DISCLAIMER

This project report/dissertation has been prepared by the author as an intern under the Internship Programme of the Competition Commission of India for academic purposes only. The views expressed in the report are personal to the intern and do not necessarily reflect the view of the Commission or any of its staff or personnel and do not bind the Commission in any manner. This report is the intellectual property of the Competition Commission of India and the same or any part thereof may not be used in any manner whatsoever, without express permission of the Competition Commission of India in writing.
COMPETITION CONCERNS IN SHIPPING CONFERENCES
Prepared By:
Nikhil Gupta
M.A. Economics, Gokhale Institute of Politics and Economics (GIPE)
nikhil_economics@yahoo.co.in

Under the Guidance of
Mr. Augustine Peter
IES, Advisor (Economics)
Competition Commission of India (CCI)
# Competition Concerns in shipping conferences

## Table of Contents

1. Executive Summary

1.1 Contribution of shipping to the world economy

1.2 Structure of the World Fleet

1.3 Importance of liner shipping for India

1.4 Overview of the liner shipping services

2. Liner Shipping Conferences

2.1 Historical origins of the conferences

2.2 Causes for the emergence of the Shipping Conferences

3. Competition in the International Shipping market and the Competition Laws regulating Liner Shipping Conferences

3.1 Cartels

3.2 Level of Concentration of the main shipping routes

3.3 Competition laws regulating liner shipping

3.3.1 European Union

3.3.2 The US

3.3.3 Japan

3.3.4 Australia

3.3.5 India

3.4 Rationale or justification of these exemptions

4. Role of Conferences in India

5. Conference Practices

5.1 Steps to control competition between member shipping companies

5.1.1 Price Discrimination

5.1.2 Pricing and Output rules

5.2 Steps to prevent shippers from using non-member shipping companies

5.2.1 Dual Rate system

5.2.2 Deferred rebate system

5.3 Steps to eliminate non-member shipping companies

5.3.1 Predatory Pricing
6. Impact of Conferences

6.1 Instability in prices
   6.1.1 Stability in demand and supply conditions
   6.1.2 Unstable demand and supply conditions

6.2 Market Instability

6.3 Loss in Social Welfare

6.4 Conference set surcharges

7. Impact of Conferences on the Indian economy

7.1 Problems faced by the Indian shippers

7.2 Suggestion made by affected parties to resolve the issue

8. Other forms of agreements

8.1 Alliances and Consortia

8.2 Discussion Agreements

8.3 Individual Confidential Service Agreements

9. Recent changes in different countries to restore competition and efficiency in the liner shipping industry

9.1 Europe
   9.1.1 Repeal of the Regulation 4056/86
   9.1.2 Impact of the repeal of this regulation
   9.1.3 Alternatives to the Regulation 4056/86

9.2 India

9.3 Japan
   9.3.1 Reviewing exemptions of Antimonopoly Act 1999
   9.3.2 Regulations regarding the involvement of the Fair Trade Commission (Maritime Transportation Law Article 29, Clause 3 & 4)
   9.3.3 The abolition of the Special Shipping Designation (2006)

9.4 The United States

9.5 Australia

10. Concluding Remarks

References
List of tables:

Table 1: Volume Growth in World Trade in Goods (in %)..................................................12

Table 2: Development of International Seaborne Trade, selected years\textsuperscript{a} (Goods loaded)........13

Table 3: Distribution of the world fleet and TEU capacity of fully cellular containerships, by country groups, in 2004, 2005, 2006\textsuperscript{*} (Beginning-of-year figures).................................................................15

Table 4 (a): Summary of Coastal Tonnage as on 31-12-2006..............................................17

Table 4(b): Summary of Overseas Tonnage as on 31-12-2006................................................18

Table 5: India’s Overseas Trade during 2005-06(P) (Share of Indian Shipping).......................19

Table 6: Estimated cargo flows in millions of TEU along major trading routes......................24

Table 7: Evolution of carrier operated fleets and market shares 2000-2006............................29

Table 8: Shares of European routes (outgoing)........................................................................38

Table 9: Shares of North American routes (outgoing)............................................................39

Table 10: Contents and breakdown of reports regarding shipping agreements (FY 2005)........42

Table 11: Relevant Market shares..........................................................................................63

Table 12: IPBCC Trade Growth 1995-2004..............................................................................66

Table 13: Europe/Indian Subcontinent Container Capacity......................................................67

Table 14: Pay-offs of a conference liner and a potential entrant.............................................82

Table 15: THC rates for CFS stuffed export boxes.................................................................89

Table 16: BAF and CAF charged by IPBCC............................................................................90
List of Figures:

Figure 1: International Seaborne Trade for selected years.................................13

Figure 2: World Fleet by principle type of vessels, selected years........................14

Figure 3: Total Container Trade in Millions of TEUs........................................21

Figure 4: Development of the Annual share of World Container Exports of regions in million of TEUs........................................................................................................22

Figure 5: Evolution of Global Liner Market share 2000-2006.................................28

Figure 6: Market Equilibrium showing Deadweight loss......................................35

Figure 7: Capacity and Market Share of Top 10 Carriers 1992-2005...........................40

Figure 8: Europe-Subcontinent Trade Volume 2000-2010.......................................64

Figure 9: IPBCC- Average Eastbound USD Tariff Rate Levels 1995-2004.....................68

Figure 10: IPBCC- Average Westbound USD Tariff Rate Levels 1995-2004..................68

Figure 11: Finding the efficient number of producers.........................................72

Figure 12: Shipping tonnage for the main alliances on major shipping routes............96
Acknowledgements

I am really obliged to my guide Mr. Augustine Peter, IES, Advisor (Economics), Competition Commission of India to provide me with this great opportunity to work on one of the most interesting field, Competition in the International Shipping. I am also indebted for his personal attention and been patient with me. Without his faith in me, this paper would not have possible. Besides, I am also very thankful to my faculty member, Dr. Rupayan Pal, Ph.D., Gokhale Institute of Politics and Economics for helping me to learn how to do research and write a research paper.
Executive Summary

Shipping Conferences have been formed for more than 130 years. Their practices include, price fixing, Loyalty contract system and capacity management. Due to these practices, these conferences are considered as cartels that are prohibited in almost all the Competition laws. These conferences, nonetheless, were given exemptions or immunity in many jurisdictions on basis of the stability that they are supposed to bring in the market. In fact in many places this sector is taken as the ‘special sector’ and thus given exemptions from the Competition laws.

However, these conferences have brought instability in the market and prices which contradicts the main point that was put forward in the favor of conferences. Furthermore, since they are cartels, they lead to the loss in the social welfare by creating deadweight loss and X-inefficiency.

Thus, the trend has been changing to remove these exemptions and immunity given to the shipping conferences historically. In fact, European Union has already repealed the Regulation 4056/86 providing exemption to liner shipping conferences on 25th September 2006 and provided a two years cooling time to the conferences operating to and from Europe to wind up by October 2008. Other major players like the US, Australia and Japan are also reviewing the exemptions they have provided to the liner shipping conferences.

In India, 95% of India’s international trade by volume and 70% by value are seaborne. The U.K.-Calcutta Conference is usually described as the first conference, started in 1875 to provide regular shipping services between Europe and the Indian subcontinent. Soon it came to be known as India Pakistan Bangladesh Ceylon Conference (IPBCC). The IPBCC accounts for 75 per cent of the total cargo being moved on this sector. Shipping Corporation of India (SCI) is a
part of this conference. The benefit to India is only to the extent of the recognition that SCI has achieved.

The Competition Act, 2002 prohibits cartels strictly. At this point of time, when the trend is towards removing the immunity or exemption given to the shipping conferences there is no justification for providing such exemption in the Competition Act, 2002. The liner shipping services come under the preview of the Competition Act, 2002 and any kind of cartelization in this sector will also not be tolerated.

This report is made in partial fulfillment of the Post Graduate course in Gokhale Institute of Politics and Economics as part of the internship programme at the Competition Commission of India (CCI) explaining the cartelization among the liner shipping in the form of conferences and their impact on the world and the Indian economy. The report proceeds in the following manner:

Section 1 describes the importance of shipping for the world economy in terms of the growth in their size and capacity. A close look has been given to the liner shipping industry as this industry is prone to join conferences, not tramp shipping services. It also explains the importance of shipping in India.

Section 2 explains the concept of Shipping Conferences and their historical origins. The main factors contributing to the emergence of these conferences are also covered in this section.

Section 3 explains some very critical concepts and issues covered in this report. As these conferences are, in fact, shipping cartels, the concept of cartels is explicitly explained along with the conditions that are making it possible for the liner shipping industry to form these cartels. Furthermore, the level of concentration in the international shipping market is also explained. Then we come to the competition laws governing liner shipping conferences all over the world explaining the exemptions given to them. The rationale behind the exemption provided to this industry is also discussed in this section.
Section 4 explains the role of the shipping conferences in India explaining the role of India Pakistan Bangladesh Ceylon Conference (IPBCC) mainly.

Section 5 describes the different practices followed by the shipping conferences to prevent competition from the independent liners or to remove the competition from the entire market.

