消 費 者 委 員 會 CONSUMER COUNCIL

Assessment of complaints against members of shipping line agreements

July 2002

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Executive Summary

1. Competition issues have long been subjects of Council's studies. This Report outlines two complaints made to the Council alleging anti-competitive conduct engaged in by a collective group of shipping lines providing container liner shipping services to Hong Kong shippers (importers/exporters). The Consumer Council has a concern with such allegations, given the effect that any market distortion could have on consumer welfare, through increased costs for Hong Kong businesses that could be passed on to consumers.

2. The complaints relate to the manner in which a Yen Appreciation Surcharge (YAS) and Terminal Handling Charge (THC) are determined and imposed by competing container liner members of collective groups of shipping lines. The groups are commonly known as 'conference agreements' and are a common feature of international shipping.

3. With regard to the YAS complaint, it was alleged that the YAS did not reflect contemporary movements in the exchange rate, and as a result this lead to losses by importers/exporters because tariffs were higher than they should have been, taking into account the exchange rate that applied at the time of transportation. With regard to the THC complaint, it was claimed that the charge had been increasing at an unchecked rate since its introduction in 1990 resulting in a situation where Hong Kong shippers, as of May 2001, were paying the highest THCs in the world.

4. Since there is an element of pricing uniformity in the conference agreement members' operations, as far as charges are concerned, the conduct of the conference agreements raises a genuine concern and comes within the category of business conduct that, according to the Government's *Statement on Competition Policy*, requires close scrutiny.

5. While the procedures followed by conference agreement members appear to provide some transparency in regard to the matters agreed or discussed by member shipping lines, the procedures do not satisfy all the shippers who use those services. For instance, the complainants who do not belong to the Shippers Council. In addition, there is also the wider issue of whether the effect of the collaborative efforts by the conference agreement members raises a concern as to the reasonableness of the terms and conditions of tariffs and surcharges, such as the THC or YAS.

6. In view of the Government's preferred sector specific policy approach to competition policy, the Council suggests the Port and Maritime Board (as the sector-specific agency with responsibility for this sector) should take on the role of facilitating the following processes.

Competition analysis

7. A process should be introduced whereby any allegations of restrictive practices by members of shipping line agreements (such as conferences or discussion agreements) are examined to ascertain whether:

   (a) a service provided by shipping lines in co-operation with each other is subject to effective competition from lines that do not belong to the co-operative agreement;

(b) where a shipping line agreement exists, the terms of the agreement allow each individual line to offer individual services, outside the agreement, if the line so chooses; and

(c) where a shipping line agreement exists, the parties to the agreement demonstrate that there is a public benefit in the agreement that outweighs the inherent detriment to competition that would be expected to arise.

Facilitating effective negotiation

8. When competitors agree with each other on matters that could otherwise be subject to competition, a concern naturally arises that shippers will not be able to negotiate a better deal for themselves, in terms of a low cost service, wider product choices, and higher quality of service.

9. In view of the concern that arises from the market power held by aggregations of competitors, the Council considers that a mechanism should be established that provides some countervailing power for shippers when attempting to negotiate terms and conditions.

Introduce transparency

10. The Hong Kong Shippers' Council has agreed to disseminate details of any new charges, or changes in the levels of current charges to their members and Hong Kong shippers in general through circulars and the "Shippers Today" magazine, as and when IADA furnish them with details. Likewise, the Secretary for IADA has also agreed and made a commitment to give the Hong Kong Shippers' Council due notification whenever there are changes in IADA's recommended surcharge items which may impact the Hong Kong shipper/consignee. The Consumer Council believes that those measures when implemented will go a long way to help improve communication and transparency, avoiding misunderstandings.

Self-regulation

11. In the long run, the Council considers that in the absence of its preference for a general competition law in Hong Kong, and the Government's encouragement of self regulatory measures to govern competitive safeguards, that an industry code of practice could be introduced:

(a) to provide an appropriate degree of transparency, and opportunity for those who use the services of lines party to the agreements to negotiate terms and conditions;

(b) to obtain information that justifies any claimed cost recovery mechanisms built into service agreements; and

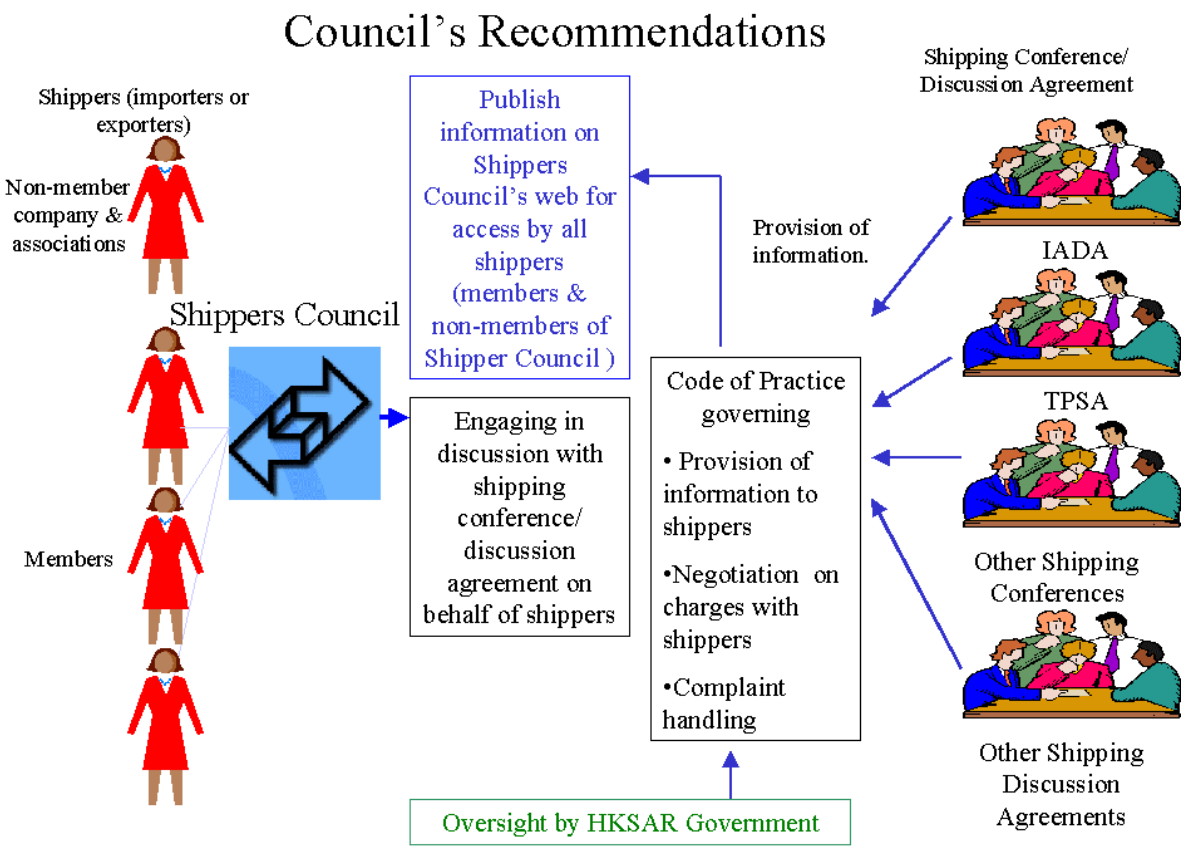
(c) to provide a complaint handling mechanism for any persons aggrieved with the actions of the members of shipping agreements. (Such a mechanism has been advocated in a general sense by the Hong Kong General Chamber of Commerce in its *'Chamber Statement on Competition'*.)

12. In this regard, the liner shipping industry could be requested to develop a code of practice that addresses the issue of competition, along the self-regulatory lines preferred by Government, and which provides for the above safeguards and complaints handling mechanism.

