an agreement was either not approved by the Commission or one of its provisions fell outside of an already approved arrangement, the issue became whether "the exclusive remedy for such activity [was] an administrative one under section 22 [of the 1916 Act], or whether the failure to obtain the requisite section 15 approval subject[ed] the parties to antitrust liability." 70

In the first two important cases involving this issue, United States Navigation Company v. Cunard S.S. Co. 71 and Far East Conference v. United States, 72 the Supreme Court found that all plaintiffs 73 were barred from obtaining relief under the antitrust laws without first resorting to the Federal Maritime Board (now the Federal Maritime Commission) for a determination of whether the defendants' actions violated section 15 of the Shipping Act. 74 In the Cunard case the Court said specifically, "[T]he remedy is that afforded by the Shipping Act, which to that extent supersedes the antitrust laws." 75

But in Carnation Co. v. Pacific Westbound Conference, 76 the Supreme Court found that plaintiffs could seek their remedy from the courts under the antitrust laws, providing the conference agreements or carrier activities at issue were not debatably legal. 77 In Carnation, as in Far East Conference, 78 plaintiff shipper alleged that although the defendant conference was operating under an agreement approved by the Federal Maritime Commission, it had also implemented a secret price-fixing agreement that went beyond the bounds of the approved agreement. The Court declared that the exemption from antitrust liability for price-fixing activities that were lawful under the Shipping Act of 1916 implied that unlawful price-

70. Kryvoruka, supra note 26, at 79.
71. 284 U.S. 474 (1932).
74. In the Cunard case, plaintiffs alleged the implementation of a dual rate contract system that had not been filed with the Federal Maritime Board (Commission). See supra note 71. In Far East Conference, an agreement had been filed with and approved by the Board, but plaintiffs alleged that a dual-rate contract implemented by the Conference fell outside the bounds of the agreement. See supra note 72.
75. Cunard, 284 U.S. at 485.
77. The Court distinguished Carnation from Cunard and Far East Conference on this point. The agreements in Cunard and Far East Conference, it said, were debatably legal and as a result the initial decision regarding legality had to be made by the Commission. Carnation, 383 U.S. at 222. Technically, therefore, Cunard and Far East Conference were not reversed by Carnation.
78. Far East Conference, 342 U.S. 570.
fixing activities were not exempt.\textsuperscript{79} The price-fixing agreement at issue in this case was not even arguably within the bounds of the approved agreement. Accordingly, the courts had ample jurisdiction to award the plaintiff treble damages\textsuperscript{80} without first insisting that the plaintiff take his case to the Federal Maritime Commission.\textsuperscript{81}

The Supreme Court decision in \textit{Carnation} significantly expanded the jurisdictional reach of United States antitrust laws. As a result, international carriers that had previously not been subject to antitrust liability under the \textit{Cunard} and \textit{Far East Conference} decisions found themselves subject to antitrust liability. The large damages awarded under antitrust laws contrasted markedly with the lesser damages awarded for Shipping Act violations.

\textbf{C. Increased Restrictions on the Grant of Antitrust Immunity Under the 1916 Act}

In 1961 Congress amended section 15 of the Shipping Act of 1916 to allow the Federal Maritime Commission to disapprove any agreement found to be "contrary to the public interest."\textsuperscript{82} In a series of decisions in the 1960's, courts adopted this "public interest standard" and, in so doing, limited the antitrust immunity granted to liner conferences. This development, in conjunction with the expanded jurisdictional reach of the antitrust laws, dramatically increased the exposure of carriers engaged in international shipping to

\textsuperscript{79} \textit{Carnation}, 383 U.S. at 216-17.

\textsuperscript{80} Private treble damage actions are particularly objectionable to foreign governments. "It is one thing for an executive agency of a national government to implement policies which will disrupt normal diplomatic and commercial relations. It is quite another for the same government to allow its citizens to undertake unsupervised actions which have identical results." Cira, \textit{supra} note 5, at 272. See also Pettit \& Styles, \textit{supra} note 8, at 698. A private treble damage action may raise complex international political and economic issues. Unlike an action strictly under the control of the United States Government, a private action cannot by its nature be resolved by intergovernmental accommodation or compromise. Compromise agreements have been reached between the United States and other governments regarding the extraterritorial application of United States antitrust laws by the United States Government. See, \textit{e.g.}, Agreement Relating to Cooperation on Antitrust Matters, June 29, 1982, United States-Australia, \textit{____ U.S.T. ______}, T.I.A.S. No. 10365, \textit{reprinted in} [July-Dec.] \textit{Antitrust \& Trade Reg. Rep. (BNA)} No. 171, at 36 (July 1, 1982); the 1976 Executive Agreement Between the United States and the Federal Republic of Germany, 27 U.S.T. 1956, T.I.A.S. No. 8291 (June 23, 1976).

\textsuperscript{81} Also, European nations have nothing akin to the American treble damage action. Huntley, \textit{supra} note 26, at 218. Indeed, the British feel such an award to be penal in character rather than compensatory "and consequently consider that in international dealings at least these [treble-damage] proceedings should be subject to the limitations that we would regard as appropriate to criminal proceedings." Huntley, \textit{supra} note 26, at 220 (quoting J. Nott, H.C. (Hansard) col. 1151). See also \textit{supra} note 63.

\textsuperscript{82} The Court noted that a private plaintiff had the choice of bringing an action either under the Shipping Act of 1916 or under the antitrust laws. "This does not suggest that petitioner might have sought recovery under both, but petitioner did have its choice." \textit{Carnation}, 383 U.S. at 224.

antitrust liability. This, in turn, brought the United States further in conflict with generally accepted international shipping policies.

It was in Carnation that the Supreme Court first announced that "the 1916 Act provided the shipping industry with only a 'limited antitrust exemption.'" This limitation was further defined in 1968 in the Volkswagenwerk Aktiengesellschaft v. Federal Maritime Commission in which the Court stated that before granting antitrust immunity under the Shipping Act of 1916, the Federal Maritime Commission had the duty to "scrutinize the agreement to make sure that the conduct thus legalized [did] not invade the prohibition of the antitrust laws any more than [was] necessary to serve the purpose of the regulatory statute."

The key decision in the 1960's establishing the "public interest standard" as the test for assessing a liner conference's immunity from antitrust laws was Federal Maritime Commission v. Aktiebolaget Svenska Amerika Linien. In a significant departure from the past, the Supreme Court in Svenska articulated a new presumption: "Once an antitrust violation is established, this alone will normally constitute substantial evidence that the agreement is 'contrary to the public interest' . . . ." Based on this presumption, the Court adopted the test formulated by the Federal Maritime Commission shifting the burden to the conference to "bring forth such facts as would demonstrate that the . . . rule [in favor of an agreement] was required by a serious transportation need, necessary to secure important public benefits or in furtherance of a valid regulatory purpose of the Shipping Act."