Section 6 covers the impact of these conference practices, in general, affecting the entire world. In section 7 the impact of cartelization on the Indian shippers and exporters and on the Indian economy as a whole has been explained to a large extent. Different suggestions given by the affected groups in order to address the issue are also covered.

Section 8 describes the other forms of agreements that are prevailing in the market and increasing the level of co-operation even though the importance of conferences is reducing.

In section 9, recent developments in different jurisdictions in order to maintain competition and efficiency are discussed. The concluding comments have been given in section 10.
1. Introduction

With the changing economic scenario, factors such as globalization of markets, international economic integration, removal of barriers to business and trade and increased competition have enhanced the need of transportation. It is one of the most important infrastructure requirements which is essential for the expansion of opportunities and plays an important role in making or breaking the competitive positioning.

Within transportation, shipping industry is one of the most globalised industries operating in a highly competitive business environment that is far more liberalized than most of the other industries and is, thus, intricately linked to the world economy and trade. Shipping is the lynchpin of the global economy. Over 90% of world trade is carried by the international shipping industry. Without shipping, it would not be possible to conduct intercontinental trade, the bulk transport of raw materials or the import/export of affordable food and manufactured goods.

Ships are technically sophisticated, high value assets (the largest hi-tech vessel can cost over US $150 to build) and the operation of merchant ships generates an estimated annual income approaching US $500 billion in freight rates, representing about 5% of the total global economy. There are around 50,000 merchant ships trading internationally, transporting every kind of cargo. The world fleet is registered in over 150 nations, and manned by over a million seafarers of virtually every nationality.

World trade continues to grow and the international shipping industry responded to demand for its services. Recently the service has enjoyed what has become the largest sustained period of buoyant markets within living memory. Shipping markets are cyclical and notorious volatile, and today’s unprecedented markets are unlikely to continue forever. However, virtually all sectors of the industry have benefited from the recent global shipping boom.
1.1 Contribution of Shipping to the World Economy

The international shipping industry is responsible for the carriage of 90% of world trade and is the lifeblood of the global economy. Without shipping the import and export of goods on the scale necessary for the modern world would not be possible—half the world would starve and the other half would freeze! However, the growth potential of the shipping industry is directly dependent on growth in world output, world trade, and world maritime trade. In 2005, world output increased 4.8%, as compared with a growth of 5.3% in 2004. World output is expected to increase 4.9% in 2006, and 4.7% in 2007; primarily driven by higher growth in emerging economies. While output growth in emerging/developing countries is expected to be 6.9% in 2006 (7.2% in 2005), output growth in advanced economies is expected to be 3% in 2006 (2.7% in 2005). Over the period 1998-2007, world output is expected to expand 4.1% per annum. During 2005, the volume of world trade increased 7.2%, as compared with a growth of 10.7% in 2004 as shown in table 1. The increase in trade was driven by high oil and metals trade.

Table 1: Volume Growth in World Trade in Goods (in %)

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Exports</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Advanced economies</td>
<td>7.2</td>
<td>5.2</td>
<td>-1.3</td>
<td>2.3</td>
<td>3.4</td>
<td>8.5</td>
<td>5.1</td>
<td>6.6</td>
<td>6.1</td>
</tr>
<tr>
<td>Other emerging market</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>and developing countries</td>
<td>7.6</td>
<td>8.9</td>
<td>2.8</td>
<td>7.4</td>
<td>11.4</td>
<td>14.4</td>
<td>10.8</td>
<td>10.1</td>
<td>10</td>
</tr>
<tr>
<td>Fuel exporters</td>
<td>4.4</td>
<td>5</td>
<td>1.7</td>
<td>3.1</td>
<td>9.1</td>
<td>9.9</td>
<td>6</td>
<td>6.6</td>
<td>5.3</td>
</tr>
<tr>
<td>Nontax exporters</td>
<td>8.9</td>
<td>10.2</td>
<td>3.1</td>
<td>8.9</td>
<td>12.1</td>
<td>16</td>
<td>12.5</td>
<td>11.6</td>
<td>12</td>
</tr>
<tr>
<td><strong>Imports</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Advanced economies</td>
<td>7</td>
<td>5.9</td>
<td>-1.5</td>
<td>2.9</td>
<td>4.7</td>
<td>9.4</td>
<td>5.9</td>
<td>6.3</td>
<td>5.5</td>
</tr>
<tr>
<td>Other emerging market</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>and developing countries</td>
<td>7.4</td>
<td>8.9</td>
<td>3.5</td>
<td>6.6</td>
<td>11.5</td>
<td>16.6</td>
<td>12.1</td>
<td>12.9</td>
<td>12.4</td>
</tr>
<tr>
<td>Fuel exporters</td>
<td>1.3</td>
<td>9</td>
<td>15.3</td>
<td>8.9</td>
<td>6.4</td>
<td>14.4</td>
<td>19.4</td>
<td>16.2</td>
<td>10.3</td>
</tr>
<tr>
<td>Nontax exporters</td>
<td>9.5</td>
<td>8.9</td>
<td>1.4</td>
<td>6.1</td>
<td>12.6</td>
<td>17.1</td>
<td>10.7</td>
<td>12.3</td>
<td>12.8</td>
</tr>
</tbody>
</table>

*Source: International Monetary Fund, ICRA Report, Industry-Shipping and Ports, May 2006*
World seaborne trade increased considerably in 2005, reaching 7.11 billion tons of loaded goods. The annual growth rate, calculated with the provisional data available for 2005, reached 3.8 per cent as shown in table 2 and figure 1.

Table 2: Development of International Seaborne Trade, selected years\(^d\) (Goods loaded)

<table>
<thead>
<tr>
<th>Year</th>
<th>Tanker cargo</th>
<th>Dry cargo</th>
<th>Total (all goods)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>million tons</td>
<td>million tons</td>
<td>million tons</td>
</tr>
<tr>
<td></td>
<td>% change</td>
<td>% change</td>
<td>% change</td>
</tr>
<tr>
<td>1970</td>
<td>1 442</td>
<td>1 124</td>
<td>448</td>
</tr>
<tr>
<td>1980</td>
<td>1 871</td>
<td>1 833</td>
<td>796</td>
</tr>
<tr>
<td>1990</td>
<td>1 755</td>
<td>2 253</td>
<td>968</td>
</tr>
<tr>
<td>2000</td>
<td>2 163</td>
<td>3 821</td>
<td>1 288</td>
</tr>
<tr>
<td>2002</td>
<td>2 139</td>
<td>3 981</td>
<td>1 352</td>
</tr>
<tr>
<td>2003</td>
<td>2 226</td>
<td>4 274</td>
<td>7 4</td>
</tr>
<tr>
<td>2004</td>
<td>2 318</td>
<td>4 528</td>
<td>7 6</td>
</tr>
<tr>
<td>2005</td>
<td>2 422</td>
<td>4 687</td>
<td>7 2</td>
</tr>
</tbody>
</table>

Source: Estimated by the UNCTAD secretariat on the basis of annex II and data supplied by specialized sources.

\(^d\) Includes international cargoes loaded at ports of the Great Lakes-St. Lawrence system for unloading at ports of the same system.

Figure 1: International Seaborne Trade for selected years

Source: UNCTAD, Review of Maritime Transport 2006
Forecasts for 2006 indicate that annual growth rates will probably be slightly lower than those of the previous year, while the distributions of world tonnage by continent and for selected trading blocs are expected to fluctuate marginally. As at 1st January 2006, the world trading fleet was made up of 47,681 ships, with a combined tonnage of 647,075,000 gross tonnes.

1.2 Structure of the world Fleet

The world merchant fleet stood at 960 mln deadweight tons (dwt) on 1 January 2006, this represents a 7.2% increase over the start of 2005, at which time the world fleet has expanded by 4.5% over the 2004. The most recent growth is the highest since the beginning of 1989, when the world merchant fleet started to expand after the contraction of 1980s.

![Figure 2: World Fleet by principle type of vessels, selected years](image)

*Source: Compiled by the UNCTAD secretariat on the basis of data supplied by Lloyd's Register – Fairplay.*

Moreover the world fleet of fully cellular containerships continued to expand substantially in 2005 in terms of both number of ships and their Twenty-foot Equivalent Unit (TEUs = 20’ length x 8’ width x 8.5’ height) capacity; by the
beginning of 2006 there were 3,494 ships with a total of 8,120,465 TEUs, an increase of 8.9 per cent in the number of ships and 13.3 percent in TEU capacity over the previous year.