13. The Port & Maritime Board noted that improved arrangements to increase transparency were facilitated and brokered through the mediation efforts of the Board. The Shippers Council has also used its web page to show details of charges as well as their advice to shippers on these charges. The Consumer Council believes that these measures will go a long way to help improve communication and transparency, avoiding misunderstandings in the market. A diagrammatic representation of the Council's recommendations can be found at Figure 1 attached to this report.

14. The Council has a statutory function of encouraging business and professional associations to establish codes of practice to regulate the activities of their members. Accordingly, the Council would be pleased to make its resources available to work with government and industry in assisting with the development of a self-regulatory a code.

Figure 1


Council's Recommendations
Shippers (importers or exporters)
Non-member company & associations
Shippers Council
Members
Publish information on Shippers Council's web for access by all shippers (members & non-members of Shipper Council)
Engaging in discussion with shipping conference/ discussion agreement on behalf of shippers
Code of Practice governing
• Provision of information to shippers
•Negotiation on charges with shippers
•Complaint handling
Oversight by HKSAR Government
Provision of information.
Shipping Conference/ Discussion Agreement
IADA
TPSA
Other Shipping Conferences
Other Shipping Discussion Agreements

The Report

Introduction

1. This paper outlines two complaints made to the Council alleging anti-competitive conduct engaged in by a collective group of shipping lines providing container liner shipping services to Hong Kong shippers (importers/exporters). The Consumer Council is putting forward its assessment of the complaints, in addition to suggestions, to assist the Competition Policy Advisory Group in determining what if any measures should be taken either by the Government or industry in dealing with similar complaints that may arise in the future.

Complaint by Hong Kong Auto (Parts & Machinery) Association

2. The HK Auto (Parts & Machinery) Association (HKAPM) lodged a complaint with the Council in October 2000, complaining about a 'Yen Appreciation Surcharge' (YAS) imposed by a container liner APL Co P/L (APL) on cargo shipments from Japan to hedge against exchange rate risks.

3. HKAPM had been informed by APL that the surcharge was a uniform charge laid down by an association of shipping companies, known as the 'Intra-Asia Discussion Agreement' (IADA) of which APL was a partner. The complaint was that:

   (a) the imposition of the surcharge was not determined through lines competing against each other, but as the result of a 'cartel'; and

   (b) the surcharge did not reflect contemporary movements in the exchange rate, and as a result this lead to losses by HKAPM members because tariffs were higher than they should have been, taking into account the exchange rate that applied at the time of transportation.

Complaint by Hong Kong Shippers Council

4. In the course of making inquiries with regard to the complaint by HKAPM, the Council held discussions with the Hong Kong Shippers Council. The Shippers Council subsequently raised another complaint regarding the manner in which Terminal Handling Charges (THC) are applied in the trade. The concern was that:

   (a) THCs have been set at a uniform rate between members of agreements between shipping lines (IADA and the Transpacific Stabilization Agreement were specifically mentioned);

   (b) that the rates had been increasing unchecked since their introduction in 1990; and

   (c) that Hong Kong shippers are now paying the highest THCs in the world.

Yen Appreciation Surcharge Complaint

5. Council staff met with HKAPM on 1 December 2000; to obtain further details about the uniform exchange rate adjustment mechanism adopted by the shipping lines, and subsequently approached the Hong Kong Shippers' Council on 15 December 2000 to

ascertain the facts of the alleged cartel arrangement. The Shippers Council, which represents importers and exporters in Hong Kong, but not HKAPM members, confirmed the existence of the surcharge. However, the Shippers Council was not aware of the allegation that the surcharge was not aligned with contemporary exchange rate movements, largely because none of their members had complained.

6. The Council wrote to the local Secretariat of IADA seeking comments on the complaint. IADA's reply provided information on the current formula and format of the surcharge. IADA considered that the surcharge mechanism was transparent to the Shippers Council, which was the body to which it provided information on IADA's terms and conditions, including the surcharge. The explanation was that the surcharge did not relate to contemporary movements of the exchange rate because the surcharge quantum is a historical average exchange rate calculated over a period of four months that is also subject to a one-month notification period.

The Yen Appreciation Surcharge mechanism

7. The YAS mechanism begins with the construction of a table identifying a range of monthly average 'Telex Transfer Selling' (TTS) rates. A copy of the relevant table, which applied at the time of the complaint at Annex A. The table determines that if a TTS is above 120 yen to the US dollar at the time an importer is billed, and then no surcharge is applied. If the TTS at the time of billing is below 120, then a surcharge, on an increasing scale, is applied. The rationale is that the Japanese shipping lines will want to be compensated by the importers who customarily give US dollars as payment for the shipping service, in circumstances when the yen has appreciated against the US dollar.

8. The IADA Secretariat claimed that the reason for not making changes more frequently than four months was that changing the quantum more frequently would create the potential for confusion. Moreover, any differences that occur could be recovered in subsequent periods.

9. The IADA Secretariat, (which also services other shipping agreements between lines operating in the region) also stated that the preference for shipping companies was to rely more on holding discussions between each other, on matters such as routing and shipping charges, rather than enter into formal agreements. This was a reference to the distinction between what are commonly referred to as 'discussion agreements' and 'conference agreements'. An explanation of the differences between these types of shipping agreements is found in further sections of this paper.

10. The IADA Secretariat have stated that the rationale behind setting a regular review period on the exchange rate, rather than using daily exchange rates, is that the former lessens the risk of confusion on the part of shippers.

11. The Council accepts that having a regular review period, where a rate is maintained at a constant rate will reduce confusion. However, whether confusion actually arises is largely a function of how adequately timely information can be transmitted to shippers, and agreement reached on the exchange rate between both parties. Improvements in the way in which information is transmitted between parties, and agreement reached would also reduce the risk of confusion.

12. The Secretariat also suggested that any differences in exchange rates that occur throughout the year, which result in higher rates paid than what may at any one time be on offer, could be recovered in subsequent averaging periods.

13. The Council accepts that for some shippers, with regular and constant usage of shipping services, this may well be the case; insofar as the yen fluctuates below the established rates in the TTS table. However, the mechanism is a one-sided surcharge in that there is no reduction on the fee for yen depreciation, when the exchange rate moves above the TTS threshold of 120 (JPY/USD). For example, if the TTS selling rate rises to 130 JPY/USD, the benefit derived to the Japanese shipping lines in receiving US dollars is not factored into a lower shipping charge for importers.

14. As a matter of principle, the Council considers that whether the YAS and the threshold of 120 is acceptable to any individual or class of shippers is a matter that should ideally be settled by parties through negotiation, where:

- the particular requirements of individual or class of shippers can be taken into account; and

- the negotiations take place with reference to competing services available from other service providers who may choose to negotiate, for example, different exchange rate appreciation adjustment mechanisms.

Extent of economic loss

15. According to government statistics, there was a total of 13.5 millions of inward TEUs containers (standardized container of 20ft x 8ft x 8ft) throughput by container terminals over the period between July 1997 – March 2001. Based on the proportion of imports from Japan[1], around 1.91 million of containers probably were affected by the YAS. Over the same period, the average yen/dollar rate was 118. Without the means to negotiate a cut off the TTS threshold rate, instead of the 120 as is currently used, it is estimated that importers will have to pay the surcharge of total HK$158 millions under the predetermined surcharge rate.

16. If the TTS threshold rate were set at 118 for the above period, the surcharge total would have been HK$146 millions. Accordingly, because the rate has been set at 120 for that period, importers of containers from Japan have had to pay approximately HK$12 millions extra.