This "public interest" test was devastating for the conferences. "Given the nature of conference agreements and combinations, an opponent of an agreement [had] little difficulty in

86. Volkswagenwerk, 390 U.S. at 274 n.21 (quoting Isanbrandtsen Co. v. United States, 211 F.2d 51, 57 (D.C. Cir. 1954)). The Volkswagenwerk case involved an agreement between the carriers in the Pacific Maritime Association to charge an extra amount for their dock-unloading and warehouse services. The money collected was to be deposited in a fund established pursuant to a collective bargaining agreement with the International Longshoremen's and Warehousemen's Union. The purpose of the fund was to assist longshoremen, displaced from their jobs by mechanization, to reeducate themselves for different employment. The Court found that the agreement fell under the 1916 Act. To be lawful under the 1916 Act as well as immune from antitrust liability the agreement had to be approved by the FMC.
87. 390 U.S. 238 (1968). The Svenska case involved a review of a Federal Maritime Commission decision disallowing two conference rules restricting the commissions earned by travel agents dealing with the conference and prohibiting them from dealing with any other conference. Id.
88. 390 U.S. at 245-46.
89. Svenska, 390 U.S. at 243 (quoting - F.M.C. -- (1965)). In its opinion, the Court noted that under the original 1916 Act, the Federal Maritime Commission could disapprove an agreement only on three grounds: unjust discrimination; detriment to commerce; or illegality under one of the specific provisions of the Act.
shifting the burden to the proponents to counter with the substantial degree of proof necessary to justify the agreement . . . By dramatically increasing the risk of antitrust liability, the "public interest" test articulated in Svenska posed the greatest threat to the operation of conferences in the United States trade.\(^90\)

The last decision in the series of cases decided in the 1960’s was *Sabre Shipping Corp. v. American President Lines*.\(^92\) In this case a New York carrier sued, among others, the Maritime Company of the Philippines and the five largest Japanese shipping companies under sections 1 and 2 of the Sherman Antitrust Act.\(^93\) The complaint alleged that the companies had set their rates so unreasonably low that they were detrimental to the commerce of the United States and therefore in violation of section 18(b)(5) of the 1916 Act.\(^94\) The carriers were operating under an agreement approved by the Federal Maritime Commission. They therefore argued that, according to section 15, once an agreement is approved, new rates could be put into effect without prior approval of the Commission.\(^95\) Notwithstanding approval by the Commission, the court found that, because the carriers violated section 18(b)(5) of the 1916 Act, their conduct was not “otherwise in accordance with the law.”\(^96\) The carriers were retroactively stripped of antitrust immunity.\(^97\) Thus, even when an agreement had been approved by the Commission, the extent of antitrust immunity arising from that approval was uncertain.

### D. Imposition of United States Discovery and Enforcement Procedures Abroad in Connection with Antitrust Litigation—the Ultimate Jurisdictional Transgression

The 1960’s court decisions that expanded antitrust jurisdiction

\(^{90}\) Kryvoruka, *supra* note 26, at 89.

\(^{91}\) Friedmann & Devierno, *supra* note 32, at 317.


\(^{93}\) Sherman Act, ch. 647, §§ 1, 2, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1, 2 (1982)).

\(^{94}\) 46 U.S.C.A. § 817(b)(5) (1982), repealed by 1984 Act § 20(a), 46 U.S.C.A. § 1719(a) (West Supp. 1984). This section stated that rates permitted by conference agreements could not be so unreasonably low or high “as to be detrimental to the commerce of the United States.” This section of the 1916 Act was repealed by the 1984 Act § 20(a), 46 U.S.C.A. § 1719(a) (West Supp. 1984).

\(^{95}\) 46 U.S.C. § 814 (1982). The provision on which the conferences in the Sabre case relied states: “[T]ariff rates, fares, and charges, and classifications, rules, and regulations explanatory thereof . . . agreed upon by approved conferences, and changes and amendments thereto, if otherwise in accordance with law, shall be permitted to take effect without prior approval upon compliance with the publication and filing requirements of . . . this title . . . .” *Id.* (emphasis added).


and restricted antitrust immunity brought the “regulatory” approach of the Federal Maritime Commission into sharper conflict with the “noninterventionist” approach of the European Economic Community, Japan, and other nations. In addition, nowhere in these decisions did the courts take into consideration comity or balance the United States interests involved against those of other nations.

The ultimate jurisdictional transgression occurred in the late 1970’s, however, with the initiation of United States discovery procedures in the North Atlantic Shipping cases and the Westinghouse uranium antitrust litigation. These two incidents gave rise to a key problem in the extraterritorial application of United States antitrust laws—the application of United States discovery procedures abroad. In response to the United States Department of Justice's

98. Huntley, supra note 26, at 216.
99. This was so even though § 40 of the Restatement (Second) of Foreign Relations Law of the United States urged the courts in cases involving international interests to consider the principle of comity among nations. Restatement (Second) of Foreign Relations Law of the United States § 40 (1965). But see Foreign Relations Law of the United States § 403 (Tent. Draft No. 21,981).

One significant case in 1976 followed the recommendations of the 1965 Restatement, Timberlane Lumber Co. v. Bank of America, 549 F.2d 597 (9th Cir. 1976). In this case Judge Choy advocated a three-part test:

As acknowledged above, the antitrust laws require in the first instance that there be some effect—actual or intended—on American foreign commerce before the federal courts may legitimately exercise subject matter jurisdiction under those statutes. Second, a greater showing of a burden or restraint may be necessary to demonstrate that the effect is sufficiently large to present a cognizable injury to the plaintiffs and, therefore, a civil violation of the antitrust laws. . . . Third, there is the additional question which is unique to the international setting of whether the interests of, and links to, the United States—including the magnitude of the effect on American foreign commerce—are sufficiently strong, vis-à-vis those of other nations, to justify an assertion of extraterritorial authority.

Id. at 613 (emphasis added).

Judge Choy's analysis in Timberlane Lumber was cited in dicta in Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287 (3d Cir. 1979), but it was not adopted in the uranium antitrust litigation that followed. See In re Uranium Antitrust Litigation, 480 F. Supp. 1138 (N.D.Ill. 1979), aff'd, 617 F.2d 1248 (7th Cir. 1980). See generally infra note 101 and accompanying text. Both the district court in the In re Uranium Antitrust Litigation case and the Canadians expressed the fear that the Timberlane Lumber decision would plunge American courts into the realm of diplomacy. Blair, The Canadian Experience, in Perspectives, supra note 27, at 67; In re Uranium Antitrust Litigation, 480 F. Supp. at 1147. See supra text accompanying note 67.

100. See supra note 9.
101. In re Westinghouse Electric Corp. Uranium Contracts Litigation, [1978] 1 All E.R. 434, reprinted in 17 Int'l Legal Materials 38 (1978). Westinghouse entered into contracts with several utility companies to supply them with uranium. The price of uranium subsequently skyrocketed and Westinghouse was sued by sixteen utility companies when it notified them that it would not be able to fulfill the contracts. In its own defense, Westinghouse alleged that the formation of a cartel, involving forty companies of which twenty-six were Canadian, Australian, South African, French or English, had driven the price of uranium up and made the performance of the contracts commercially impracticable. See Westinghouse, 1 All E.R. at 451, 17 Int'l Legal Materials at 44-45 (opinion of Viscount Dilhorne); Hacking, The Increasing Extraterritorial Impact of U.S. Laws: A Cause for Concern Amongst Friends of America, reprinted in Perspectives, supra note 27, at 165 [hereinafter cited as Hacking].
102. Hacking, supra note 101, at 163. ("Of all activities, . . . the most conspicuous and
issuance of Civil Investigatory Demands on the British shipping companies involved in the North Atlantic investigation, Great Britain's Under-Secretary of State for Trade told Parliament that he considered such a "disclosure" to be an infringement of the United Kingdom's jurisdiction. The Attorney General of England and Wales intervened in the Westinghouse litigation and argued to the House of Lords that the letters rogatory issued by a United States District Court to the High Court of England demanding disclosure of documents of a certain British company amounted to an invasion of United Kingdom sovereignty.

Notwithstanding the furor that arose over the Civil Investigative Demands in the North Atlantic Shipping case, the Department of Justice on June 1, 1979, obtained a criminal indictment of seven corporations (four American and three foreign) and thirteen of their executives, including six non-United States citizens. The indictment was for entering into agreements between 1971 and 1975 to "fix, raise, stabilize and maintain price levels for the shipment of freight in the United States/Europe trade." On June 8, 1979, the defendants pleaded nolo contendere and the court imposed fines totalling 6.1 million dollars; "the largest fines ever assessed in one antitrust case." Following this judgment, more than thirty treble damage complaints were filed and eventually settled. The Federal Maritime Commission also initiated proceedings to investigate the same defendants for Shipping Act violations.

103. Hacking, supra note 101, at 163-64 (referring to Stanley Clinton Davis' comment to the House of Commons. H.C. (Hansard), Nov. 1976.).