Table 3: Distribution of the world fleet and TEU capacity of fully cellular containerships, by country groups, in 2004, 2005, 2006* (Beginning-of-year figures)

<table>
<thead>
<tr>
<th>Flags of registration by groups of countries</th>
<th>Number of ships</th>
<th>TEU capacity and percentage shares</th>
</tr>
</thead>
<tbody>
<tr>
<td>World total</td>
<td>3,054</td>
<td>3,206</td>
</tr>
<tr>
<td>Developed market-economy countries</td>
<td>100.0</td>
<td>100.0</td>
</tr>
<tr>
<td>Developed market-economy countries</td>
<td>824</td>
<td>897</td>
</tr>
<tr>
<td>Developed market-economy countries</td>
<td>27.0</td>
<td>28.0</td>
</tr>
<tr>
<td>Major open-registry countries</td>
<td>1,224</td>
<td>1,255</td>
</tr>
<tr>
<td>Major open-registry countries</td>
<td>40.1</td>
<td>39.1</td>
</tr>
<tr>
<td>Total developed market-economy and major open-registry countries</td>
<td>2,048</td>
<td>2,152</td>
</tr>
<tr>
<td>Total developed market-economy and major open-registry countries</td>
<td>67.1</td>
<td>67.1</td>
</tr>
<tr>
<td>Countries in Central and Eastern Europe</td>
<td>35</td>
<td>34</td>
</tr>
<tr>
<td>(including former USSR)</td>
<td>1.1</td>
<td>1.1</td>
</tr>
<tr>
<td>Socialist countries of Asia</td>
<td>136</td>
<td>117</td>
</tr>
<tr>
<td>Socialist countries of Asia</td>
<td>4.5</td>
<td>3.6</td>
</tr>
<tr>
<td>Developing countries</td>
<td>779</td>
<td>848</td>
</tr>
<tr>
<td>Developing countries</td>
<td>25.5</td>
<td>26.5</td>
</tr>
<tr>
<td>of which:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Africa</td>
<td>9</td>
<td>11</td>
</tr>
<tr>
<td>Africa</td>
<td>0.3</td>
<td>0.3</td>
</tr>
<tr>
<td>America</td>
<td>282</td>
<td>314</td>
</tr>
<tr>
<td>America</td>
<td>9.2</td>
<td>9.8</td>
</tr>
<tr>
<td>Asia</td>
<td>488</td>
<td>523</td>
</tr>
<tr>
<td>Asia</td>
<td>16.0</td>
<td>16.3</td>
</tr>
<tr>
<td>Europe</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Europe</td>
<td>0.0</td>
<td>0.0</td>
</tr>
<tr>
<td>Oceania</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Oceania</td>
<td>0.0</td>
<td>0.0</td>
</tr>
<tr>
<td>Other, unallocated</td>
<td>56</td>
<td>55</td>
</tr>
<tr>
<td>Other, unallocated</td>
<td>1.8</td>
<td>1.7</td>
</tr>
</tbody>
</table>

Source: Compiled by the UNCTAD secretariat on the basis of data supplied by Lloyd’s Register – Fairplay.

* Percentage shares are shown in ratios.

Ship sizes also continued to increase with average carrying capacity per ship growing from 2,235 TEUs in 2005 to 2,324 TEUs in 2006, reflecting the commissioning of larger ships to achieve economies of scale.
1.3 Importance of Liner Shipping in India

In view of the continued liberalization and increasing globalization of the Indian economy, India’s overseas trade has been growing at a rapid pace. Presently, India’s exports formed about 0.8% of the world merchandise exports and currently, India is ranked as the 31st leading exporter and 24th leading importer in world merchandise trade.

During the post liberalization period i.e., FY1992-2006, India’s trade has performed at a much better rate than in the pre-reform period. India’s trade has been increasing since 2002. In value terms, its exports are almost US $100,607 million and imports are around $140,238 million leading to a large trade deficit.

Approximately 95% of India’s international trade by volume and 70% by value are seaborne. India has 12 major and 185 minor/intermediate ports along its coastline of around 7,517 Kms. India ranks 15th in the world by flag of registry forming approximately 1.5% of the world total tonnage with a favorable average age as compared to the world fleet. Contributing approximately 0.3 percent to the country’s GDP, share of Indian shipping industry in India’s sea borne trade has declined from 40.7% in FY 1988 to around 30-32% over the last few years. In terms of India’s overseas trade, the share of Indian shipping industry is only around 14% (ICRA Research Analysis, 2006).

Indian shipping tonnage which was only 1.92 lakhs Gross Tonnage (GT) on the eve of Independence increased to 70.5 lakhs GT on 01.06.2004 stands at 84.17 lakhs GT with 774 vessels and 139.22 lakhs dead weight tonnage (dwt) as on 31.12.2006.
Table 4(a): Summary of Coastal Tonnage as on 31-12-2006

<table>
<thead>
<tr>
<th>Sl. No.</th>
<th>Type of vessel</th>
<th>No. of Vessel</th>
<th>G.T.</th>
<th>D.W.T.</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Dry Cargo Liner</td>
<td>68</td>
<td>106027</td>
<td>154706</td>
</tr>
<tr>
<td>2</td>
<td>TUG</td>
<td>154</td>
<td>40986</td>
<td>14347</td>
</tr>
<tr>
<td>3</td>
<td>Dry Cargo Bulk Carrier</td>
<td>10</td>
<td>233982</td>
<td>382877</td>
</tr>
<tr>
<td>4</td>
<td>Tanker (Product Carrier)</td>
<td>10</td>
<td>27676</td>
<td>42602</td>
</tr>
<tr>
<td>5</td>
<td>Tanker (Crude Oil Carrier)</td>
<td>2</td>
<td>50080</td>
<td>82246</td>
</tr>
<tr>
<td>6</td>
<td>Passenger –own-Cargo</td>
<td>20</td>
<td>72656</td>
<td>24739</td>
</tr>
<tr>
<td>7</td>
<td>Passenger Service</td>
<td>26</td>
<td>8420</td>
<td>841</td>
</tr>
<tr>
<td>8</td>
<td>Ethylene Gas Carrier</td>
<td>3</td>
<td>8727</td>
<td>6558</td>
</tr>
<tr>
<td>9</td>
<td>Ro-Ro</td>
<td>1</td>
<td>958</td>
<td>1386</td>
</tr>
<tr>
<td>10</td>
<td>Dredgers</td>
<td>19</td>
<td>79761</td>
<td>16965</td>
</tr>
<tr>
<td>11</td>
<td>Offshore Supply Vessel</td>
<td>87</td>
<td>87352</td>
<td>103130</td>
</tr>
<tr>
<td>12</td>
<td>Specialized Vessel for Offshore Services</td>
<td>36</td>
<td>81678</td>
<td>47373</td>
</tr>
<tr>
<td>13</td>
<td>Port Trust and Maritime Boards</td>
<td>90</td>
<td>44218</td>
<td>15427</td>
</tr>
<tr>
<td>Total</td>
<td></td>
<td>526</td>
<td>640717</td>
<td>873231</td>
</tr>
</tbody>
</table>

Source: Ministry of Shipping, Annual Report 2006-07
### Table 4(b): Summary of Overseas Tonnage as on 31-12-2006

<table>
<thead>
<tr>
<th>Sl. No.</th>
<th>Type of vessel</th>
<th>No. of Vessel</th>
<th>G.T.</th>
<th>D.W.T.</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Dry Cargo Liner</td>
<td>3</td>
<td>21674</td>
<td>25632</td>
</tr>
<tr>
<td>2</td>
<td>Cellullar Container</td>
<td>9</td>
<td>129103</td>
<td>166026</td>
</tr>
<tr>
<td>3</td>
<td>Dry Cargo Bulk Carrier</td>
<td>35</td>
<td>2169043</td>
<td>3778380</td>
</tr>
<tr>
<td>4</td>
<td>Ore-Oil Bulk Carrier</td>
<td>2</td>
<td>294955</td>
<td>186257</td>
</tr>
<tr>
<td>5</td>
<td>Tanker Crude Oil Carrier</td>
<td>51</td>
<td>2997206</td>
<td>5420851</td>
</tr>
<tr>
<td>6</td>
<td>Oil Tanker Product Carrier</td>
<td>30</td>
<td>2357242</td>
<td>2965933</td>
</tr>
<tr>
<td>7</td>
<td>Passenger Cum-cargo</td>
<td>3</td>
<td>11257</td>
<td>9663</td>
</tr>
<tr>
<td>8</td>
<td>Acid Carrier</td>
<td>4</td>
<td>74817</td>
<td>116639</td>
</tr>
<tr>
<td>9</td>
<td>LPG Carrier</td>
<td>15</td>
<td>318877</td>
<td>385452</td>
</tr>
<tr>
<td>10</td>
<td>Supply Vessel</td>
<td>20</td>
<td>41249</td>
<td>41180</td>
</tr>
<tr>
<td>11</td>
<td>RO-RO</td>
<td>2</td>
<td>17790</td>
<td>18889</td>
</tr>
<tr>
<td>12</td>
<td>Dredger</td>
<td>2</td>
<td>14565</td>
<td>-</td>
</tr>
<tr>
<td>13</td>
<td>Tug</td>
<td>2</td>
<td>2327</td>
<td>2663</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td></td>
<td><strong>248</strong></td>
<td><strong>7578774</strong></td>
<td><strong>13049070</strong></td>
</tr>
<tr>
<td>Total of Coastal and Overseas</td>
<td>774</td>
<td>8417493</td>
<td>13922301</td>
<td></td>
</tr>
</tbody>
</table>

*Source: Ministry of Shipping, Annual Report 2006-2007*
As shown in table 5, the share of Indian shipping in the carriage of general cargo during the year 2005-06 was about 3.9%, dry bulk cargo 8%, liquid bulk cargo 26.4%. However, the overall share of Indian ships in the total overseas trade was around 13.7%.