Terminal Handling Charge Complaint

17. Terminal Handling Charges (THCs) are levied by shipping lines against shippers as an additional charge to ocean freight rates. According to shipping lines THCs are to help recover the costs of shore side operations that are not covered by their ocean freight rates[2].

18. THCs are container port charges levied by container shipping lines for the service of moving a container from a ship to a position some distance away within the confines of the container terminal at the port of discharge to enable clearance from the port. The containers, either twenty foot equivalent units (known as TEUs) or forty foot equivalent units (known as FEUs) are placed within an area of the terminal that allows consignees

[1] The ratio of imports from Japan to total imports was estimated using data from various issues of 'Hong Kong Monthly Digest of Statistics' Census and Statistics Department.

[2] Sourced from a copy of a letter from the Transpacific Stabilization Agreement to Hong Kong Shippers Council 18 October 1999, provided to the Consumer Council.

or their agents to pick them up and deliver them to their next destination.

19. The introduction over the years of container terminals utilising sophisticated cranes and moving equipment has changed port layouts so that private vehicles are prohibited from travelling to and from the ship's side. On conventional wharves, consignees are able to place their vehicles alongside the ship and receive goods, generally known as 'break bulk cargoes', directly onto their vehicle. The dangers inherent in allowing public access to the ship's side within container ports have prevented similar access to container ships.

20. Schematically, the range of services involved in moving containers at the port of discharge can be represented (in general) as follows:

    (a) from **ship** to a **terminal stack**, by crane and moveable chassis;

    (b) from the **terminal stack** out of the port through the **terminal gate**, by consignee.

21. The question of which of the above services are incorporated within the THC and their relation with the ocean freight rate is important to an understanding of the Shippers Council's complaint. In its complaint, the Shippers Council provided correspondence from IADA and the Transpacific Stabilization Agreement that listed a large range of cost items associated with how the quantum of THCs, as applied by the agreement members, was calculated. An example of the cost items is as follows:

    Lift-on for empty containers
    Lift-off for laden containers
    Storage at terminal
    Lift-on to ports
    Haulage from terminal to ports
    Lift-off at port CY
    Storage at port within free period
    Passage at port
    Lift-on at port for loading
    Haulage at pier
    Barge Charges
    M & R per container
    Monitoring and rental for reefer equipment
    Stevedoring for CFS cargo
    Container Inspection Charges
    Pre-trip Reefer Inspection Charge
    Electrical Supply
    Risk at terminal (typhoon, etc)

Terminal handling charge costs

22. The major concern of the Hong Kong Shippers Council is that members are required to pay the same level of THCs without any competitive choices, reflecting the collective agreement nature of IADA, and other collective agreements between shipping lines. Moreover, there is a concern at the lack of transparency as to how the THCs are calculated, as no costing figures are provided. The Shippers Council was concerned that the quantum of the THC fee had evolved over a period of time where it was now considered to be the main source of revenue for carriers.

23. In correspondence from the shipping lines to the Shippers Council, copies of which were provided to the Consumer Council, shipping lines have stated that the THC is

intended to cover them for various shore side operations that are not recovered by their ocean freight tariffs. In their letter to the Shippers Council they have also noted that in their experience the charges rarely provide full cost recovery.

24. In discussions with the Consumer Council, the Shippers Council noted that different shipping lines should have different costs, but the THCs by members of the shipping line agreements are all the same. Moreover, since the THCs were introduced in 1990, increases have been at double digits almost every year.

25. It stands to reason that the actual costs to move containers from a ship to a stacking location within the terminal for delivery to consignees can vary between different ports, and between different container handling terminals. The Shippers Council stated that Hong Kong had the highest THCs in the world. In this regard the Council has obtained an Information Paper submitted to the LegCo Panel on Economic Services 'Terminal handling charges in major Asian ports' [CB(1)1830/00-01(01) 9 April 2001]. A copy is attached as Annex B. The document provides a comparison of charges for different shipping line agreements between different ports in the region and supports the contention that Hong Kong has comparatively high THCs.

26. Notwithstanding charges applied for other ports in the region, the costs of the various elements now considered to make up the THCs in Hong Kong should be a function of the actual costs that are levied against shipping lines for loading and unloading containers and making them available for delivery to consignees. Moreover, given the expectation that different shipping lines would have different costs of operation and different profit levels, the extent to which those terminal costs would be passed on to shippers should ideally be a function of the competition that exists between shipping lines to attract the custom of shippers.

27. Due to the uniform nature of the THCs as applied to shippers, this does not appear to be the case. As a result, there is no information on which a competitive market price for THCs could be ascertained. It is impossible therefore to ascertain the extent to which THCs in Hong Kong are either in excess of a competitive market standard, or below such a standard.

Council's View on the Complaints

28. With regard to the YAS complaint, the Council notes that IADA's reasoning behind the current YAS mechanism is that having a uniform mechanism reduces confusion in the industry. However, leaving aside the question as to whether confusion might be overcome through applying uniformity, there was no indication from IADA on what, if any formal process is carried out for seeking the views of individual shippers or classes of shippers on the mechanism. For example, the level of TTS threshold or any problems that might arise from all classes of shippers.

29. With regard to the THC complaint, the Council has not been able to carry out an extensive inquiry into the quantum of the THC applied by IADA members. However, it does appear:

    (a) from the list of different factors that are taken into account in calculating the amount of the THC; and

    (b) that competition between shipping lines is supposed to play a part in the way in which shipping tariffs are quoted to shippers,

that charges could in theory vary between shipping lines.

30. However, the approach taken by members of the shipping line agreements complained of is to apply a 'cost plus' methodology to the recovery of terminal handling costs, and to apply a uniform charge between those members.

31. The lack of formal processes to require collective associations of shipping lines such as IADA to negotiate with shippers on the YAS mechanism, and the quantum of THCs reinforces the sentiment expressed by the complainants that shippers' interests are secondary to that of the lines. It is that approach which has given rise to this particular complaint. At the very least, the Council considers that shipping lines could:

    (a) use the Shippers' Council to collect opinions on whether there should be a periodic review on the YAS charging mechanism and the THC to reflect the current business environment and the market situation of all users of the shipping lines' services so as to minimize the cost burden to Hong Kong shippers; and

    (b) make opportunity for shipping associations' representatives such as the HKAPM, who are not members of the Shipping Council to discuss their concerns at meetings between members of formal shipping line agreements.

32. In its written response to HKAPM on its complaint about the YAS mechanism, the Council noted that the YAS surcharge was in accordance with the mechanism discussed under the IADA forum in regard to matters such as service rates and charges by IADA members.

33. With regard to HKAPM's allegation that the mechanism had been set under 'a cartel', the Council noted that there is no general competition law in Hong Kong against which allegations of abuse of market power (that could arise from competitors forming agreements amongst each other) could be examined[3].

34. The Council also acknowledged that the exchange rate adjustment mechanism is not transparent to all parties as details of the mechanism are only provided to the Hong Kong Shippers Council. Because HKAPM is not a member of the Shippers Council, it is therefore not provided with details of the surcharge mechanism used by IADA members, even though HKAPM members use the services of the lines and are subject to the surcharge.

35. The Council informed the complainant that it would pursue policy options for Government to consider, in addressing this lack of transparency, and providing safeguards against any possible anti-competitive detriment arising from the collective actions of shipping lines.

Overseas Practices on Shipping Line Agreements

36. The issue of shipping line agreements is one that has attracted the attention of competition authorities in other jurisdictions. Annex C of this report examines the nature of shipping agreements, for example, the difference between conference agreements and discussion agreements, and the manner in which competition

[3] It might be argued by some that there are legal remedies in Hong Kong to counter 'cartel' type activities under the common law doctrine of restraint of trade. However, the common law doctrine of restraint of trade presents problems as the doctrine has been applied to support price fixing agreements between competitors, e.g. *English Hop Growers v Dering* [1928] 2 KB 174. Moreover, the consequence of the Courts approach to competitor agreements under the doctrine has led to the introduction of specific competition law. See E McEndrick 'Contract Law' Macmillan Press Ltd. 1997, page 298.

authorities in other jurisdictions place these forms of competitor agreement under examination.