105. Silkin, The Perspective of the Attorney General of England and Wales, in PERSPECTIVES, supra note 27, at 31-32. Under the provisions of the Hague Convention, a state could refuse to honor a letter rogatory if it felt its sovereignty or security would be threatened by the execution. Hague Convention, supra note 102.


108. These claims were consolidated and settled as a class action for approximately $5.4 million. In re Ocean Shipping Antitrust Litigation, 1982-1 Trade Cas. (CCH) 964,585 (S.D.N.Y. Jan. 19, 1982).

109. In re Unfiled Agreements in the North Atlantic Trades, No. 79-83 (F.M.C. filed Aug. 14, 1979; discontinued June, 1984). The Commission proceedings were not acted upon
Such extraterritorial application of United States laws infuriated foreign governments. To protect their sovereignty and their citizens, they retaliated by enacting blocking legislation.

E. Foreign Government Reaction

The Westinghouse case may be credited with turning British opinion against American antitrust discovery and enforcement procedures.\(^{110}\) When combined with the unprecedented fines imposed in the North Atlantic Shipping cases, this opinion was converted into action. In 1980 Parliament passed The Protection of Trading Interests Act,\(^{111}\) a blocking statute, containing

three basic elements: (1) expanded authority to block foreign discovery requests; (2) new authority to bar enforcement in British courts of foreign judgments for multiple damages against British defendants; and (3) a unique 'claw-back'\(^{112}\) provision which allows qualifying British companies to recover in British courts the 'punitive' portion of any foreign multiple damages judgement entered against them.\(^{113}\)

The British Parliament was not alone in resorting to a blocking statute. Canada passed Uranium Information Security Regulations in 1976.\(^{114}\) Australia passed the Foreign Antitrust Judgments (Restriction of Enforcement) Act 1979\(^{115}\) in response to another set of letters rogatory from Westinghouse Electric Corporation.\(^{116}\) New Zealand

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\(^{110}\) Cira, supra note 5, at 250.

\(^{111}\) Protection of Trading Interests Act, 1980, ch. II.

\(^{112}\) "The claw-back is a retaliatory measure aimed primarily at American antitrust treble damage actions." Cira, supra note 5, at 249.

\(^{113}\) Cira, supra note 5, at 248-49, referring to §§ 2, 5, and 6 of the Protection of Trading Interests Act, 1980, ch. II. Note that the protection of Trading Interests Act of 1980 repeals and replaces the Shipping Contracts and Commercial Documents Act, 1964, ch. 87. The latter was passed in 1964 expressly in response to the claims of the Federal Maritime Commission that it had the power to inspect on demand the documents of members of approved conferences, no matter where located and no matter whether in response to a legal proceeding or not. See Hacking, supra note 101, at 162-63; Huntley, supra note 26, at 221.


\(^{116}\) Cira, supra note 5, at 253.
passed its own blocking statute\textsuperscript{117} when it was notified of another ocean shipping investigation by the Justice Department.\textsuperscript{118} Even France, which had no special need for a blocking statute during the uranium litigation, took note of the problems encountered by other countries and in 1980 passed its Law Concerning the Communication of Documents or Information of an Economic, Commercial, Industrial, Financial, or Technical Nature to Aliens Whether Natural or Artificial Persons.\textsuperscript{119}

In brief, this was the situation that Congress faced when it sat down to revise the Shipping Act of 1916. Whether drafted in direct response to antitrust liabilities placed on foreign shippers or as the result of some other antitrust action, the foreign blocking statutes effectively immunized foreign shippers from United States antitrust fines while United States shippers bore the full force of such fines. In addition, United States laws continued to conflict with the laws of other countries. Other countries believed, and the economic realities of the liner industry indicated, that basic antitrust assumptions did not work in the context of the liner industry.\textsuperscript{120} Increased efficiency and increased harmony with the laws of other nations required a change in the Shipping Act of 1916.

IV. The Shipping Act of 1984

As indicated by the Declaration of Policy segment of the new Act,\textsuperscript{121} the intent of Congress in drafting the new legislation was to bring United States shipping policy in harmony with international shipping practices. But, by stating that such harmony would be

\textsuperscript{117} Evidence Amendment Act (No. 2), N.Z. Stat. No. 27 (1980).
\textsuperscript{118} Cira, \textit{supra} note 5, at 256.
\textsuperscript{119} Law Concerning the Communication of Documents or Information of an Economic, Commercial, Industrial, Financial, or Technical Nature to Aliens Whether Natural or Artificial Persons, No. 80-538, 1980 J.O. 1799 [France]. \textit{See also} Cira, \textit{supra} note 5, at 257.
\textsuperscript{120} Both the \textit{Judiciary Committee Report}, \textit{supra} note 10, and the \textit{Merchant Marine and Fisheries Committee Report}, \textit{supra} note 14, also noted with some alarm that the requisite number of nations had ratified a liner code of conduct developed by the United Nations Conference on Trade & Development, 2 United Nations Conference of the Plenipotentiaries on a Code of Conduct for Liner Conferences (Final Act), U.N. Doc. TD/CODE/13/Add.1 (1975) (entered into force Oct. 6, 1983). The Code provides for a multilateral regulatory mechanism for liner conferences. The United States has not acceded to the Code, feeling it will disadvantage United States-flag commercial carrier operations as cross-traders. \textit{See} H.R. REP. No. 600, 98th Cong., 2d Sess. 39 (1984), \textit{reprinted in} 1984 U.S. CODE CONG. \& AD. NEWS at 295 [hereinafter cited as \textit{CONFERENCE COMMITTEE REPORT}]. This Comment does not deal with the question of whether United States law is in greater harmony with the provisions of the Liner Code since the passage of the Shipping Act of 1984 than it was under the 1916 Act. \textit{See} Larsen \& Vetterick, \textit{supra} note 11; Lopatin, \textit{The UNCTAD Code of Conduct for Liner Conferences: Time for a United States Response}, 22 HARV. INT'L L. J. 355 (1981).
\textsuperscript{121} 1984 Act § 2(2), 46 U.S.C.A. § 1701(2) (West Supp. 1984). ("The purposes of this chapter are—... (2) to provide an efficient and economic transportation system in the ocean commerce of the United States that is, insofar as possible, in harmony with, and responsive to, international shipping practices... "). \textit{See also} \textit{supra} note 3.
achieved only "insofar as possible,"\textsuperscript{122} Congress reserved discretion to retain some of the competition oriented characteristics of the 1916 Act. The resulting statute is substantially responsive to international shipping policies and the concerns of foreign nations regarding extraterritorial application of United States antitrust and shipping legislation. Some aspects of the new Shipping Act, however, are still in conflict with international shipping norms.

\textbf{A. Provisions Responsive to International Shipping Practices}

1. Conference Agreements.—Harmonizing United States shipping policy with international shipping practices necessitated limiting extraterritorial application of United States antitrust laws by expanding antitrust immunity for carriers involved in United States trades. The two portions of the new Act most responsible for effectuating this expansion are section 6,\textsuperscript{123} which alters the substantive and procedural approach of the government in reviewing multicarrier agreements, and section 7,\textsuperscript{124} which, \textit{inter alia}, broadens antitrust immunity and eliminates the right of private parties to bring treble damage actions.\textsuperscript{125}

The substantive change set forth in section 6 involves an alteration of the general standard used by the Federal Maritime Commission for reviewing conference agreements. As will be recalled, the \textit{Svenska} decision\textsuperscript{126} required that multicarrier agreements satisfy the "public interest" test required by section 15 of the 1916 Act.\textsuperscript{127} This test was exceptionally difficult to pass because it (1) assumed that agreements between carriers were per se contrary to the public interest; and (2) placed the burden of proof upon the proponents of an agreement to show that the benefits to the public warranted approval. Section 6(g)\textsuperscript{128} of the new Act eliminates the "public interest" test and replaces it with a "substantially anticompetitive" test. Section 6(h)\textsuperscript{129} shifts the burden of proof to the Commission when an action to enjoin operation of an agreement is brought in the United States District Court for the District of Columbia.\textsuperscript{130}