### Table 5: India’s Overseas Trade during 2005-06(P)
(Share of Indian Shipping)

<table>
<thead>
<tr>
<th>Type of Cargo</th>
<th>Indian Lines</th>
<th>Foreign Lines</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>General Cargo</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Loaded</td>
<td>1610(3.2%)</td>
<td>49417(96.8%)</td>
<td>51027</td>
</tr>
<tr>
<td>Unloaded</td>
<td>2338(4.6%)</td>
<td>48506(95.4%)</td>
<td>50844</td>
</tr>
<tr>
<td>Total</td>
<td>3948(3.9%)</td>
<td>97923(96.1%)</td>
<td>101871</td>
</tr>
<tr>
<td><strong>Dry Bulk</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Loaded</td>
<td>5099(4.8%)</td>
<td>10095(95.2%)</td>
<td>106094</td>
</tr>
<tr>
<td>Unloaded</td>
<td>9532(12.2%)</td>
<td>68374(87.8%)</td>
<td>77906</td>
</tr>
<tr>
<td>Total</td>
<td>14631(8.0%)</td>
<td>169369(92.0%)</td>
<td>184000</td>
</tr>
<tr>
<td><strong>POL/Product &amp; Other</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Loaded</td>
<td>2000(8.6%)</td>
<td>21358(91.4%)</td>
<td>23358</td>
</tr>
<tr>
<td>Unloaded</td>
<td>40537(29.4%)</td>
<td>97373(70.6%)</td>
<td>137910</td>
</tr>
<tr>
<td>Total</td>
<td>42537(26.4%)</td>
<td>118731(73.6%)</td>
<td>161268</td>
</tr>
<tr>
<td><strong>Grand Total</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Loaded</td>
<td>8709(4.8%)</td>
<td>171770(95.2%)</td>
<td>180479</td>
</tr>
<tr>
<td>Unloaded</td>
<td>52407(19.7%)</td>
<td>214253(80.3%)</td>
<td>266660</td>
</tr>
<tr>
<td>Total</td>
<td>61116(13.7%)</td>
<td>386023(86.3%)</td>
<td>447139</td>
</tr>
</tbody>
</table>

*Source: Major and Non-Major Ports, Ministry of Shipping, Annual Report 2006-07
(P): Provisional*

To compare the robust growth being witnessed in the global container trades *vis-à-vis* Indian container trades, about 85 per cent of general cargo in developed world was containerized, while in India it is only about 55 per cent.
1.4 Overview of the Liner shipping services

Marine transport on routes between foreign countries, or international shipping, can be broadly divided into shipping via liner shipping and tramp services depending on the type of shipping. Shipping via liner shipping refers to the shipping of cargo received from any number of shippers, with shipping schedules and shipping rates made publicly available and advertisements placed far and wide for shippers to use services. Shipping via tramp services, on the other hand, refers to the shipping of cargo received from specific shippers using specialized vessels.

LINER trade and shipping is significant to the world economy, since it involves the transportation of finished or semi-finished goods, invariably high value exports. Today, the majority of liner shipping services consist of container shipping whereby goods are shipped in standard sized containers. As liner shipping services involve shipping cargo from any number of shippers, routes stopping off at numerous ports along the way are determined in order to provide services line with shippers’ various shipping needs.

Globalization of international production and the international division of labor has impacted container trade resulting in a massive growth in container trade primarily from Asia in the past five years (Figure 3). Annual growth rates of container trade were two to five times as high as the annual growth rates of the real world gross domestic product. With average growth rates of world total container trade close to 8% during the last ten years, container transport has more than doubled. However, significant variations in experienced annual growth rates exist. From 1997 to 2002 ups and downs of annual growth rates amounted to variations between 4 and 7 percent points. For instance, in 2001 the annual growth was close to 4% and jumped up to around 11% in 2002. Since then the growth rate remained above 10% in 2003 and 2004. The future prospect of the global liner industry is a slowdown of annual growth rates that are expected to fall below 8% in the long term after 2005 as import substitution reaches a balance.
The volume of container cargo shipped around the world in 2006 from figure-3 came to be above 90.0 million TEUs (twenty-foot equivalent unit). The breakdown of volume according to different routes shows that North American routes (between Asia and North America) and European routes (between Asia and Europe) are the highest volume routes, with routes within Asia accounting for roughly 50% of the global volume of container shipping.

The driving forces behind the growth in container trades are the countries in the Far East and particular in China. From 1995 until now container exports in TEUs from the Far East to the world tripled. The share of the world total container export in TEUs of Far Eastern countries was growing steadily during that time. Compared to 40% in 1995 it reached around 55% in 2004 (Figure 4).
Shippers purchase services by the container based on information provided directly by the shipping company or details of services printed in publicly available industry journals, selecting any port of call along a route as the point of origin or destination. Shippers can also purchase services for a fixed period such as one year by signing a service contract with a shipping company outlining terms and conditions of trade for the relevant period.

From the point of view of shipping companies, the key to increasing their rate of return is to increase the operating rate from each individual vessel, meaning that it is essential to determine the routes and frequency of their services so as to meet shippers’ various needs as closely as possible. One of the common management issues facing all shipping companies is the fact that there tends to be an imbalance between the quantity of incoming and outgoing shipping according to the volume of cargo shipped and seasonal factors.
2. Liner Shipping Conferences

It gives an edge to the ship-owners to behave co-operatively and exploit the shippers to the maximum extent and how they do it will be discussed in this section.

The international shipping industry has been characterized by a remarkable degree of collusion for more than a century. These collusive agreements are more commonly known as ‘shipping conferences’. The two features that are most astonishing are the length of time that some of these conferences have endured, and the wide latitude that regulatory authorities have given them. Firms in many industries have attempted to collude but typically they have met with only fleeting success. Yet in both instances ocean shipping is an exception to the rule.

Conferences are organizations of shipping lines operating on a particular route. The principal activity of shipping conferences is to meet frequently in order to fix freight rates (or passenger fares in the case of passenger shipping conferences). Freight rates are typically set by commodity, with the highest value commodities charged higher rates than lower value commodities. The process of fixing rates can be immensely complicated, because lower cost carriers will prefer that the cartel fix lower rates than higher cost carriers will prefer. Simple fixing of rates may not be satisfactory, however. On the one hand, there is no control over non-price competition. For example, carriers might all wish to schedule vessels in a similar way with the result that vessels are still not carrying at full capacity. This is especially likely if the conference rates are higher than the competitive rates, which results in a lower quantity demanded. It might also be true that if firms are not competing on price, they may have an incentive to invest in higher quality vessels so as to attract more customers. Finally, the cartels must be able to detect and deter member firms from secretly cutting rates and thereby attracting larger volumes. Clearly ocean carriers have much to gain from colluding on more than price.
Table 6: Estimated cargo flows in millions of TEU along major trading routes.

<table>
<thead>
<tr>
<th>Year</th>
<th>Asia-USA</th>
<th>USA-Asia</th>
<th>Asia-Europe</th>
<th>Europe-Asia</th>
<th>Europe-USA</th>
<th>USA-Europe</th>
</tr>
</thead>
<tbody>
<tr>
<td>2002</td>
<td>8.81</td>
<td>3.90</td>
<td>6.13</td>
<td>3.94</td>
<td>2.59</td>
<td>1.50</td>
</tr>
<tr>
<td>2003</td>
<td>10.19</td>
<td>4.12</td>
<td>7.06</td>
<td>4.00</td>
<td>2.56</td>
<td>1.58</td>
</tr>
<tr>
<td>% change</td>
<td>15.70</td>
<td>5.60</td>
<td>15.20</td>
<td>1.50</td>
<td>-1.0</td>
<td>5.30</td>
</tr>
</tbody>
</table>


A closer look at table 6 shows that cargo flows are not balances on the most important routes. To manage such imbalances, to meet the growing demand, and to improve cost efficiency liners engage more and more in various forms of cooperation.

As discussed in Section 2.1 and shown in Table 4, for the dates in September 2005 and September 2004 the top ten operators of containerships increased their carrying capacity by 12.4% to 4.6 million TEUs-49.2% of the world’s total containership carrying capacity. Similarly, the top 20 liner operators increased by 12.1% to 6.6 million TEUs-71.0% of the world’s total container carrying capacity during the same period. The top 30 carriers now reach a joint market share of 92%. Not only this, the top 10 carriers currently have a market share (measured by share of total carrier capacity) of approximately 58% vs. 50% ten years ago (Figure 5).

Some cartels coordinate sailing schedules or create exclusive territories (control over specific ports or ranges of ports), and there has been at least one case in which the firms even restricted investment in newer, larger and faster ships. One of the most prevalent innovations introduced by conferences is a mechanism known as the "pool." In a pool, the firms are each assigned a percentage of the total freight (or passengers) carried or revenue earned. The secretary of the conference collects data from the firms in order to make the pool operational. Similarly, quota arrangements might be devised and enforced such that lower cost firms carry greater amounts of freight than higher cost firms, which leads to greater aggregate profits. Still, agreements that extend beyond simple price-fixing are more costly to negotiate and carry out.
2.1 Historical Origins of the conferences

As part of the international shipping market, international cartels called shipping conferences have continued to be formed and exempted from competition law in each country for over 130 years. The current international shipping market and the completions are affected by the historical background of international shipping and the framework of competition policies. In order to gain a clear understanding of the current international shipping market, it is therefore essential to take a look at the history of the international shipping industry.