37. In December 2001, the OECD published its 'Liner Shipping Competition Policy Report' in which it examined the rationale and impacts of traditional conference price fixing, discussion agreements, and capacity limitation agreements. The OECD's report included reference to the shipping agreements that are the subject of the two complaints made to the Council. The OECD stated that it did not find convincing evidence that the practice of discussing and/or fixing rates and surcharges among competing carriers offers more benefits than costs to shippers and consumers. It recommended that limited anti-trust exemptions *not* be allowed to cover price-fixing and rate discussions. The full recommendations, as made by the OECD are reproduced at Annex D to this report.

38. Unlike most other advanced economies, Hong Kong does not have a general competition law under which price fixing arrangements and other inherently anti-competitive agreements between competitors can be assessed. Neither is there a transparent process whereby parties to inherently anti-competitive agreements are given the opportunity to publicly demonstrate that the agreements should be exempted because the agreements deliver public benefits that outweigh the detriment to competition.

Council Comment

39. External trade plays a vital role in Hong Kong's economic development. The value of our total trade in goods and services amounted to around 282% of GDP in 2001. From 1996 to 2001, the value of the HKSAR' s merchandise trade grew from HK$2,994 billion to HK$3,049 billion with an average annual growth rate of 0.3%[4]. In 1999, Hong Kong was the world' s sixth-largest leading exporter and the fifth-largest leading importer in terms of value of merchandise trade[5]. It is vital for Hong Kong's economy for it to have a competitive shipping industry, which offers efficient services to facilitate the flow of trade.

40. Although it is generally understood that Hong Kong has high terminal efficiency and fast customs clearance, mainland ports are also making improvements, which poses a challenge to Hong Kong's place as a world leading trade entity in the region. Enhancing Hong Kong's competitiveness is necessary; otherwise shippers may direct their goods via mainland ports. The Council believes that a high degree of market-based competition is the best way to maintain our cost-effective shipping services for Hong Kong shippers.

41. The Hong Kong Government's Statement on Competition Policy indicates that price fixing arrangements between competitors "may warrant more thorough examination" to ascertain whether they do in fact limit market accessibility or contestability, or impair economic efficiency or fair trade[6].

42. Agreements between shipping lines, however termed, but collectively referred to as 'conference agreements', because of their price fixing characteristics, would therefore come within the category of business conduct that, according to the Government's Statement on Competition Policy, may warrant further examination.

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[4] The ratios was estimated using data from 2002 May issues of 'Hong Kong Monthly Digest of Statistics' Census and Statistics Department.

[5] Based on International Trade Statistics 2000 by World Trade Organization.

[6] Hong Kong Government, *Statement on Competition Policy*, May 1998, paragraph 7.

43. The procedures followed by IADA, in its dealings with the Hong Kong Shippers Council, appear to provide some transparency in regard to the terms and conditions for use of its members' services. However, as indicated in the complaint by HKAPM the procedures do not satisfy all the shippers who use those services. In addition, there is also the wider issue of whether the effect of the collaborative effort by the IADA members raises a concern as to the reasonableness of the terms and conditions of the conference tariffs and surcharge mechanism. In effect, whether they satisfy the economic efficiency and consumer welfare objectives of the Government, as outlined in its Statement on Competition Policy[7]. As noted above, other comparable advanced economies have a regulatory mechanism to provide ongoing oversight of shipping line agreements, and a mechanism for handling competition complaints, notwithstanding the limited application of anti-trust exemptions.

44. In view of the Government's preferred sector specific policy approach to competition policy, there would seem to be a role for the Government (i.e. the Port and Maritime Board as the sector-specific agency with responsibility for this sector) to take on the role of facilitating processes that:

    (a) obligate negotiations between shippers and lines that have formed shipping agreements; and

    (b) provide a mechanism whereby independent scrutiny of shipping agreements could be considered in terms of their effect on competition.

Council Recommendations

45. The Council's first preference is that a law of general application administered by a competition authority is the correct means of addressing the regulatory conundrum concerning competition oversight. The Government's preference is for sector specific administrative oversight, utilising self-regulatory mechanisms where possible. In view of the Government's preferred policy approach, the Council suggests the Port and Maritime Board (as the sector-specific agency with responsibility for this sector) should take on the role of facilitating the following processes.

Competition analysis

46. A process should be introduced whereby any allegations of restrictive practices by members of shipping line agreements (such as conferences or discussion agreements) are able to be examined to ascertain whether:

    (a) a service provided by shipping lines in cooperation with each other is subject to effective competition from non-conference lines;

    (b) where a shipping agreement exists, the terms of the agreement preserve the right for each individual line to offer individual services, outside the agreement, if the line so chooses; and

    (c) where shipping lines are parties to an agreement, and the lines who take part in the agreement do not offer competing levels of services on all or some aspects of their operations, that there is a public benefit in the agreement that outweighs the detriment to competition.

[7] Hong Kong Government *Statement on Competition Policy*, paragraph 2.

Facilitating effective negotiation

47. When competitors agree with each other on matters that could otherwise be subject to competition, a concern naturally arises that shippers will not be able to negotiate a better deal for themselves, in terms of a low cost service, wider product choices, and higher quality of service.

48. In respect to the "Yen Appreciation Surcharge" mechanism, individual shippers, or classes of shippers, are not in a position where they are able to counter the market power exerted through the agreement under IADA to negotiate separate terms and conditions. Neither can they press for changes to the mechanism (as suggested by the Council in paragraphs 13-14) to seek a better threshold to reflect the current state of the foreign exchange market.

49. In view of the concern that arises from the market power held by aggregations of competitors, a mechanism should be established that provides some countervailing power for shippers when attempting to negotiate terms and conditions.

Introduce transparency

50. As mentioned earlier in this report, the Council indicated to the HKAPM that it would pursue policy options for Government to consider in addressing the lack of transparency. During the course of the preparation of this report, the Council met with the Hong Kong Port & Maritime Board and the Hong Kong Shippers Council to discuss ways to improve communication between IADA and Hong Kong shippers. The Port & Maritime Board subsequently informed the Council that improved arrangements to increase transparency were facilitated and brokered through the mediation efforts of the Board. This had resulted in the Hong Kong Shippers' Council agreeing to disseminate details of any new charges, or changes in the levels of current charges to their members and Hong Kong shippers in general through circulars and the "Shippers Today" magazine, as and when IADA furnish them with details.

51. The Secretary for IADA had also agreed and made a commitment to give the Hong Kong Shippers' Council due notification whenever there are changes in IADA's recommended surcharge items which may impact the Hong Kong shipper/consignee. The Shippers Council advised the Council that it is in the process of redesigning its web page to show details of charges as well as their advice to shippers on these charges. The Consumer Council believes that these measures will go a long way to help improve communication and transparency, avoiding misunderstandings.

Self-regulation

52. In the long run, so as to address the issue of market power accruing from an aggregation of competitors, that arises with conference or discussion agreements, the Council considers that some self regulatory safeguards in the form of an industry code of practice should be introduced:

    (a) to provide an appropriate degree of transparency, and opportunity for those who use the services of lines party to the agreements to negotiate terms and conditions;

    (b) to obtain information that justifies any claimed cost recovery mechanisms built into service agreements; and

    (c) to provide a complaint handling mechanism for any persons aggrieved with the

actions of the members of shipping agreements.