\textsuperscript{122.} \textit{Id.} (emphasis added).
\textsuperscript{125.} The two sections of the 1984 Act work in conjunction with § 4, 46 U.S.C.A. § 1703 (West Supp. 1984), defining the types of agreements covered by the Act, and § 5, 46 U.S.C.A. § 1704 (West Supp. 1984), detailing those items that must be included in each agreement. The effect is to expand antitrust exemptions from antitrust liability and bring United States shipping policy closer to that followed internationally.
\textsuperscript{126.} \textit{See supra} note 87 and accompanying text.
\textsuperscript{128.} 1984 Act § 6(g), 46 U.S.C.A. § 1705(g) (West Supp. 1984).
\textsuperscript{130.} Under § 6(h), 46 U.S.C.A. § 1705(h) (West Supp. 1984), the FMC no longer has the power to enjoin an agreement itself. If it feels that an agreement either violates the new
new general standard

responds to the Senate concern that the 'public interest' test in the [Shipping Act of 1916 was] vague and unworkable in its automatic application of certain antitrust principles to ocean shipping. The new standard removes any per se condemnation of concerted conduct such as might be applied under the antitrust laws.\textsuperscript{131}

Section 6(g), entitled “Substantially anticompetitive agreements,” specifically states:

If, at any time after the filing or effective date of an agreement, the Commission determines that the agreement is likely, by a reduction in competition, to produce an unreasonable reduction in transportation service or an unreasonable increase in transportation cost, it may, after notice to the person filing the agreement, seek appropriate injunctive relief under subsection (h) of this section.\textsuperscript{133}

Although this “substantially anticompetitive” test gives less weight to antitrust policy and greater deference to carrier agreements, it still suggests that the Federal Maritime Commission is to place some focus on competition. The determination of how much of a decrease in transportation service or increase in transportation cost is necessary before it becomes “unreasonable” is to be made in accordance with the following three-part test set forth in the legislative history to the statute.\textsuperscript{133}

The Federal Maritime Commission must determine first whether a conference agreement is likely to cause a \textit{substantial} reduction in competition.\textsuperscript{134} If not, the Commission is prohibited from interceding. The Committee reasoned that if anticompetitive conduct is insubstantial, any reduction in service or increase in cost would not be unreasonable.\textsuperscript{135} The Committee also stated that when judging an agreement’s effect on competition, the Commission must consider “whether the relevant competitive market includes more than just ocean common carriers providing direct service in a trade.”\textsuperscript{136}

For example, alternate liner routings, bulk carriers, charter opera-

\textsuperscript{131} 
\textsuperscript{132} 1984 Act § 6(g), 46 U.S.C.A. § 1705(g) (West Supp. 1984).
\textsuperscript{133} Conference Committee Report, \textit{supra} note 120.
\textsuperscript{134} \textit{Id.} at 34, 1984 U.S. Code Cong. & Ad. News at 290.
\textsuperscript{135} \textit{Id.}
tors, or air freight carriers could provide shippers with alternate and perhaps less expensive methods of transporting their goods.\textsuperscript{137}

Second, if the agreement does cause a substantial reduction in competition, it must also cause a "material and meaningful" reduction in service or increase in cost to shippers. To be "material and meaningful" specific evidence of adverse impact must be shown.\textsuperscript{138} This evidentiary requirement is demonstrative of the new government perception that carrier agreements are not per se anticompetitive.\textsuperscript{139}

Third, whenever an agreement causing a reduction in competition is both substantial as well as material and meaningful, the potential benefits of the agreement must then be considered. These benefits may include an increased ability to control rate instability or overcapacity, increased economic efficiency, and, significantly, the favorable impact an agreement may have on United States foreign policy or international comity.\textsuperscript{140}

The Conference Committee Report further states in reference to section 6(g) that "[t]he language of this subsection must be interpreted in light of the historic international acceptance of carrier conference agreements."\textsuperscript{141} Clearly, the new general standard developed by the Conferees is intended to favor formation of liner conferences—a significant change from the approach under the 1916 Act, and one more in line with internationally accepted shipping practices.

The procedural changes delineated by section 6 concern the filing and effective dates of conference agreements. These alterations also contribute to expanded antitrust immunity.

Under the provisions of the 1916 Act,\textsuperscript{142} agreements were not effective until approved by the Federal Maritime Commission. Carriers who operated as part of a conference pursuant to a filed agreement before the Commission rendered a decision were subject to antitrust liability regardless of whether the conference agreement was subsequently approved. No time limit for rendering a decision was placed on the Commission.

\begin{itemize}
  \item \textsuperscript{137} Id. See also supra note 50.
  \item \textsuperscript{138} Id. See also Friedmann & Devierno, supra note 32, at 328.
  \item \textsuperscript{139} Friedmann & Devierno, supra note 32, at 328.
  \item \textsuperscript{140} Conference Committee Report, supra note 120, at 35-36, 1984 U.S. Code Cong. & Ad. News at 291-92. ("Another possible benefit to be considered by the Commission is the impact of an agreement on U.S. foreign policy and international comity. The Conferees agree that the United States should act with sensitivity to the interests of its trading partners when administering shipping regulation."). See also Friedmann & Devierno, supra note 32, at 328.
  \item \textsuperscript{141} Conference Committee Report, supra note 120, at 33, 1984 U.S. Code Cong. & Ad. News at 289.
  \item \textsuperscript{142} 1916 Act § 15, 46 U.S.C. § 814 (1982).
\end{itemize}
These restrictions are removed under section 6(b)\textsuperscript{143} of the new Act. An agreement automatically becomes effective within forty-five days of filing (or thirty days after notice is published by the Commission in the Federal Register, whichever is later),\textsuperscript{144} unless the Commission takes action within that period to reject the agreement.\textsuperscript{145} This means that conduct undertaken pursuant to a filed and effective agreement is lawful conduct protected from antitrust liability even without express approval from the Federal Maritime Commission or proof from the proponent that the agreement would be beneficial to the "public interest."\textsuperscript{146} Also, creation of a time limit within which the Commission must act encourages conference agreements because it increases the certainty surrounding their formation. Carriers now know within a short period of time whether their planned course of conduct will be exempt from antitrust liability.\textsuperscript{147}

2. Antitrust Exemptions.—As under the 1916 Act, carrier conduct undertaken pursuant to an effective agreement\textsuperscript{148} is exempt from antitrust liability. Three additional exemptions, however, have been established under the new Act. These will significantly broaden total carrier exemption.

The first of these is outlined in section 7(a)(2).\textsuperscript{149} Under this provision, antitrust laws may not be applied to any activity or agree-

\textsuperscript{143} 1984 Act § 6(b), 46 U.S.C.A. § 1705(b) (West Supp. 1984).


\textsuperscript{145} An agreement may be rejected if it does not list those items outlined in § 5, 46 U.S.C.A. § 1704 (West Supp. 1984), if it does not fall within the scope of the Act as defined in § 4, 46 U.S.C.A. § 1703 (West Supp. 1984), or if it does not satisfy the general standard mentioned in § 6(g), 46 U.S.C.A. § 1705(g) (West Supp. 1984) and detailed in the legislative history. See supra text accompanying notes 134-40. Although not explicitly stated in the 1984 Act, there is also reason to believe that an agreement will be rejected if it is contrary to one of the prohibitions listed in § 10, 46 U.S.C.A § 1709 (West Supp. 1984).

\textsuperscript{146} Merchant Marine and Fisheries Committee Report, supra note 14, at 17, 1984 U.S. Code Cong. & Ad. News at 182.