Historical accounts of steamship companies in the nineteenth century confirm that much of the motivation for collusion was to raise prices and thwart further price competition. Steamship firms serving North Atlantic routes attempted to collude as early as the 1840s, shortly after the steamship was first applied there. The first cartels that had some staying power, however, served the trade between Britain and India, and Britain and China. By the beginning of the twentieth century, liner shipping companies had established cartels on nearly all world trade routes.

From the earliest times, the cartels were not without their critics. Investigations into their affairs have been conducted periodically. The first substantial investigation reported in the U.K. in 1909. The investigation into shipping rings concluded that overall the conferences were desirable because of the increased price stability. This position was supported by the majority of shippers as well as by the carriers. The report recommended strengthening the countervailing powers of shippers to reduce the risk of conferences abusing their power. However, nothing was done.

The U.K.-Calcutta conference is usually described as the first conference, and is certainly the first modern conference. It started in 1875, consisting of five carriers: the P&O (Peninsular and Oriental Steam Navigation Co.), the B.I. (British India), and the City, Clan, and Anchor Lines (Aldcroft, 1968, p.343). Within a decade or so, the conference extended its coverage of ports of origin from only U.K. to the rest of northern Europe.
Although the U.K.-Calcutta Conference was clearly the first modern conference, Sloan (1998) shows that there was a conference from 1850 to 1856 on the North Atlantic involving the British and North American Steam Packet Company (the Cunard Line) and the New York and Liverpool United States Mail Steamship Company (the Collins Line). Dyos and Aldcroft (1969, p.269) assert that Glasgow ship owners were fixing rates with a conference system in the 1860s. In addition, the Transatlantic Shipping Conference was formed in 1868. It was concerned, however, with issues such as uniform bills of lading and improving methods for inspecting cargo, and did not become involved in rate setting until 1902 (Smith, 1906a, p.253). Although conferences are generally associated with international shipping, Armstrong (1991) finds evidence of precursors in British coastal shipping as early as the 1830s.

In the 30 years following the formation of the U.K.-Calcutta conference, conferences were formed on most of the major trade routes out of the U.K. and northern Europe. The Far East Conference (later renamed the Far East Freight Conference and is still in operation) was founded in 1879 by John Swire, a shipping agent widely viewed as the driving force behind the spread of conferences (Marriner and Hyde, 1967). The Australia conference was started in 1884, the South African conference in 1886, the West African and northern Brazil conferences in 1895, the River Plate conference in 1896, the west coast of South America conference in 1904, and a conference covering the North Atlantic trade around 1900 (Kirkaldy, 1914, p.188; Dyos and Aldcroft, 1969, p.269). Most of these conferences covered the outbound trade from Europe, leaving the inbound trades of mostly bulk commodities to tramp vessels (Marx, 1953, p.47; Dyos and Aldcroft, 1969, p.269).

Shipping conferences continued to develop after that, centered mainly on routes to and from Europe.
the establishment of US antitrust legislation in 1890 at a time when cartels themselves were not against the law.

2.2 Causes for the emergence of Conferences

It is commonly argued by historians of shipping conferences that they were formed in response to excess capacity. A good summary of the conventional view is Greenhill (1998). The common version of this argument is that the opening of the Suez Canal in 1869, by shortening the distance between Europe and Asia, created excess capacity, but this version is not supported by the evidence (Sjostrom, 1989b). Sailing vessels could not use the Canal. Existing steamships had been built for short routes through the Mediterranean Sea or the Red Sea, and most of them were scrapped after the opening of the Canal. Moreover, after the opening of the Canal, there were increases in net steamship production, which increased later in the 1870s with the introduction of the double expansion engine. The continued production of steamships is inconsistent with industry-wide excess capacity.

If it was not industry-wide excess capacity that triggered the establishment of the conference system, what did trigger it? Though there are many reasons like high entry and exit barriers, high concentration-few competitors, homogeneity of the products etc. that support these conferences, in our view, conferences can be due to the presence of excess capacity or, it could be vice-versa. Thus we will explain some main reasons for the emergences of these conferences in next sub-sections.

2.2.1 Excess Capacity

Firms in some industries may keep excess capacity for forestalling entry or expansion by rivals. Excess capacity can deter entry by forming expectations on the part of the potential entrants that dominant firms are capable of responding aggressively to threats.
Liner shipping firms have long argued that the task of providing adequate service to shippers while earning reasonable rates of return on capital requires at least some form of limited antitrust immunity. Even then excess capacity is and has been a persistent problem that could be a major cause of inefficiency.

Figure 5 shows the performances of a selection of carriers among the TOP 30 lines. It is based on the ratio between market shares at 1st January 2000 and 1st January 2006. For example, CSCL market share rose from 1.67% to 3.80%, i.e. an increase of 126%. Market shares are deducted from the existing on board TEU capacities of carriers, compared with the total capacity effectively deployed on liner trades.

**Figure 5: Evolution of Global Liner Market share 2000-2006**
Table 7 shows that the total market share of top 25 liners was 74.6% in January 2000 and it increased gradually to 83.7% by January 2006 while the top 5 liners concentration is even more prominent, i.e. 32.8% in January 2000 to 42.1% in January 2006 with the growth of 14.7%. The total market capacity and the carrier’s market shares are computed daily by BRS-Alphaliner.

Table 7: Evolution of carrier operated fleets and market shares 2000-2006
Between January 2000 and January 2006, the TEU capacity deployed on liner trades has risen from 5,150,000 TEU to 9,135,000 TEU, i.e. a 77.4% increase, according to BRS-Alphaliner data. It means that in order to simply keep their market shares during that period, carriers had to increase their fleet capacities by
77.4%. Those which failed to invest, or charter, enough to keep the pace have lost market share.

As discussed earlier in section 1.2 and shown in table 3, the world fleet of fully cellular containerships continued to expand substantially in 2005 in terms of both number of ships and their TEU capacity; by the beginning of 2006 there were 3,494 ships with a total of 8,120,465 TEUs, an increase of 8.9% in the number of ships and 13.3% in their TEU capacity over the previous year.

Carriers contend that because scheduling requirements unique to liner shipping firms constrains their ability to adjust capacity to meet market conditions, liner shipping capacity is essentially fixed in the short term while demand is variable. And because individual firms have incentive to minimize unit costs by maximizing capacity utilization on every voyage, the threat of destructive price wars looms large. Consequently, carriers have advocated that governments leave them free to form collusive arrangements called conferences in which members are free to meet to discuss and fix prices.

However, the data show that the liners have been able to increase their capacity to maintain their market shares. Looking at the rise per annum (p.a.) in the TEU capacity, for most of the carriers, it has been more than 10 per cent p.a. which cannot be considered less. As earlier said, excess capacity is only one of the many reasons in the support of conferences, there are many other reasons.

2.2.2 High Entry and Exit barriers

The prices of all main types and sizes of ships have increased significantly over the last years. During 2004, price increases were more pronounced for tankers and bulk
carriers and reflected the high demand for these modes of transport. New shipbuilding prices for Panamax dry bulk carriers and VLCC tankers fared particularly well, with a 40% increase in 2004, while prices for Suezmax tankers and Handymax bulk carriers increased by 36.6% and 36.4%, respectively. In general, the upward trend of shipbuilding prices reflects increased ship ordering in the wake of optimistic forecasts for international trade.

Ships are technically sophisticated, high value assets (larger ships can cost over US $100 million to build). The more successful a cartel is in obtaining profits, the more incentives there are for new firms to enter the route to share in the spoils. Shipping conferences typically have employed two kinds of strategies against entrants and potential entrants. First, they often engage in predatory behavior (cutting of rates below the Average Variable Cost, AVC) in response to entry. Rate wars reduce entrants' incentives to stay in the business. Rate wars also send a signal to potential entrants that the cartel will respond strongly to any entry. This is meant to deter firms from entering the conference's domain. There is evidence that conferences were more likely to engage in predatory behavior against weak entrants than well-established firms with substantial financial resources.

The second strategy that shipping conferences employ against entrants is to offer exclusive contracts to their customers. With such contracts, exporters or importers receive a discounted freight rate in exchange for a commitment to exclusively use the services of conference vessels. Breaches of the commitments carried financial penalties. In the case of one such exclusive contract, the deferred rebate, conferences withhold all or a portion of the rebate earned during a given period of time until continued allegiance to the conference could be verified, usually through the examination of statistics or by simply having agents observe the loading of competitors' ships.

Due to the high fixed costs involved in this industry, it acts as a barrier to exit as well because there are high sunk costs. Many economists believe that fixed costs are important because the higher that they are relative to variable costs, the more
likely it is that vigorous price competition will lead to business bankruptcies. This threat of bankruptcy in the presence of price competition provides a strong incentive for firms to collude. The higher the fixed costs are, the higher the sunk costs and the greater the barriers to entry as well as exit.