53. A complaints handling mechanism similar to that suggested above is a principle that has been espoused by the Hong Kong General Chamber of Commerce in its *'Chamber Statement on Competition'*. The Statement encourages specific industries to develop, through their respective associations, statements or codes of practice to promote competition within their own sectors, and where possible, to include a complaints handling procedure as well as provisions to deal with non compliance of their members. See <http://www.chamber.org.hk>

54. In this regard, the liner shipping industry could be requested to develop a code of practice that addresses the issue of competition, along the self-regulatory lines preferred by Government, and which provides for the above safeguards and complaints handling mechanism.

55. The basic approach taken by the Council in the above recommendations is in conformance with the Government's Statement on Competition Policy which states "

"the Government is promoting economic efficiency and free trade through competition by working together with the Consumer Council to encourage the private sector to adopt pro-competition measures, such as self-regulatory regimes that preserve and enhance free competition; and to monitor and review business practices in sectors prone to anti-competition behaviour"[8]

56. In addition, leaving aside the self-regulatory concept, the Council's recommendations are also considered to be in line with the general approach taken by Government's in other comparable advanced economies. They are also considered to be generally in line with the principles behind the recommendations that the OECD outlined in its recent Liner Shipping Competition Policy Report, at Annex C to this report.

57. The Council would be pleased to make its resources available to work with government and industry in assisting with the development of such a code[9].

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[8] Hong Kong Government *Statement on Competition Policy*, paragraph 10 (f)

[9] The Council has developed a 'Competition and Consumer Protection Model Code' that has a set of suggested competition rules (based on existing sector specific competition legislation in Hong Kong) and suggested complaint handling procedures. The Model Code could serve as the basis for development of a code of practice for the shipping industry.

Annex A: Yen Appreciation Surcharge Mechanism

Annex A

INTRA-ASIA DISCUSSION AGREEMENT

The YAS Application Table which produces the applicable YAS based on the average exchange rate during the review period is as follows:

Monthly Average TTS Selling Rate	Applicable YAS (per 20', 40', LCL)
Above 120	No YAS
119.99 to 115	US$10 , 15 , 0.50
114.99 to 110	US$20 , 30 , 1.50
109.99 to 105	US$30 , 45 , 2.50
104.99 to 100	US$40 , 60 , 3.50
99.99 to 95	US$60 , 90 , 5.00
94.99 to 90	US$70 , 105 , 6.00
89.99 to 85	US$90 , 135 , 7.50
84.99 to 80	US$110 , 165 , 9.00
79.99 to 75	US$130 , 195 , 11.00
74.99 to 70	US$160 , 240 , 13.00

The review period and application period applied by IADA are as follows:

Exchange Rate Review Period	Notification Period	YAS Application Period
Nov through Feb	March	April through July
March through June	July	Aug through Nov
July through Oct	Nov	Dec through March

Annex B: Terminal Handling Charges in Major Asian Ports

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Annex B

ORIGIN TERMINAL HANDLING CHARGE (THC)

		AUSTRALIA		TRANS PACIFIC		INTRA ASIA		EUROPE		MIDDLE EAST		INDIA SUB-CON	
HONG KONG	20'	HK$2,065	(US$267)	HK$2,140	(US$277)	HK$1,800	(US$233)	HK$2,065	(US$267)	HK$2,065	(US$267)	HK$2,065	(US$267)
	40'	HK$2,750	(US$355)	HK$2,855	(US$369)	HK$2,650	(US$342)	HK$2,750	(US$355)	HK$2,750	(US$355)	HK$2,750	(US$356)
	R20'	HK$2,685	(US$347)	HK$2,790	(US$357)	HK$2,340	(US$302)	HK$2,685	(US$347)	HK$2,685	(US$347)	HK$2,685	(US$347)
	R40'	HK$3,575	(US$462)	HK$3,680	(US$475)	HK$3,445	(US$455)	HK$3,575	(US$462)	HK$3,575	(US$462)	HK$3,575	(US$462)
TAIWAN	20'	NT$5,600	(US$184)	NT$5,600	(US$184)	NT$4,819	(US$141)	NT$5,600	(US$184)	NT$5,600	(US$184)	NT$5,600	(US$184)
	40'	NT$7,000	(US$205)	NT$7,000	(US$205)	NT$6,104	(US$178)	NT$7,000	(US$205)	NT$7,000	(US$205)	NT$7,000	(US$205)
	R20'	NT$7,280	(US$213)	NT$7,280	(US$213)	NT$6,145	(US$179)	NT$7,280	(US$213)	NT$7,280	(US$213)	NT$7,280	(US$213)
	R40'	NT$9,100	(US$266)	NT$9,100	(US$266)	NT$7,815	(US$228)	NT$9,100	(US$266)	NT$9,100	(US$266)	NT$9,100	(US$266)
SHANGHAI	20'	US$15		US$68		US$15.0		US$15.0		US$15.0		US$15.0	
	40'	US$25		US$88		US$22.5		US$22.5		US$22.5		US$22.5	
GUANGDONG	20'			US$141		US$105		US$105					
	40'			US$269		US$210		US$210					
	R20'			US$181		US$155		US$155					
	R40'			US$344		US$310		US$310					
PHILLIPINES	20'			US$70		PESO3,220		US$65		US$65		US$65	
	40'			US$95		PESO4,255		US$89		US$89		US$80	
	R20'			US$76		PESO4,255		US$84.5		US$84.5		US$84.5	
	R40'			US$90		PESO5,400		US$104		US$104		US$104	
JAPAN	20'			YEN12,000	(US$98)	YEN11,000	(US$89)	YEN28,491	(US$208)	YEN11,000	(US$89)	YEN11,000	(US$90)
	40'			YEN15,000	(US$169)	YEN16,500	(US$120)	YEN40,982	(US$299)	YEN18,500	(US$126)	YEN18,500	(US$129)
KOREA	20'	WON160,000	(US$76)	WON161,000	(US$71)	WON161,000	(US$71)	WON100,000	(US$70)	WON100,000	(US$70)	WON100,000	(US$70)
	40'	WON136,000	(US$95)	WON137,000	(US$96)	WON137,000	(US$96)	WON138,000	(US$95)	WON136,000	(US$95)	WON136,000	(US$95)
	R20'	WON198,000	(US$139)	WON217,000	(US$152)	WON132,000	(US$92)	WON198,000	(US$139)	WON198,000	(US$139)	WON198,000	(US$139)
	R40'	WON287,000	(US$201)	WON289,000	(US$202)	WON178,000	(US$125)	WON287,000	(US$201)	WON287,000	(US$201)	WON287,000	(US$201)
SINGAPORE	20'	S$182	(US$93)	S$182	(US$105)	S$182	(US$105)	S$182	(US$105)	S$182	(US$105)	S$182	(US$105)
	40'	S$230	(US$132)	S$270	(US$155)	S$270	(US$155)	S$270	(US$155)	S$270	(US$155)	S$270	(US$155)
	R20'			S$237	(US$136)	S$237	(US$136)	S$237	(US$136)	S$237	(US$136)	S$237	(US$136)
	R40'			S$351	(US$202)	S$351	(US$202)	S$351	(US$202)	S$351	(US$202)	S$351	(US$202)
THAILAND	20'	BHT2,600	(US$65)	BHT2,600	(US$65)	BHT2,600	(US$65)	BHT2,600	(US$65)	BHT2,600	(US$65)	BHT2,600	(US$65)
	40'	BHT3,900	(US$97)	BHT3,900	(US$97)	BHT3,900	(US$97)	BHT3,900	(US$97)	BHT3,900	(US$97)	BHT3,900	(US$97)
	R20'			BHT3,100	(US$77)	BHT3,100	(US$77)	BHT3,380	(US$84)	BHT3,380	(US$84)	BHT3,380	(US$84)
	R40'			BHT4,650	(US$116)	BHT4,650	(US$116)	BHT5,070	(US$126)	BHT5,070	(US$126)	BHT5,070	(US$126)
MALAYSIA	20'	M$190	(US$50)	M$295	(US$77)	M$295	(US$77)	M$295	(US$77)	M$295	(US$77)	M$295	(US$77)
	40'	M$285	(US$75)	M$440	(US$115)	M$440	(US$115)	M$440	(US$115)	M$440	(US$115)	M$440	(US$115)
	R20'			M$383	(US$100)	M$384	(US$95)	M$384	(US$95)	M$384	(US$95)	M$384	(US$95)
	R40'			M$572	(US$149)	M$542	(US$142)	M$542	(US$142)	M$542	(US$142)	M$542	(US$142)
PORT KELANG	20'			M$335	(US$87)	M$335	(US$87)						
(eff 1-10-2000)	40'			M$500	(US$131)	M$500	(US$131)						
	R20'			M$423	(US$110)	M$404	(US$105)						
	R40'			M$632	(US$165)	M$602	(US$157)						
INDONESIA	20'	US$75		US$100	(*US$130)	US$100	(*US$130)	US$100		US$100		US$100	
	40'	US$125		US$165	(*US$200)	US$155	(*US$200)	US$155		US$155		US$155	
	R20'			US$140	(*US$180)	US$140	(*US$180)	US$140		US$140		US$140	
	R40'			US$190	(*US$245)	US$190	(*US$245)	US$190		US$190		US$190	