\textsuperscript{147} Once an agreement goes into effect, the Act also provides that the FMC may investigate conduct occurring pursuant to that agreement. If such conduct is found to violate § 5 of the 1984 Act, 46 U.S.C.A. § 1704 (West Supp. 1984), the Commission may disapprove, cancel, or modify the agreement. If the conduct violates the general standard in § 6(g), 46 U.S.C.A. § 1705(g) (West Supp. 1984), of the Act, however, the Commission's sole remedy is under § 6(h), 46 U.S.C.A. § 1705(h) (West Supp. 1984), which authorizes the Commission to bring an action before the district court to enjoin the agreement. See generally section 9, 46 U.S.C.A. § 1710 (West Supp. 1984); Donovan, supra note 144, at 473; Merchant Marine and Fisheries Committee Report, supra note 14, at 11-12, 1984 U.S. Code Cong. & Ad. News at 176-77. An agreement already in effect remains in effect during the investigation unless enjoined under § 7(h), 46 U.S.C.A. § 1706(h) (West Supp. 1984). See § 9(c), 46 U.S.C.A. § 1708(c) (West Supp. 1984). See also Merchant Marine and Fisheries Committee Report, supra note 14, at 31-32, 1984 U.S. Code Cong. & Ad. News at 196-97.

\textsuperscript{148} Under the 1916 Act, an agreement had to be "approved" before the parties to it were protected from antitrust liability. 1916 Act, supra note 4, at 46 U.S.C. § 814. Under the new Act, this is no longer true. See also supra text accompanying note 143.

ment which falls within the scope of the new Act and which was entered into upon the reasonable belief that it was in accordance with an effective agreement filed with the Commission, or exempt under section 16 from the filing requirements. This exemption from antitrust liability applies even when the conduct is prohibited under the chapter so long as the parties can satisfy the "reasonable belief" defense.

The second provision, section 7(c)(2), prohibits private parties from seeking a remedy under the antitrust laws for violations of the Shipping Act. This eliminates private treble damage action. This section is a major departure from prior United States shipping law and, at least on this point, brings the United States directly in line with international policy. The Judiciary Committee rationalized this change in policy by stating that because the application of competitive principles to conference configurations frequently involves the sensitivities of foreign governments and complex economic issues, such matters were best left to the expertise of the Federal Maritime Commission. Congress thereby eliminated one of the primary objections to the extraterritorial application of United States antitrust laws by relieving carriers from the threat of private treble damage actions.

The third new exemption from antitrust liability appears in section 7(c)(1). Under this provision, when a new determination by an agency or a court strips a particular conference activity of antitrust immunity, neither the agency nor the court may hold the conference retroactively liable under the antitrust laws for participating in that activity. Thus, if a situation arose, as it did in the Sabre

150. Id. at § 1715.
151. Under this new reasonable basis test, the outcome in Carnation, 383 U.S. 213 (1965), would have been reversed if the defendants could have proven that they had a reasonable basis to conclude that their new rate agreement was within the bounds of an existing and effective agreement. See supra note 76 and accompanying text.
152. 46 U.S.C.A. § 1706(c)(2) (West Supp. 1984). ("(c) Limitations ... (2) No person may recover damages under section 15 of Title 15, or obtain injunctive relief under section 26 of Title 15, for conduct prohibited by this chapter.").
154. See supra note 80 (private treble damage actions).
155. Judiciary Committee Report, supra note 10, at 12, 1984 U.S. Code Cong. & Ad. News at 232. Regarding private actions the Judiciary Committee also noted the following:

[The excessive cost and delay surrounding such litigation are major reasons for the current legislative reform efforts. The cost of such delays to the ocean carriers, their shipping customers, and the ultimate consuming public will be reflected in delayed or diminished investment, higher legal and regulatory costs, and fewer entrants into a trade, all of which translate into higher bills or diminished service for the consumer.

Id.
Shipping case, in which a court determines that a carrier operating under the terms of an agreement filed with the Commission is not immune from the antitrust laws, that carrier would be protected from liability for any activity conducted prior to the decision. The rationale behind this provision was "to provide a degree of stability and certainty to an agreement filed in good faith and valid on its face."

Although antitrust immunity has been broadened by the three new provisions detailed above, it is not absolute. Carriers operating under a conference agreement that has not been properly filed with the Commission are as open to antitrust sanctions under the new Act as they were under the 1916 Act. Likewise, parties to an agreement who did not have a reasonable basis to believe that their conduct was in accordance with an effective agreement or exempt from filing requirements will not be able to hide behind the section 7(a)(2) defense. Under section 5(b)(5), unprotected conduct includes conduct that is predatory or constitutes an unreasonable refusal to deal. Antitrust liability in all the above situations, however, still does not subject the violators to private antitrust suits. Private suits are prohibited for all purposes under section 7(c)(2).

Additional exemptions provided for by the Act which may be of particular interest to foreign governments and carriers include exemptions for activities that occur either outside the United States or between foreign countries. For example, section 7(a)(3) immunizes any agreement or activity within the scope of the Act that relates to transportation services within or between foreign countries, regardless of any connection with the United States. Section 7(a)(4) also exempts any activity concerning the foreign inland seg-

157. See Sabre Shipping, supra note 92; notes 93-97 and accompanying text.
158. Compare Sabre Shipping, id., with National Association of Recycling v. Am. Mail Line, 720 F.2d 618 (9th Cir. 1983) (in this proceeding occurring after legislative process had been instituted to change the 1916 Act, the Ninth Circuit expressly refused to follow Sabre Shipping and instead took the stance now found in the 1984 Act § 7(c)(1), 46 U.S.C.A. § 1706(c)(1) (West Supp. 1984)), cert. denied, 104 S.Ct. 1616 (1984)).
159. MERCHANT MARINE AND FISHERIES COMMITTEE REPORT, supra note 14, at 33, 1984 U.S. CODE CONG. & AD. NEWS at 198. See also Friedmann & Devierno, supra note 32, at 334.
161. See supra text accompanying note 151.
162. 46 U.S.C.A. § 1704(b)(5). See also Donovan, supra note 144, at 469; Friedmann & Devierno, supra note 32, at 333.
165. The § 7(a)(3) immunity is conditioned on the agreement or activity not having a "direct, substantial, and reasonably foreseeable effect on the commerce of the United States." Id.
ment of United States export or import trade. Last, any agreement to provide or furnish wharfage, dock, warehouse, or other terminal facilities outside the United States is not subject to United States antitrust laws.

3. Discovery Procedures.—One of the major points of contention in the North Atlantic Shipping cases, as well as in the non-shipping Westinghouse case, was the extraterritorial application of United States discovery procedures. Although the Commission is still empowered to regulate the discovery and subpoena process and issue discovery orders on its own behalf, two provisions have been added to the Shipping Act of 1984 that should alleviate the tension caused by the conflict between United States discovery rules and foreign discovery practices.

Both of these provisions are contained in section 13, the “Penalties” section of the Act. This is the same section that authorizes the Commission to sanction carriers who violate a subpoena or discovery order. Section 13(b)(4) deals specifically with a situation in which a carrier is unable to comply with a discovery order because of a blocking statute. If this occurs, the Commission is required to notify the Secretary of State, who must then “promptly consult with the government of the nation within which the documents or information are alleged to be located for the purpose of assisting the Commission in obtaining the documents or information sought.” This section illustrates Congressional recognition that foreign governments may not conform with United States law, and that United States courts and administrative agencies should attempt other methods before imposing their procedures on foreign jurisdictions.

One issue that may arise under section 13(b)(4) that is not dealt with in either the statute or the regulations is whether a carrier


Further, the regulations recently promulgated by the Commission make it clear that the Commission’s subpoena and discovery powers are intended for use outside United States territory if necessary. See 49 Fed. Reg. 44,390 (1984) (to be codified at 46 C.F.R. § 502.202), (directly addressing the taking of depositions abroad); 49 Fed. Reg. 44,393 (1984) (to be codified at 46 C.F.R. § 502.210(c)), (addressing refusal to comply with Commission orders directed to persons or documents located in a foreign country).