Besides, these two reasons, the kind of services provided by the providers is also homogenous or identical and the dependability of the consumers on their services is also very high. All these reasons taken together lead to the increasing concentration among the liners which lead to the possibility of cartelization in the liner shipping industry. We will discuss this in the next section.

3. **Competition in the International shipping market and Competition Laws regulating Liner Shipping Conferences**
Due to the above mentioned reasons, the possibility of liners to engage in the concerted practices has increased that leads to the possibility of cartelization among the liners. The practices of shipping conferences are considered to have an effect of eliminating or reducing competition. Thus, it is very important to know what cartels are and how do they affect competition in an adverse manner. This section will throw some light on cartels and their effects as well as the level of competition in the international shipping market with the Competition Laws governing liner shipping conferences in different countries.

3.1 Cartels

The argument that conferences are cartels is at least as old as Marshall (1921, p.433), who argued that conferences could act as monopolists because there were substantial scale economies in the industry that led to a small number of firms.

Under the Competition Act 2002, cartels are prohibited as they are likely to cause an appreciable adverse effect on competition in India. In fact, anti-competitive activities, including cartels, taking place outside India but having effect on competition in India would fall within the ambit of the Act and can be inquired into by the Commission. The Act thus has extra territorial reach (section 32).

As defined by Organisation for Economic Co-operation and Development (OECD), a cartel is a formal agreement among firms in an oligopolistic industry. Cartel members may agree on such matters as prices, total industry output, market shares, allocation of customers, allocation of territories, bid-rigging, establishment of common sales agencies, and the division of profits or combination of these. Cartel in this broad sense is synonymous with "explicit" forms of collusion and in the Competition Act, 2002; it’s “implicitly” mentioned. Cartels are formed for the mutual benefit of member firms. The theory of "cooperative" oligopoly provides the basis for analyzing the formation and the economic effects of cartels. Generally
speaking, cartels or cartel behaviour attempts to emulate that of monopoly by restricting industry output, raising or fixing prices in order to earn higher profits.

Cartels are anti-competitive and thus presumed bad. Cartels shield participants from competition allowing them to charge higher prices and removing the pressure on them to improve the products they sell or find more efficient ways in which to produce them. It is the customers (companies and consumers) who foot the bill in terms of paying higher prices for lower quality and narrower choice. This not only makes consumers and businesses suffer but also adversely affects the competitiveness of the economy as a whole.

Therefore, they are prohibited in all the Competition Commission Laws running worldwide with some specific sectors being exempted from the law. Cartelization works in secrecy and provides the service providers to charge high prices from the service users. A cartel, where firms may agree to fix prices, restrict output, freeze market shares, or divide markets, directly raises price and causes a wealth transfer from consumers to the cartel as well as a dead weight loss. The deadweight welfare loss is a measure of the dollar value of consumers' surplus lost (but not transferred to producers) as a consequence of a price increase.

If we go by the Marshall’s argument that conferences can act as monopolist, the loss in the social welfare caused by the deadweight loss can be shown diagrammatically.

Figure 6 shows how deadweight loss arises in the monopoly. Industry output in case of monopoly reduces from \( Q_c \) to \( Q_M \) and price increases from \( P_c \) to \( P_M \). Thus, it is like a two-sided curse- Output falling and Price increasing. As defined above, deadweight loss is a measure of dollar value of consumer surplus lost (but not transferred to producers) as a consequence of price increase. This loss is equal to the area \( \Delta ACM \) which is neither retained by consumers nor transferred to producers.

**Figure 6: Market Equilibrium showing Deadweight loss**
From society’s perspective, the costs of forming and enforcing the cartel ("rent seeking") are also welfare-reducing. The problem of cartel is not only one of price but also one of costs. While cartels may provide the basis for extracting higher prices from customers, the lack of competitive stimulus may raise the costs of producing the goods and services it sells. The lack of incentives or competitive pressures may lead oligopolistic firms to neglect minimizing unit costs of production, i.e., to tolerate "X-inefficiency" (phrase coined by H. Leibenstein). Included in X-inefficiency are wasteful expenditures such as maintenance of excess capacity, luxurious executive benefits, political lobbying seeking protection and favorable regulations, and litigation.

Clearly due to all these negative effects that cartel has, they are nowhere tolerated and are regarded as totally unacceptable behaviour on the part of the companies getting into them and breaking the competition laws. Heavy fines are imposed as such fines are supposed to act as deterrent to others. For example, EC fined the Otis, KONE, Schindler and ThyssenKrupp groups €992 million for operating cartels for the installation and maintenance of lifts and escalators in Belgium, Germany, Luxembourg and the Netherlands in 2007.
India, however, is to say a ‘cartel heaven’ for the companies because so long as the Competition Act, 2002 does not get amended, cartels can continue to grow and prosper at the cost of consumers. In this situation, they can very well capture the markets and freeze out competition till the time there is no regulatory authority effectively in place to check them.

If there is effective competition in the market, cartels would be difficult to form and sustain. Some of the conditions that are conducive to cartelization are:

- high concentration-few competitors
- high entry and exit barriers
- homogeneity of the products (similar products)
- similar production costs
- excess capacity
- high dependence of the consumers on the product
- history of collusion.

Most of these conditions can be found in liner shipping as discussed in the previous section. And most of them lead to the reduction in competition among the liner shipping market. Thus, though the level of concentration is considered to be high in the liner shipping, it has been falling in the main shipping routes, namely, European Union and North America. Although this process is not new, it has gained strength in recent years. Moreover the exemptions provided by different jurisdictions to the liner shipping are also under review. In this section we will discuss these two topics in detail.
3.2 Level of Concentration of the main shipping routes

European and North American routes account for the most of the cargo shipping to and from India. Thus in this section, we will look at the competition on these two main routes. We will not treat container liner cartels as one single operator, rather this section will look at the indicators of concentration based on the shares of individual member companies. This calculation will, no doubt, give us an idea of the level of concentration in the container trade but it is not the complete picture as their relevant markets are different. Relevant markets, as defined by the Competition Act 2002, is determined with reference to the relevant geographic market (the area in which the conditions of competition for supply of goods or provision of services or demand of goods or services are distinctly homogenous and can be distinguished from the conditions prevailing in the neighboring areas) or with reference to the relevant product market (a market comprising all those products or services which are regarded as interchangeable or substitutable by the consumers, by reason of characteristics of the products or services, their prices and intended use) or with reference to both of the markets.

The concentration ratio of the top five firms and the HHI (Herfindahl-Hirschman Index) are on the decline on both European and North American routes. Competition on European routes has decreased slightly during the period from 2001 to 2004, from 709 to 662 based on the Herfindahl-Hirschman Index (HHI) and from 48.5% to 44.7% based on the concentration ratio for the top five firms (CR5).

The reason for this is thought to be a fall in the share of the market held by major shipping companies over the last few years as a result of a slump in the shipping market (Table 8). The number one share of the market has increased due to Maersk Sealand’s takeover of P&O Nedlloyd in February 2006. The total share held by European Conference member companies on the European routes, on the other hand, has fallen slightly from 69% in 2001 to 65% in 2004.
Table 8: Shares of European routes (outgoing)