*Eff. 1st-Oct, 2000

Report Date : 21 May 2001

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Annex C: Shipping Line Agreements & Competition Oversight In Other Jurisdictions

Shipping Line Agreements

i. Shippers' interests are served by ensuring that not only are goods transported at the lowest possible price, but that adequate returns are obtained by liners to ensure the long-term availability of efficient services. In most markets this is brought about through open competition where market participants compete with each other and prices for goods or services at brought down, through the competitive process, to a level equal to or slightly above marginal cost.

ii. Historically, in international liner shipping, 'conferences' have been created between liners for the purpose of ensuring that appropriate returns are achieved to guarantee that long-run availability of efficient shipping services is maintained. The conferences are in effect joint venture operations, and efficiencies are brought about through the pooling arrangements of participating lines that result in economies of scale.

iii. Another form of agreement commonly found amongst shipping lines is that of a 'discussion' agreement. Discussion agreements, of which IADA is one, are commonly formed amongst shipping lines to allow for discussion amongst competing shipping lines. The purpose of the agreements may be stated as promoting service, stability and efficiency in liner cargo shipping by authorising parties to discuss and exchange information with regard to matters of mutual interest and concern in the trade, and forming a non binding consensus.

iv. A scheme administered by the United States Federal Maritime Commission under the *Shipping Act 1984* that requires the registration of shipping agreements, defines by regulation various categories of shipping agreements. For example:

- conference and rate agreements;
- joint service and consortium agreements;
- pooling agreements;
- sailing and space charter agreements; and
- co-operative working and discussion agreements.

Joint service agreements

v. Generally, all of the above are referred to in US legislation as 'conference' agreements. However, notwithstanding their common name, the agreements do not all share common elements. As such they have different effects in the markets they serve. Some agreements, for example, are long term agreements between a number of competitors achieving economies of scale, that are formed with the intention of providing a joint service in a trade. They should be clearly distinguished and, where they face competition with other lines not party to the joint service agreement, could be encouraged. This obviously needs to be considered in terms of the market share of the joint service providers and their collective market power.

Discussion agreements

vi. Agreements between a group of joint service providers and lines not involved in the provision of joint services, but who get together under a 'discussion' agreement do not provide competitive services with implied benefits of economies of scale. Their purpose could be to promote industry-wide efficiency through a range of matters such as resolving technical issues related to cargo handling and terms and conditions for providing shipping services; such as the exchange rate adjustment mechanism the subject of this complaint. Discussion might also include issues of rationalisation, which in other circumstances would be determined through the process of attrition.

vii. Efficiencies in international liner shipping through technical co-operation, and by addressing matters such as rate instability and managing capacity, may be brought about through discussion agreements in much the same way as through joint service agreements.

viii. The anti-competitive effects of discussion agreements may in some circumstances be seen as remote because, unlike joint venture agreements, they are stated to be non binding informal arrangements, with little if any capital investment, and that can be easily abandoned. However, discussion agreements can be seen as having a greater anti-competitive effect than joint service agreements. This is particularly the case where:

(a) notwithstanding the so called 'non binding' nature of the agreement, parties do actually agree on matters and uniform positions are reached;

(b) the matters discussed and agreed upon cover a wide range of issues that affect the level of competition; and

(c) the members of the agreement include lines with a large share of the overall market (or of specific commodity markets) in the trade

ix. Discussion agreements might also act as an impediment to innovation, tending toward achieving consensus on matters that might otherwise be treated independently.

x. The benefits that can be derived from competition between shipping lines can therefore be diminished through involvement by those lines in discussion agreements. It follows therefore that in the interests of ensuring efficiency in the provision of shipping services, safeguards would need to be introduced to ensure that shippers' interests are protected from the collusive nature of the agreements.

Competitive safeguards

xi. Safeguards for shippers in other advanced economies, where shippers are faced with collective agreements by shipping lines, are usually achieved by:

(a) providing government oversight on the content and working of shipping line agreements; and

(b) imposing negotiation obligations on shipping lines.

xii. The general understanding is that effective negotiation can occur only when there are guarantees that adequate information will be made available to both parties so that both can maintain optimal efficiency.

xiii. The information needs of the shipping lines are the short and long term service requirements and technical aspects of the cargo to be transported. The information

needs of shippers have two aspects. First, they need to be assured that a service is provided with the right capacity and frequency. The second need has more to do with ensuring that the tariffs, and terms and conditions on offer do not take advantage of the diminished competition brought about by the collusive nature of the shipping line agreements. In this respect, shippers need to know the relationship between aspects of the quality of service and the costs.

Organisation for Economic Co-operation and Development (OECD)

xiv. In December 2001, the OECD published its 'Liner Shipping Competition Policy Report' in which it examined the rationale and impacts of traditional conference price fixing, discussion agreements, and capacity limitation agreements. The analyses in the report were based on information collected through a survey completed in 2001, supplemented by other publicly available sources of information. The report investigated market share, freight rate, financial performance and regulatory trends in addition to different models of liner shipping markets. The OECD's report included reference to the shipping agreements that are the subject of the two complaints made to the Council[10].

xv. Based on the results of its analysis, the OECD's report sought to determine whether the continuing existence of anti-trust exemptions for price fixing and rate discussions in liner shipping are preferable to a move towards more competitive liner markets. The OECD stated that it did not find convincing evidence that the practice of discussing and/or fixing rates and surcharges among competing carriers offers more benefits than costs to shippers and consumers.

xvi. Accordingly, it recommended that limited anti-trust exemptions *not* be allowed to cover price-fixing and rate discussions. It also found that capacity agreements should be carefully scrutinized to ensure that they do not distort the markets in which they are present. However, the OECD recognized that the high degree of polarization in the longstanding debate relating to the topic, and set out a possible way forward based on points of convergence between shippers and carriers. It noted that the points serve to frame three principles that countries should use to guide when re-assessing the validity of anti-trust exemptions for price fixing, rate discussions and capacity agreements between competitors in the liner shipping sector. The full recommendations, as made by the OECD are reproduced at Annex D to this report.

xvii. In summary, the three principles identified in the recommendations are:

(a) Rates, surcharges and other terms of carriage in liner shipping should be freely negotiated between shippers and carriers on an individual and confidential basis.