In addition, 1984 Act § 13(b)(2), 46 U.S.C.A. § 1712(b)(2) (West Supp. 1984), and 49 Fed. Reg. 44,393 (1984) (to be codified at 46 C.F.R. § 502.210(a)) empower the Commission, after notice and hearing, to sanction a carrier for noncompliance by suspending any or all tariffs charged by the carrier or revoking the carrier’s right to use any or all tariffs approved for the conference(s) of which it is a member.

170. Id.
who is unable to comply with a discovery order because of a blocking statute will be penalized under section 13(b)(2)\textsuperscript{172} in the event the Secretary of State is unsuccessful in persuading a foreign government to release the documents or information requested. An informal response from the Federal Maritime Commission affirmed the possibility that sanctions would be imposed.\textsuperscript{178} A representative of the Commission stated that the Commission hoped the matter would be solved diplomatically before the question of sanctions arose.

In raising the possibility of a diplomatic solution, the Commission representative was referring not only to the actions of the Secretary of State, but also to the provisions of section 13(b)(6)\textsuperscript{174} which states: “Before an order under this subsection becomes effective, it shall be immediately submitted to the President who may, within 10 days after receiving it, disapprove the order if the President finds that disapproval is required by reasons of the national defense or the foreign policy of the United States.”\textsuperscript{175} This is the second of the two discovery procedures outlined in the new Act that, if exercised, will alleviate the political tensions caused by the extraterritorial application of United States discovery procedures. Like section 13(b)(4), the ultimate check provided by section 13(b)(6) illustrates a Congressional recognition that did not exist in the 1916 Act of the importance of international comity.

4. Prohibitions Replacing the “Detriment to Commerce” Standard.—Under section 15 of the 1916 Shipping Act, the Federal Maritime Commission was authorized to disapprove any conference agreement found “to operate to the detriment of the commerce of

\begin{enumerate}
\item[173.] Telephone interview with Bruce A. Dombrowski, Assistant Secretary, U.S. Federal Maritime Commission (Feb. 7, 1985). In response to a formal request for an opinion from the Commission regarding this issue, Mr. Dombrowski sent the following reply:

This responds to your [question] . . . regarding the assessment of penalties against common carriers who fail to respond to a subpoena due to allegations of foreign government interference. Specifically, you have asked if, in the event the Secretary of State's diplomatic efforts fail, the carrier would be penalized under section 13 (b)(2) of the Shipping Act of 1984 (the Act).

As you are aware, neither the Act nor the Commission's Rules of Practice and Procedure (46 CFR 502) explicitly answer this question. I have discussed the matter with the Commission's General Counsel, and we have determined that a definitive answer simply cannot be given. If a situation as you address should arise, the Commission would necessarily have to make an \textit{ad hoc} determination as to the assessment of penalties, based on all attendant circumstances. The involved carrier would naturally remain subject to the specified penalties, but the Commission would be required to examine all involved factors before implementing its discretionary authority. Although consistency and equal treatment would be a primary objective in such matters, each specific situation would be controlled by its unique set of circumstances.

Letter from Bruce A. Dombrowski to the author (Mar. 8, 1985) (copy on file with the Dickinson Journal of International Law).
\item[175.] \textit{Id.}
Likewise, section 18(b)(5) enabled the Commission to "disapprove any rate or charge filed by a common carrier . . . which . . . it [found] to be so unreasonably high or low as to be detrimental to the commerce of the United States." It was the Federal Maritime Commission itself that brought the vagueness of this "detriment to commerce" standard to the attention of those responsible for revising the 1916 Act. Following the Commission's recommendation, the revising committees analyzed the decisions of the Commission and consolidated the holdings into three concrete prohibitions. These prohibitions replaced the "detriment to commerce" standard. They read as follows:

No conference or group of two or more common carriers may

(1) boycott or take any other concerted action resulting in an unreasonable refusal to deal;

(2) engage in conduct that unreasonably restricts the use of intermodal services or technological innovations;

(3) engage in any predatory practice designed to eliminate the participation, or deny the entry, in a particular trade of a common carrier not a member of the conference, a group of common carriers, an ocean tramp, or a bulk carrier; . . . .

This clarification reduces the confusion surrounding the original "detrimental to commerce" standard, and contributes to the stability and efficiency of conference activity in the United States.

5. Declaration of Policy.—The 1984 Act's Declaration of Policy indicates Congressional intent to bring the United States in line with international shipping practices. No such intent was declared in the 1916 Act. Indeed, the 1916 Act contained no statement of policy to guide either the Federal Maritime Commission or the courts in their determinations. Just how often the Commission will resort to the policy statement in interpreting the Act remains to be seen. It is likely, however, that the statement will compel the Commission to be more sympathetic to shipping policies of other nations.

178. See, e.g., Sabre Shipping, supra note 92 and accompanying text.
181. The Senate Commerce Committee made clear that the Declaration of Policy provisions were to "guide interpreters in determining Congressional intent and the Commission in
B. Provisions Conflicting with International Shipping Practices

1. Penalties. (a) Penalties for blocking United States-flag vessel access to foreign trade.—Of all the provisions in the 1984 Act contrary to international shipping practices, section 13(b)(5) is most likely to have a negative impact on foreign relations. It provides:

If, after notice and hearing, the Commission finds that the action of a common carrier, acting alone or in concert with any person, or a foreign government has duly impaired access of a vessel documented under the law of the United States to ocean trade between foreign ports, the Commission shall take action that it finds appropriate.

Factors indicating conditions unduly impairing access may include: closed conferences; deferred rebates; reservation of a substantial portion of total cargo in trade to national-flag or other vessels; or discriminatory imposition of fees or charges on United States-flag vessels. In a departure from the 1916 Act, it is no longer necessary for the Commission to find that carriers or foreign governments are guilty of an unfair practice specified under the new Act.

A conflict of laws problem will arise in situations in which actions by foreign governments or carriers impairing the United States-flag trades are perfectly legal in those countries or when those actions are in conformity with international shipping practices. Congress did anticipate this problem and dealt with it by providing, in section 13(b)(6), that before any order under subsection 13(b) be promulgating rules and regulations, 'Friedmann & Deviero, supra note 32, at 322-23 (quoting S. REP. NO. 3, 98th Cong., 1st Sess. 18 (1983)).

183. Id. According to the MERCHANT MARINE AND FISHERIES COMMITTEE REPORT, this provision makes the language [of the Act] protect U.S. economic interest vis-à-vis the recent maritime policy decisions of OECD Maritime nations. Particularly, in discussions with OECD nations regarding the European Economics Community's accession to the UNCTAD Code, the United States delegations have insisted on protecting the rights of access to U.S. carriers to trades where the Code will apply.

185. Id.
comes effective it must be sent to the President "who may, within 10
days after receipt of it, disapprove the order if the President finds
that disapproval is required for reasons of the national defense or the
foreign policy of the United States." 189

It is not possible at this time, however, to foretell how often the
President will choose to act under section 13(b)(6). If he does not,
and the Federal Maritime Commission takes the stringent actions it
is empowered to take, the negative impact on United States foreign
relations could be as substantial as that created by the extraterrito-
rial application of the United States antitrust laws.

(b) Awards to private parties.—Although section 7(c)(2) 190 of
the 1984 Act proscribes private treble damage actions under the an-
titrust laws, section 11 191 permits private parties injured by a viola-
tion of the new Shipping Act (other than a violation of the general
standard) 192 to obtain reparations. 193 In addition, section 11(g) actu-
ally expands the remedies previously allowed private plaintiffs under
the Shipping Act of 1916 by permitting the court to award up to
double the amount of damages for violations of six expressly prohib-
ited acts. 194 These double damages, plus interest calculated at com-
mercial rates of interest from the date of injury, are intended to de-
ter the commission of prohibited acts. 195 To prevent frivolous suits
brought by private parties in search of an award of double or other
damages, section 11(h) 196 of the new Act provides for the award of
reasonable attorneys fees to successful defendants.