<table>
<thead>
<tr>
<th></th>
<th>2001</th>
<th>2002</th>
<th>2003</th>
<th>2004</th>
</tr>
</thead>
<tbody>
<tr>
<td>Hanjin (South Korea)</td>
<td>12.3%</td>
<td>12.2%</td>
<td>12.5%</td>
<td>12.5%</td>
</tr>
<tr>
<td>Maersk Sealand (Denmark)</td>
<td>11.8%</td>
<td>12.3%</td>
<td>11.0%</td>
<td>10.5%</td>
</tr>
<tr>
<td>P&amp;O Nedlloyd (Holland)</td>
<td>9.7%</td>
<td>8.4%</td>
<td>8.4%</td>
<td>8.0%</td>
</tr>
<tr>
<td>Evergreen (Taiwan)</td>
<td>7.8%</td>
<td>8.3%</td>
<td>7.5%</td>
<td>7.5%</td>
</tr>
<tr>
<td>CMA CGM (France)</td>
<td>4.2%</td>
<td>5.2%</td>
<td>5.8%</td>
<td>6.2%</td>
</tr>
<tr>
<td>APL (Singapore)</td>
<td>6.9%</td>
<td>5.8%</td>
<td>5.8%</td>
<td>5.8%</td>
</tr>
<tr>
<td>MSC (Switzerland)</td>
<td>2.2%</td>
<td>4.9%</td>
<td>5.1%</td>
<td>5.1%</td>
</tr>
<tr>
<td>Hapag-Lloyd (Germany)</td>
<td>5.5%</td>
<td>4.5%</td>
<td>4.5%</td>
<td>4.9%</td>
</tr>
<tr>
<td>NYK (NYK Line, Japan)</td>
<td>5.5%</td>
<td>4.5%</td>
<td>4.5%</td>
<td>4.8%</td>
</tr>
<tr>
<td>COSCO (China)</td>
<td>3.9%</td>
<td>5.1%</td>
<td>4.6%</td>
<td>4.6%</td>
</tr>
<tr>
<td>OOCL (Hong Kong)</td>
<td>4.2%</td>
<td>3.9%</td>
<td>3.9%</td>
<td>4.5%</td>
</tr>
<tr>
<td>MOL (Mitsui OSK Lines, Japan)</td>
<td>5.5%</td>
<td>5.2%</td>
<td>4.5%</td>
<td>4.4%</td>
</tr>
<tr>
<td>Kawasaki Line (Japan)</td>
<td>3.5%</td>
<td>4.5%</td>
<td>4.5%</td>
<td>4.3%</td>
</tr>
<tr>
<td>China Shipping (China)</td>
<td>2.5%</td>
<td>2.7%</td>
<td>4.1%</td>
<td>4.1%</td>
</tr>
<tr>
<td>HMM (South Korea)</td>
<td>5.5%</td>
<td>4.5%</td>
<td>3.9%</td>
<td>3.8%</td>
</tr>
<tr>
<td>Yangming (China)</td>
<td>3.5%</td>
<td>3.2%</td>
<td>3.2%</td>
<td>3.2%</td>
</tr>
<tr>
<td>Norasia</td>
<td>1.4%</td>
<td>1.0%</td>
<td>1.9%</td>
<td>2.3%</td>
</tr>
<tr>
<td>MISC (Malaysia)</td>
<td>2.1%</td>
<td>1.3%</td>
<td>1.3%</td>
<td>1.5%</td>
</tr>
<tr>
<td>ANL</td>
<td>0.0%</td>
<td>0.3%</td>
<td>1.3%</td>
<td>0.8%</td>
</tr>
<tr>
<td>Others</td>
<td>2.1%</td>
<td>1.8%</td>
<td>1.6%</td>
<td>1.6%</td>
</tr>
<tr>
<td>Total share</td>
<td>100%</td>
<td>100%</td>
<td>100%</td>
<td>100%</td>
</tr>
<tr>
<td>HHI</td>
<td>769</td>
<td>696</td>
<td>665</td>
<td>662</td>
</tr>
<tr>
<td>CR5 (top five concentration ratio)</td>
<td>48.5%</td>
<td>47%</td>
<td>45.2%</td>
<td>44.7%</td>
</tr>
<tr>
<td>Total share for European Conference member companies</td>
<td>69.2%</td>
<td>64.9%</td>
<td>64.6%</td>
<td>65.0%</td>
</tr>
</tbody>
</table>

* Shaded rows indicate member shipping companies belonging to the European Conference

(Source: compiled by the Fair Trade Commission of Japan based on data provided by Mitsui OSK Lines)

Competition on North American routes has also decreased during the period from 2001 to 2004, from an HHI of 641 to 563 and from 45.5% to 39.8% on a CR5 basis. The reason for this is thought to be an increase in the share of the market held by new operators like ANL Container Line (Australia which entered North American routes in May 2003), as reflected in the increase under “Others” in table 9 (from 11.8% to 13.9%). As with European routes, the number one share of the market on North American routes has also increased due to Maersk Sealand’s takeover of P&O Nedlloyd.
The share held by member companies belonging to the Transpacific Stabilization Agreement (TSA) has also fallen significantly from approximately 80% to around 60% due in part to the withdrawal of Maersk Sealand. French firm CMA CGM also withdrew from the TSA at the end of 2005, as did Mitsui OSK Lines from an incoming transpacific stabilization agreement (WTSA, Westbound Transpacific Stabilization Agreement) in June 2005. According to a survey of shippers, asking them to evaluate how reasonable shipping rates are, a far higher percentage of shippers feel that rates on North American routes are unreasonable (45%) than those who feel that they are reasonable (22%). Moreover, between 40% and 50% of shippers feel that surcharges levels charged by the companies are unreasonably high, a significantly higher percentage than those who feel that they are reasonable (14%-18%). Reasons given for surcharge levels being unreasonable include the
following: (1) there is no competition, (2) shippers have no opportunity to negotiate, with charges being revised on a regular basis and (3) there is a lack of transparency arising from the fact that the calculation methods used and the reasons for imposing surcharges are often unclear.

Besides, a fundamental basis for the growth of total container trade is an adequate increase of capacities. To cope with growing demand, carriers have approximately tripled capacity during the last 10 years. This distribution of the additional capacity has also been mirrored by the significant consolidation in the liner industry as a result of company growth and mergers and acquisitions. The top 10 carriers currently have a market share (measured by share of total carrier capacity) of approximately 58% vs. 50% ten years ago (Figure 7).

**Figure 7: Capacity and Market Share of Top 10 Carriers 1992-2005**

Thus, though the conferences are treated as cartels, however, the main question is if conferences as cartels are presumed to be bad then why they are tolerated in different jurisdictions by giving exemptions to these conferences. We will take up this topic now.
3.3 *Competition Laws regulating Liner Shipping*

Liner shipping refers to that portion of the shipping industry that follows regular schedules. Liner shipping firms promise to depart a port on a given day regardless of whether the ship is full. Liner services involve higher fixed costs than tramp shipping not only because of larger administrative overhead, but also because the necessity of following a fixed schedule creates more stringent capacity requirements. The number of vessels required for a given liner service is determined principally by frequency, distance and speed.

It is a widespread international practice that cargo liners meet at regular conferences to fix prices and quotas for individual routes. Liners claim that conferences are a necessary pre-condition for the provision of reliable services in light of the unique nature of this industry. In contrast, it has been shown that conferences can themselves give rise to instability while there is little evidence that competition leads to the destabilizing effects.

International shipping co-operation can be broadly divided into three categories: (1) international shipping cartels known as shipping conferences, (2) consortiums and alliances, and (3) tramp vessel service agreements. Co-operation among the liner shipping has been increasing over time in these forms. In fact, while the share of conferences is falling in the world total container trade, the share of consortiums and alliances are increasing rapidly. This kind of co-operation has affected competition adversely all over the world including India as well. Its effect can be seen in respect of trade, the prices paid by the shippers and the total social welfare loss due to the X-inefficiency and Deadweight loss. These concepts will be discussed in detail later in this paper. Due to the increasing co-operation among the liner shipping, they are able to charge higher rates. Dissatisfaction with the rates charged by ocean liners to carry cargo between nations has long been expressed in various parts of the world, but recently complainants have become increasingly articulate. Thus, these agreements have been a challenge for the competition commission in many countries.
Table 10: Contents and breakdown of reports regarding shipping agreements (FY 2005)

<table>
<thead>
<tr>
<th></th>
<th>Rate estimation</th>
<th>Surcharges</th>
<th>Other surcharges</th>
<th>Withdrawing, joining, changing companies name</th>
<th>Basic agreements</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>BAF</td>
<td>CAF</td>
<td>THC</td>
<td>Subtotal</td>
</tr>
<tr>
<td>Container liner cartels</td>
<td>54</td>
<td>323</td>
<td>161</td>
<td>5</td>
<td>43</td>
</tr>
<tr>
<td>Consortia and alliances</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Tanker vessel agreements</td>
<td>1</td>
<td>5</td>
<td>0</td>
<td>0</td>
<td>5</td>
</tr>
<tr>
<td>Total</td>
<td>55</td>
<td>323</td>
<td>161</td>
<td>5</td>
<td>43</td>
</tr>
</tbody>
</table>

Source: Classified and compiled by the Fair Trade Commission of Japan (2006)

BAF- Bunker Adjustment Factors;
CAF- Currency Adjustment Factor;
THC-Terminal Handling Charges;

Generally, competition laws usually address the problems of anti-competitive practices in three ways: (1) relationships and agreements among otherwise independent firms, (2) actions by a single firm, and (3) structural combinations of independent firms.

The first category, agreements, is often subdivided for analytic purposes into two groups: “horizontal” agreements among firms that do the same things, and “vertical” agreements among firms at different stages of production or distribution. The second category is termed as the “abuse of dominant position” primarily concerned with the conduct of the individual enterprises. The third category, often called “mergers” or “acquisitions,” usually includes other kinds of structural combination, such as share or asset acquisitions, joint ventures, cross-shareholdings and interlocking directorates.

Agreements may permit the group of firms acting together to achieve some of the attributes of monopoly, of raising prices, limiting output, and preventing entry or innovation. The most troublesome horizontal agreements are those that prevent
rivalry about the fundamental dynamics of market competition, price and output. Competition Act, 2002 strictly prohibit any agreement to fix prices, limit output, rig bid, or divide markets. To enforce such agreements, competitors may also agree on tactics to prevent new competition or to discipline firms that do not go along; thus, the laws also try to prevent and punish boycotts. Horizontal co-operation on other issues, may also affect competition, but whether the effect is positive or negative can depend on market conditions. Thus, most laws deal with these other kinds of agreement by assessing a larger range of possible benefits and harms, or by trying to design more detailed rules to identify and exempt beneficial conduct.