(b) Carriers and shippers should be able to contractually protect key terms of negotiated service contracts, including information regarding rates.

(c) Carriers should be able to pursue operational agreements with other carriers so long as these do not include price-fixing or confer undue market power to the parties involved.

xviii. Examples of how other jurisdictions in comparable advanced economies have applied competitive safeguards in this sector are discussed in limited detail in the following

[10] Organisation for Economic Co-operation and Development, Directorate for Science, Technology and Industry, Division of Transport 'Liner Shipping Competition Policy Report' DSTI/DOT (2001)1, 06 Nov 2001.

section.

Other Jurisdictions' Policies on Shipping Agreements

xix. Collective agreements between shipping lines have been a focus of attention, insofar as their effect on competition is concerned, for governments in other comparable advanced economies. This section of the Council's study examines three different approaches to competition policy for the sector in the United States, the European Union, and Australia.

The United States Federal Maritime Commission (FMC)

xx. The FMC administers the Shipping Act of 1984 which is aimed at protecting shippers, carriers and others engaged in the foreign commerce of the US from, amongst other things, practices of shipping lines that have an adverse effect on shipping in U.S. trades. The FMC:

(a) investigates, upon its own motion or upon filing of a complaint, discriminatory, unfair, or unreasonable rates, charges, classifications, and

(b) investigates, upon its own motion or upon filing of a complaint, discriminatory, unfair, or unreasonable rates, charges, classifications, and practices of ocean common carriers, terminal operators, and freight forwarders operating in the foreign commerce of the U.S.; and

(c) receives agreements among ocean common carriers or marine terminal operators and monitors them to assure that they are not substantially anti-competitive or otherwise in violation of the Shipping Act of 1984;

xxi. The FMC also registers agreements among ocean common carriers or marine terminal operators and monitors them to assure that they are not substantially anti-competitive or otherwise in violation of the Shipping Act of 1984.

xxii. In this regard, the interests of shippers, when dealing with members of shipping agreements would be protected by virtue of the combined tariff examination and prohibition powers that the FMC has at its disposal.

xxiii. The recent OECD report referred to earlier, noted that the passage of the United States *Ocean Shipping and Reform Act* (OSRA) in 1998 allowed shippers and carriers active in the US trades to enter into confidential contracts without prior notice. The result of this was said to have been a rapid and massive switch (200% increase) to such confidential agreements, which had the potential to undermine the dominance of conference tariffs (at least for shippers with the power to negotiate lower rates).

xxiv. The report noted that very little traffic (e.g. less than 10% of the USA-Europe traffic) now takes place directly under Conference terms and that this movement towards service contracting between individual shippers and carriers underscored a general erosion of Conference power. This decline was supported by data from individual trades and was said to be the result not only of the regulatory changes governing conferences in many OECD countries, but also from the arrival of large and efficient independent operators.

xxv. The report also noted, however, that conferences still remain an important factor in many trades and the growth in alternative forms of organization (consortia, alliances,

discussion agreements) have raised the potential for sensitive trade data to "bleed" across conference boundaries and to other market actors. In particular, the report noted "that a decline in conference share (and a corresponding rise in non-Conference market share) does not necessarily translate into appreciably greater competition since many independent operators have every incentive to price off Conference rates rather than competing vigorously and independently with Conferences on price (see section 4). Furthermore, many smaller independent operator services may be inferior to those offered by Conference lines in terms of geographic scope and frequency of service."[11]

Australia - Part X of the Trade Practices Act

xxvi. Part X of the Australian general competition law, the Trade Practices Act (TPA), is headed 'International Liner Cargo Shipping'. It contains a wide range of provisions controlling and regulating the activities of ship owners in, and in relation to, the carriage of goods wholly or partly by sea from a place in Australia or place outside Australia (outwards cargo shipping). It draws a broad distinction between outwards cargo shipping under what are referred to as 'conference agreements' and the activities of individual ship owners in relation to outwards cargo shipping.

xxvii. Part X has separate provisions:

(a) establishing a filing system of agreements that form a public register available for inspection;

(b) regulating and controlling outwards cargo shipping activities both under conference agreements and by individual shippers (those who may be deemed to have substantial market power);

(c) obligating conferences to negotiate and provide transparency as to tariff terms and conditions with shippers bodies (e.g. shippers councils or associations);

(d) allowing for the prosecution of offences against the Part dealing with misuse of market power; and

(e) providing civil remedies for shippers in respect of a contravention.

xxviii. In general, Part X of the TPA requires that parties to registered conference agreements negotiate with relevant designated shipper bodies when requested in relation to negotiable shipping arrangements.

xxix. Specifically, the legislation requires that parties to shipping conferences:

(a) take part in negotiations whenever reasonably requested and consider matters raised;

(b) make available to shipper bodies information reasonably necessary for the purposes of negotiation;

(c) provide a duly authorised officer of the Department of Transport with information the officer requires relating to the negotiations; and

(d) give each relevant designated shipper body at least 30 days notice of any change in negotiable shipping arrangements.

[11] OECD Report, paragraph 44.

xxx. Failure to abide by the negotiation obligations could result in de-registration of the conference agreement and exposure to penalty.

xxxi. In March 2000, the Australian Competition and Consumer Commission (ACCC) which administers the TPA, investigated complaints from exporters against a conference agreement registered under Part X, known as the Australian/South East Asia Trade Facilitation Agreement. The ACCC noted that the Agreement allowed parties to discuss and exchange information on matters of interest, such as freight rates. The exporters had complained about excessive and rapid rate rises being imposed by the shipping lines covering the route.

xxxii. The ACCC was required to assess if the services of the lines were 'economic' and 'efficient'. The ACCC noted that in such investigations the concepts had to be translated into meaningful quantitative indicators, requiring quality data. The ACCC noted that it had particular difficulty in getting adequate data from the Secretariat for the Agreement and that in testing the data that was obtained against other available data the ACCC was forced to question the veracity of data related to freight capacity.

xxxiii. In terms of the criteria of economic and efficient services, the ACCC noted that it did not have evidence to prove that the costs of the shipping lines belonging to the Agreement were excessive. According to information received by the ACCC, the Agreement member lines incurred losses on the northbound South East Asian trade in the nine months to March 2000 and that after freight rates had been at an historic low in 1999 the conference agreed on a rate restoration program.

xxxiv. The ACCC was concerned about the speed and size of the proposed rate restoration program. However, in reaching its final view on this issue, the ACCC gave some weight to the fact that the actual rates, at the time, were presently below the minimum benchmark agreed in January 2000 and that further planned rises were not applied. The ACCC noted that it may have reached a different position had additional rises been implemented.