Although private complainants are limited to awards in the
amount of actual injury in cases involving violations of the Shipping
Act other than those specified above for which double damages are
awarded, and frivolous suits are discouraged by the granting of at-
torneys fees, cases won by plaintiffs against foreign nationals would
still involve extraterritorial application of United States law. In addi-

189. Id. This is the same provision that would require referral to the President if a
penalty were assessed for noncompliance with discovery orders. See supra text accompa-
nying note 174. The Shipping Act of 1916 did not have a provision similar to 1984 Act § 13(b)(6),
191. Id. at § 1711.
192. 1984 Act § 6(g), 46 U.S.C.A. § 1705(g) (West Supp. 1984). See supra text ac-
companying notes 132-40.
193. CONFERENCE COMMITTEE REPORT, supra note 120, at 40-41, 1984 U.S. CODE
CONG. & AD. NEWS at 296-97.
194. The prohibited acts are encompassed in the following sections: 1984 Act § 10(b)(5)
or (7), 46 U.S.C.A. § 1709(b)(5) or (7) (West Supp. 1984); 1984 Act § 10(c)(1) or (4), 46
U.S.C.A. § 1709(c)(1) or (4) (West Supp. 1984); and 1984 Act § 10(a)(2) or (3), 46
195. The authors in Friedmann & Devierno, supra note 32, suggest that this increase in
remedies under the Shipping Act for private plaintiffs may be designed to counterbalance the
elimination of private remedies under the antitrust laws. Id. at 334 n.121.
tion, under section 11, the Commission may investigate perceived violations of the Act on its own motion. After notice and hearing it may assess a penalty against the violator pursuant to section 13(a) and (c).\textsuperscript{197} This also, in the case of a foreign carrier, would be an extraterritorial application of United States law.

Nothing in section 11 forces the Commission or the courts to consider the effect such awards to private plaintiffs would have on foreign policy.\textsuperscript{198} Similarly, they are not required to refer the issue to the President for approval or disapproval prior to assessment.\textsuperscript{199} And section 13(c),\textsuperscript{200} regarding the assessment of civil penalties, only provides that in determining the amount of the penalty, "the Commission shall take into account the nature, circumstances, extent, and gravity of the violation committed and, with respect to the violator, the degree of culpability, history of prior offenses, ability to pay, and such other matters as justice may require."\textsuperscript{201} Nothing regarding foreign relations or the laws of another country need be considered.

2. Miscellaneous. (a) Tariffs.—The United States is the only country that requires shipping tariffs to be filed. According to the Judiciary Committee Report, it was for this reason that the Reagan Administration recommended eliminating the tariff filing requirement in the new Shipping Act.\textsuperscript{202} In the interest of maintaining a certain amount of competitiveness between carriers and conferences, however, the tariff filing requirement remained in the legislation.\textsuperscript{203} Therefore, on this point too, United States shipping policy under the 1984 Act is not in harmony with international shipping practices.

(b) "Open" conferences.—"Open" conferences are still required under the 1984 Act.\textsuperscript{204} This requirement is at complete odds with general international shipping practices under which so-called "closed" conferences are tolerated.\textsuperscript{205} Under an "open" system, a conference must admit and readmit any carrier willing to service a particular trade. No penalties may be imposed for withdrawal from the conference.\textsuperscript{206}

\begin{footnotes}
\footnotetext{197}{Id. at § 1712(a) & (c).}
\footnotetext{198}{See Timberlane Lumber, supra note 99.}
\footnotetext{199}{See supra notes 174 & 188.}
\footnotetext{200}{46 U.S.C.A. § 1712(c) (West Supp. 1984).}
\footnotetext{201}{Id.}
\footnotetext{202}{MERCHANT MARINE AND FISHERIES COMMITTEE REPORT, supra note 14, at 18, 1984 U.S. CODE CONG. & AD. NEWS at 183.}
\footnotetext{205}{See supra note 31 (regarding open conferences).}
\footnotetext{206}{MERCHANT MARINE AND FISHERIES COMMITTEE REPORT, supra note 14, at 13-14, 30, 1984 U.S. CODE CONG. & AD. NEWS at 178-79, 195.}
\end{footnotes}
(c) Loyalty Contracts.—Under section 10(b)(9) of the new Act, loyalty contracts are prohibited except when they conform to antitrust laws. Such contracts were sanctioned under section 14b of the 1916 Act and are generally used internationally. In the event antitrust laws are applied to carriers using loyalty contracts, conflicts could arise in United States relations with other countries.

V. The Shipping Act of 1984—One Example

The shift to a “substantially anticompetitive” general standard, the adoption of discovery procedures flexible enough to consider conflict of laws problems, and the implementation of other provisions of the 1984 Act that are responsive to international shipping practices do a great deal to bring the United States in line with shipping policies of other nations. This is true notwithstanding the potential problems that may arise if: (1) penalties are assessed against carriers for blocking United States-flag vessels in foreign ports; (2) double damage awards are given to private plaintiffs; or (3) foreign carriers balk at the Commission’s regulations concerning tariffs, open conferences, or loyalty contracts.

The ramifications of a new act, however, are difficult to perceive through a mere recitation of its major provisions. To better illustrate how the 1984 Act will operate, the last portion of this Comment applies the Act’s key sections to a set of facts based on the situation found in the North Atlantic Shipping cases.

A. Fact Situation

In June of 1983 the Ocean Bridge Conference, a group of ocean common carriers composed entirely of non-United States-flag vessels hailing from three European nations, decided to enter the United States-Europe trade. In compliance with United States shipping regulations and pursuant to the Shipping Act of 1916, then in effect, the conference filed the Ocean Bridge Agreement with the Federal Maritime Commission. The agreement was approved by the Commission pursuant to section 15 of the 1916 Act in November of 1983, and the conference began operating in the United States-European trade in December of that same year.

In July of 1984 the All-Trades Shipping Company, feeling that the Ocean Bridge Conference’s rates were too high, decided to con-

210. See supra note 9 and text accompanying notes 106-09.
tainerize their goods and truck them to a major port on the Gulf of Mexico to be shipped to Europe via another conference known as the Gulf Conference. In September, All-Trades had another shipment that needed to be transported to Europe. This time, however, there had been a drastic increase in interstate trucking rates. All-Trades decided it would be more economical to return to the services of the Ocean Bridge Conference. When they approached the Conference carriers, however, their shipment was refused. No reason for the refusal was given.

All-Trades suspected that the Ocean Bridge Conference had retaliated against them for using the services of the Gulf Conference in July. They also suspected that Ocean Bridge’s high rates were the result of a secret agreement that was not covered by the provisions of the agreement on file with the Federal Maritime Commission. All-Trades further believed that the agreement was so anticompetitive that it should never have been approved by the Commission. All-Trades sought legal advice regarding what remedies were available.

B. Remedies Under the Shipping Act of 1984

All-Trades Shipping was disappointed to find that under section 7(c)(2) of the new Act private plaintiffs were no longer afforded the remedy of a private treble damage action. All-Trades was told, however, that the 1984 Act applied to complaints similar to theirs regarding Ocean Bridge’s conduct. This was true even though the agreement under which the Conference was operating had been filed and approved prior to March 10, 1984 (the date of the enactment of the 1984 Act), since all agreements approved prior to that date continued in force as if approved under the new Act. In addition, All-Trades’ claim arose out of conduct occurring after March 20, 1984, bringing it within the purview of the new Act.