European Union

xxxv. The Treaty establishing the European Community includes Articles 81 and 82, which prohibit, in general anti-competitive agreements and conduct. Article 81, which prohibits anti-competitive price fixing agreements, would have prima facie application to shipping conferences. The Article reads as follows:

Article 81 (ex Article 85)

1. The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;

(b) limit or control production, markets, technical development, or investment;

(c) share markets or sources of supply;

(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of: -

- *any agreement or category of agreements between undertakings; -*
- *any decision or category of decisions by associations of undertakings;*
- *any concerted practice or category of concerted practices,*

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question

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xxxvi. In 1986 the Council of the European Union (EU), in recognition of the perceived stabilising effects on service reliability that could accrue from such competitor agreements, adopted a special Regulation (EEC) No 4056/86 laying down detailed rules for the application of Articles 81 and 82 which provided block exemption to 'liner conferences' from the application of Article 81(3).

xxxvii. In order to prevent liner conferences from engaging in practices which would be incompatible with Article 85(3) and in particular, to prevent the imposition of restrictions on competition which are not indispensable to the attainment of the objectives on the basis of which exemption is granted, certain conditions and obligations to the block exemption were made.

xxxviii. First, Article 4 of the regulation provided that the exemption is to be granted subject to the mandatory condition that agreements did not cause detriment to certain ports, transport users or carriers by applying differentiated conditions of carriage. Second, Article 5 of the Regulation attached to the exemption certain obligations relating, in particular, to loyalty arrangements and to services not covered by the freight charges. Furthermore, it was noted 'there can be no exemption if the conditions set out in Article 85(3) of the Treaty are not satisfied.

xxxix. For that purpose, Article 7 of Regulation No 4056/86 provided a mechanism for monitoring exempted agreements. Where persons concerned are in breach of an obligation laid down in Article 5 of that regulation or where, owing to 'special circumstances', agreements, which qualify for an exemption, have effects incompatible with the conditions laid down in Article 85(3), the European Commission is able to take certain measures. Special circumstances expressly include those created by 'acts of conferences or a change of market conditions in a given trade

resulting in the absence or elimination of actual or potential competition. In that case, Article 7 of the Regulation provides that the Commission is to withdraw the benefit of the block exemption.

xl. An example of how the conduct of shipping conferences can come under scrutiny in the European context can be found in a complaint lodged with the European Commission by the German Shippers Council. In that matter the German Shippers Council alleged anti-competitive price fixing by members of the Far Eastern Freight Conference in relation to intermodal (maritime and land) transport services. The German Shippers Council noted that there were five activities that made up the intermodal service:

(a) Inland transport to the port;

(b) cargo handling in the port (transfer from the mode of inland transport to the vessel);

(c) sea transport (maritime transport from the port of origin to the port of destination);

(d) cargo handling in the port of destination (transfer from the vessel to the mode of inland transport); and

(e) inland transport from the port of destination to the place of final destination.

xli. The German Shippers Council complained that the block exemption provided under Article 3 of Regulation No 4056/86 only covered the third of the above elements, i.e., the maritime element of a shipping conference tariff, whereas the conference agreement extended to all the five elements. In 1994 the European Commission made a decision (confirmed on appeal in February 2002 by the Court of First Instance of the European Communities) that the conference had infringed the provisions of Article 81 by agreeing on prices for inland transport services, in combination with other services.

xlii. In its confirmation of the Commission's decision, the Court noted "the scope of Regulation No 4056/86 is limited to maritime transport services properly so called, that is, to transport by sea from port to port, and does not cover the inland on-or off-carriage of cargo supplied in combination with other services as part of an intermodal transport operation"[12].

[12] Far Eastern Freight Conference v Commission [2002] The Court of First Instance of the European Communities (Third Chamber) T-86/95, Clause 241.

Annex D: Recommendations from OECD

RECOMMENDATIONS EXTRACTED FROM ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT LINER SHIPPING COMPETITION POLICY REPORT - 6 NOVEMBER 2001

i. Countries, when reviewing the application of competition policy in the liner-shipping sector should remove anti-trust exemptions for common pricing and rate discussions. Exemptions for other operational arrangements may be retained so long as these do not result in excessive market power.

ii. Carriers may have legitimate operational needs that require co-operation with other (sometimes competing) carriers. These needs may involve closer working synergies through global alliances and consortia or more trade-specific requirements such as the sharing of ship capacity through slot sharing/chartering arrangements. Countries have in the past recognized this need and have offered carriers protection from domestic anti-trust laws in those instances where these arrangements are not grossly anticompetitive. This report also recognizes that some of these arrangements may be necessary and indeed, beneficial, and does not call into question the principle of limited anti-trust exemptions for operational arrangements in liner shipping. This review, however, has not found convincing evidence that the practice of discussing and/or fixing rates and surcharges among competing carriers offers more benefits than costs to shippers and consumers and recommends that limited anti-trust exemptions *not* be extended to price-fixing and rate discussions.

iii. It would be naï ve, however, to think that this finding will change carriers' minds and/or that carrier counter-arguments to these findings will change shippers' views. Given the degree of polarity in the debate, it is also unlikely that countries will be able to continue the status quo or, alternatively, radically change it. And yet any commercial arena where such a disconnect exists between service providers and customers calls for resolution.

iv. Perhaps a way forward out of this impasse can be built on those points that are mutually agreeable and or recognized by both sides. In light of the findings of this report, countries should review their existing regulations and anti-trust exemptions, as appropriate; to ensure that they best take into account changed market circumstances. Such a review should focus on those points that are mutually agreeable and/or recognized by both sides. In particular four points stand out:

   (a). Both sides agree to the concept of direct negotiations between shippers and carriers.
   (b). Both sides, based on their acceptance of OSRA and individually negotiated rates and conditions, are not averse to contractually protecting (and rendering confidential) key elements of those negotiations.
   (c). Both sides are relying less on collectively agreed rates and conditions.
   (d). Both sides view that carriers can and should seek to co-ordinate with each other on the operational aspects of providing liner services.

v. These four points of agreement serve to frame the following principles that represent the " second-best" way forward on the matter of the organization of liner markets.

Principle 1: Freedom to negotiate

vi. Rates, surcharges and other terms of carriage in liner shipping should be freely negotiated between shippers and carriers on an individual and confidential basis.

vii. Shippers should be able to seek direct one-on-one negotiations with carriers. One form or other of individual contract negotiation should replace Conference collective agreements. Conferences, in the past, have rendered such negotiations more difficult and in some cases have actively worked against this goal. The freedom for shippers and carriers to freely meet and discuss the terms of their relationship should not be constrained by outside parties.

Principle 2: Freedom to protect Contracts

viii. Carriers and shippers should be able to contractually protect key terms of negotiated service contracts, including information regarding rates.

ix. Carriers *and* shippers should be able to stipulate which details of their negotiations they wish to protect from other parties. Carriers should be able to agree that shippers will not reveal negotiated rates to other shippers and shippers should be able to ensure that carriers will not divulge or discuss negotiated rates with other carriers. If both parties can contractually agree on confidentiality terms, these confidentiality terms should be given robust protection. Breach of contractually agreed confidentiality terms should be treated with credible and deterring sanctions. Shippers and Carriers should have the freedom to protect their privacy. In this way, discussion agreements can still operate by focusing on matters that are not considered confidential by shippers or carriers.

Principle 3: Freedom to co-ordinate operations

x. *Carriers should be able to pursue operational agreements with other carriers so long as these do not include price-fixing or confer undue market power to the parties involved.* Carriers should be able to rationalize their operations in order better to deliver services. However, capacity agreements beyond those necessary for operational reasons are tantamount to price-fixing. While capacity agreements within an existing operational grouping such as a Conference and/or Alliance, can be seen to have an operational character, arrangements further outside of such groupings can be seen to be increasingly anti-competitive. The ultimate expression of the potential anti-competitive impact of these arrangements would be a capacity agreement that covered all (or virtually all) of a trade. Such an agreement would be tantamount to manipulating an entire market and should not be allowed. Countries, therefore, should develop protocols (like the EU' s market share test for Alliances and Consortia) to determine the acceptability of such arrangements. The freedom for carriers to manage their affairs should not lead to abuses of market power.

xi. The approach encapsulated in the three principles would go far to remedy the fact that shippers do not have the power to manipulate demand in the way in which carriers can potentially manipulate supply. Of course, an alternative solution to this problem would be to grant shippers anti-trust exemptions allowing them to rig prices in liner shipping markets thus paralleling carriers' ability to discuss and/or set rates. This, however, is the worst possible solution. In our view, it is far preferable to remove from carriers the ability to discuss and/or set rates without shippers express consent than to grant parallel powers to shippers.