Regarding All-Trades’ claim that the Ocean Bridge Conference was too anticompetitive, the shipping company as a private complainant could not force review of the Ocean Bridge agreement on file with the Federal Maritime Commission. Review of an agreement for substantially anticompetitive effects is left to the Federal Maritime Commission under sections 11(a), 11(c), 6(g), and 6(h) of the new Act.213

213. See note on “Savings Provisions” following § 2 of the 1984 Act, 46 U.S.C.A. § 1701 (West Supp. 1984). Had the conduct occurred prior to March 20, 1984 (the effective date of the 1984 Act, see supra note 1), the provisions of the 1916 Act would have applied to any claim brought or penalty assessed.
214. 1984 Act § 11(a), 46 U.S.C.A. § 1710(a) (West Supp. 1984), provides that no person may file a complaint with the Commission alleging that a conference agreement is
All-Trades, however, may file a complaint with the Commission under section 11(a) alleging that the rates fixed by Ocean Bridge were pursuant to an agreement not filed with the Commission in violation of section 5. In the same complaint All-Trades may also allege that the Conference violated section 10(b)(5) by refusing space accommodations in retaliation for All-Trades' use of the Gulf Conference in July. The Commission may then conduct an investigation pursuant to its power under section 11(c). While the investigation is ongoing, the Conference may continue operating unless an injunction is granted by the district court under section 11(h) on the motion of the Commission or All-Trades.

A problem may arise during the investigation if the Commission requests documents from one of the foreign carriers and that carrier claims that its government has passed a blocking statute that will not permit the carrier to comply with the document request. The Commission must then bring the matter to the Secretary of State who will consult the government of the nation in which the documents are alleged to be located for the purpose of obtaining the documents. If the Secretary of State is unsuccessful, and the Commission does not cancel its document request, nothing in the new Act or the regulations prevents it from assessing a penalty against the carrier for non-production pursuant to section 13(b)(2). Before such an assessment could become effective, however, it would have to be submitted to the President who may disapprove it if he finds it contrary to the national defense or foreign policy interests of the

substantially anticompetitive under the definition of § 6(g), 46 U.S.C.A. § 1705(g) (West Supp. 1984). Section 11(c), 46 U.S.C.A. § 1710(c) (West Supp. 1984), provides that the Commission may, when it finds an agreement is operating in violation of § 6(g), take action pursuant to subsection (h) of § 6 (under which the Commission must seek an injunction in federal district court). The burden in this instance would be on the Commission. See supra text accompanying note 129.

219. 46 U.S.C.A. § 1710(b)(1) (West Supp. 1984) (authorizing the Commission to bring suit in district court to enjoin the defendant's conduct); § 1710(2) (permitting a private plaintiff to file suit in district court to enjoin the defendant's conduct).
220. However, there is a danger associated with initiating a suit for an injunction. If the defendant prevails, his reasonable attorneys fees will be assessed and collected as part of the costs of the suit. See supra text accompanying note 196.

223. 46 U.S.C.A. § 1712(b)(2) (West Supp. 1984). This section states:

For failure to supply information ordered to be produced or compelled by subpoena under section 1711 of this title, the Commission may, after notice and an opportunity for hearing, suspend any or all tariffs of a common carrier or that common carrier's right to use any or all tariffs of conferences of which it is a member.

Id. See supra text accompanying note 173.
United States.\textsuperscript{224}

Regarding the issue of whether rate-fixing by Ocean Bridge falls within the bounds of the agreement filed with the Federal Maritime Commission, if the rate is found to be outside the agreement, the Commission must decide whether the rate-fixing was undertaken "with a reasonable basis to conclude that . . . it [was] pursuant to an agreement on file with the Commission and in effect when the activity took place . . . ."\textsuperscript{225} If Ocean Bridge had a reasonable basis for believing that the "secret" rate agreement was encompassed in the approved agreement, All-Trades will not be able to claim reparations. If, however, the belief is not reasonable, the Commission must direct payment of reparations to All-Trades for any actual injury caused by this violation, including the loss of interest at commercial rates compounded from the date of the injury plus reasonable attorneys' fees.\textsuperscript{226}

The allegation that Ocean Bridge retaliated against All-Trades Shipping could bring a greater damage award than simply compensation for actual injury. Retaliation against a shipper for using another conference contrary to section 10(b)(5)\textsuperscript{227} is one of the violations for which the Commission, in its discretion, is permitted to award additional amounts up to an amount equal to double the actual damages.\textsuperscript{228} Again, however, the Commission must first find, pursuant to section 7(a)(2),\textsuperscript{229} that the Conference had no reasonable basis for believing that the activity fell within the bounds of the agreement on file with the Commission. If by some chance Ocean Bridge was found to have had a reasonable basis for believing its retaliatory conduct fell within the bounds of the agreement, the Commission could not award reparations to All-Trades.

All-Trades might be happy to know, however, that, if after notice and an opportunity for a hearing, Ocean Bridge is found in violation of the Act, it will be liable to the United States for a civil penalty in addition to the order for reparation that will be granted All-Trades.\textsuperscript{230} The assessment of this civil penalty and an order for

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\textsuperscript{224} Section 13(b)(6), 46 U.S.C.A. § 1712(b)(6) (West Supp. 1984). Therefore, even if the case is very strong against Ocean Bridge, All-Trades should be aware that because of the new Act's flexibility toward political considerations (illustrated by the Presidential veto provision), the outcome may not be what it expects from the weight of the evidence.

\textsuperscript{225} Section 7(a)(2), 46 U.S.C.A. § 1706(a)(2) (West Supp. 1984). See supra text accompanying notes 149-51. This is the sole inquiry the FMC must make under this subsection since the conference has not been granted an exemption by the Commission under § 16 of the 1984 Act, 46 U.S.C.A. § 1715 (West Supp. 1984). Otherwise, the FMC would have had to analyze the conduct to determine whether it fell within the exemption.


\textsuperscript{227} 46 U.S.C.A. § 1709(b)(5) (West Supp. 1984) (prohibiting retaliation against a shipper by refusing space accommodations when available).

\textsuperscript{228} 1984 Act § 11(g), 46 U.S.C.A. § 1710(g) (West Supp. 1984).


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reparations are not among the penalties reviewed by the President before becoming effective. Ocean Bridge may appeal the assessment of the civil penalty.\textsuperscript{231}

VI. Conclusion

The Shipping Act of 1984 substantially alters United States policy toward international shipping. The United States is now much more in harmony with international shipping practices than it was under the 1916 Act. Limitation of extraterritorial application of United States antitrust laws to foreign carriers, through abolition of private treble damage actions and otherwise, is a significant concession to the complaints of foreign governments.

The new Shipping Act, however, is still not in complete harmony with international shipping practices. The United States and the Federal Maritime Commission must be careful, particularly in assessing penalties against foreign nationals for conduct that occurs outside the United States that is not illegal in their own countries. An extremely stringent application of United States shipping laws abroad could cause foreign governments to retaliate in forms more drastic than the simple blocking laws of the past.\textsuperscript{232} Ultimately, all the cooperation the United States Government seeks, and indeed needs, to regulate United States shipping industry under the 1984 Act could be jeopardized.

Martha L. Cecil

\textsuperscript{231} 1984 Act § 13(d), 46 U.S.C.A. § 1712(d) (West Supp. 1984) (an assessment of a civil penalty may be reviewed under chapter 158 of Title 28).

\textsuperscript{232} Retaliation was considered by various European countries and Japan prior to the passage of the 1984 Act. Methods under consideration included, among other things, raising harbor dues on United States ships. McIntosh, \textit{Anti-trust implications of liner conferences: Alternatives to the regulation of liner trades with emphasis on the European approach}, \textit{Lloyd's M. C. L. Q.} 139, 152 (1980). Since the FMC is obligated under 1984 Act § 13(b)(5), 46 U.S.C.A. § 1712(b)(5) (West Supp. 1984), to penalize foreign carriers or the carriers of nations which impair the access of United States-flag ships to foreign ports, raising harbor dues for United States-flag ships or like forms of retaliation could touch off a vicious circle of reprisals between the United States and the foreign government(s) concerned. \textit{See also} 49 Fed. Reg. 45,406 (1984) (to be codified at 46 C.F.R. Pt. 587).