Vertical agreements try to control aspects of distribution. The reasons for concern are the same—that the agreements might lead to increased prices, lower quantity (or poorer quality), or prevention of entry and innovation. Because the competitive effects of vertical agreements can be more complex than those of horizontal agreements, the legal treatment of different kinds of vertical agreements varies even more than for horizontal agreements. As mentioned in the Competition Act, 2002, basic types of vertical agreements are resale price maintenance, tie-in-arrangements, refusal to deal and exclusive supply and exclusive dealership agreements. They can result in curbing market abuses by distributors. Agreements granting exclusive dealing rights or territories can encourage greater effort to sell the supplier’s product, or they can protect distributors from competition or prevent entry by other suppliers. Depending on the circumstances, agreements about product combinations, such as requiring distributors to carry full lines or tying different products together, can either facilitate or discourage introduction of new products.

Thus, shipping Conferences can be treated as horizontal agreements as the agreements are taken between the enterprises who are engaged in the identical or similar provision of services, however, they are provided exemptions in many jurisdictions. Globally, antitrust immunity for shipping conferences has long history. The US provides the anti-trust immunity to the carrier agreements. Under
EC Council Regulation No. 4056/86, there is a block exemption from the prohibition of liner conference agreements, decisions and concerted practices which restrict or distort competition. In India, however, there is no specific Anti-trust Immunity or Block Exemptions granted to the Liner Conferences. There are, thus, major differences worldwide in the way Competition Rules are applied to the Liner Shipping. But of late the movement has been towards the review of these exemptions. Many countries are reviewing the regulations governing liner shipping and analyzing whether, in the present situations, these exemptions for freight rate fixing, supply and market regulation by liner shipping conferences are justified. In fact, EC has abolished the block exemption from their competition laws for shipping conferences.

There is no international agreement or standardized legislative approach to liner shipping conferences. Under the auspices of both the United Nations (UN) and the Organization for Economic Cooperation and Development (OECD) formal statements on liner shipping and conferences have been adopted, but not all nations participate in or endorse the work generated by these two organizations.

For example, the "United Nations Convention on a Code of Conduct for Liner Conferences", developed by the United Nations Conference on Trade and Development (UNCTAD), was adopted in 1974 and came into force in 1983 with ratification by the requisite number of countries representing 25% of the total volume of world trade. It effectively allows the lines of the countries at each end of the conference trade to enter into commercial sharing agreements that allocate equal shares of the cargo between their ships. Third country shipping lines have the right to acquire a significant part of the conference trade, such as 20%. This provision for discrimination in favor of national flags is considered by many to be inconsistent with the principle of free and fair competition. India is also a party to the UN Code for Liner Conferences.

The Organization for Economic Cooperation and Development (OECD) is guided by a "Code of Liberalization of Current Invisible Operations" (CLIO) that was
originally adopted in 1961. Under the Code, governments refrain from taking action which would be contrary to the principle of free circulation of shipping in international trade and free and fair competition. As an extension to the CLIO, the Council of the OECD endorsed a set of "Common Principles of Shipping Policy for Member Countries" in 1987. The Principles advise OECD member governments to safeguard and promote open and fair competition, prevent the abuse of a dominant position by any commercial party, and limit involvement to minimal intervention. Nevertheless, Annex II of the Common Principles recognizes that liner shipping conferences may be advantageous when basic guidelines and rules for them have been established and followed.

In 1998, the Maritime Transport Committee of the OECD published its "Conclusions on Promotion of Compatibility of Competition Policy Applied to International Liner Shipping". It was concluded that there is a need to promote compatibility of competition policies and that Member countries should seek practical solutions in cases of incompatibility. When implementing competition policy to the liner sector, key objectives such as free and fair competition, maintenance of open trades, market access, economic efficiency, and transparency of laws, regulations and rule-making processes, are to be pursued.

Many OECD countries have traditionally granted some form of anti-trust immunity or exemption to liner conferences. For comparison purposes, examples of conference legislation in different jurisdictions are important to consider and understand. India’s major over-seas trading blocks is the EU which can not be separated from liner shipping. Since U.S. liner shipping policy is also relevant, we will consider the US as well. Thus, an attempt has been made in the following section to broadly indicate the basic Competition statute/Regulation vis-à-vis specific regulation or rules governing Shipping as also the implementing agency in the European Union, United States, India, Japan and Australia.
3.3.1 The European Union

The treaty establishing the European Community (the EC Treaty), which came into effect in 1958, prohibits agreements and contracts that restrict competition under Article 81 (Article 85 at that time). The EU competition rules are modeled on the presumption that competition provides the best services to the consumer at the most affordable prices. For that reason, the starting point under the treaty is that competition should not be distorted and that any exemption from that rule needs to be justified. Furthermore, ambiguities in regulations regarding the field of international shipping in the EC Treaty led most people to believe that international shipping was exempted from the EC Treaty.

Agreements which restrict competition within the meaning of Article 81(1) of the Treaty (such as price fixing and capacity regulation agreements) could only be exempted if they fulfill the four cumulative conditions laid down in Article 81(3) of the Treaty, namely:

1) the agreement must contribute to improving the production or distribution of goods or contribute to promoting technical or economic progress (efficiency);
2) consumers must receive a fair share of the resulting benefits (pass-on);
3) the restrictions must be indispensable to the attainment of these objectives (indispensability); and finally
4) the agreement must not afford the parties the possibility of eliminating competition in respect of a substantial part of the products in question (no elimination of competition).

In the European Union, there is no sectoral exemption of maritime transport from European Commission (EC) antitrust law. However, under EC Council Regulation No. 4056/86, there is a block exemption from the prohibition of liner conference agreements, decisions and concerted practices which restrict or distort competition. The Regulation stipulates certain conditions for the exemption of shipping
conferences. For example, the conference agreement, decision or concerted practice should not cause harm to ports, transport users or carriers. Rates and conditions should not differ according to the country of origin or destination, or the port of loading or discharge, unless such rates or conditions can be economically justified. EC decision has helped clarify the way Regulation 4056/86 is to be interpreted. For example, Individual Service Contracts (ISC) between conference members and shippers are not to be restricted by a conference, and setting inland rates jointly is not considered to be within the scope of permitted practices covered under this Regulation.

In 2003, EC decided to review the Regulation 4056/86 in light of the cumulative conditions of Article 81(3) of the Treaty and to check whether the justification for price fixing and supply regulation by liner conferences in Regulation 4056/86 could (still) be said to be valid in light of the present market circumstances. On the basis of the explanations provided by European Liners Affairs Association (ELAA) and European Shippers Council (ESC), EC had decided to repeal the Regulation 4056/86 and infact had asked the conferences to cease their practices of price fixing and supply regulation by October 2008 because of the appreciable adverse effect of these practices on the competition. Moreover, they were not found indispensable to achieve the required objectives. Thus, as a result of the confirmation that the conference system is not indispensable for the efficient working of the liner shipping industry the Council Regulation 1419/2006 of September 25th 2006 repealed regulation 4056/86 laying down detailed rules for the application of Article 81 and 82 to maritime transport. Besides, the Commission will issue Guidelines on the application of the competition rules to maritime transport before the end of the transitional period of two years.
3.3.2 The United States

Historically the U.S. government has played a more active role in regulating carriers in the U.S. liner shipping markets although the trend has been one towards deregulation. In the early part of the 20th century, during an era of monopoly busting in other industries, the U.S. followed the lead of the British government and granted the ocean shipping industry limited protection from antitrust regulations in the U.S. by allowing companies servicing the liner shipping markets in the U.S. to form conferences and benefit from a system of price-fixing. This limited immunity to antitrust regulations was put forth in the Shipping Act of 1916.

Continued pressure from shippers to make the liner industry more competitive, along with the advent of containerization and intermodalism, led to the more market oriented provisions of the U.S. Shipping Act of 1984. The spread of containerization and the undermining of shipping conferences by the US Shipping Act of 1984 boosted the share of the market held by non-member shipping companies, making it increasingly difficult for shipping conferences to impede the activities of non-member vessels. This prompted shipping conferences to establish stabilization agreements (also known as the “discussion agreements”). The purpose of stabilization agreements is to stabilize shipping routes through initiatives such as sharing information regarding matters such as shifts in supply and demand on certain routes and agreeing guidelines in relation to rate restoration and surcharges. One of the main examples is the Transpacific Stabilization Agreement (TSA), which was signed by a total of 14 companies (nine shipping conference member companies and four non-member companies) in 1989 to cover routes between Asia and North America. Although stabilization agreements involve sharing information regarding shifts in supply and demand and agreeing guidelines on matters such as the extent of increases in shipping rates with an eye to stabilizing shipping routes, they do not have any direct authority over shipping rates.
In 1998, the United States passed the *Ocean Shipping Reform Act of 1998* (OSRA) which came into force on May 1, 1999. Adoption of the OSRA was the result of a number of years of debate and it did not totally deregulate the liner industry servicing the U.S. and it did not revoke the antitrust immunity for carrier agreements however, it did make some market-oriented adjustments to the U.S. Shipping Act of 1984.

The **OSRA has retained the antitrust exemption** and has the broad aims of: (1) providing for an efficient and economic transportation system; (2) encouraging development of a U.S.-flag liner fleet; (3) contributing to national security needs; (4) promoting growth and development of U.S. exports; and (5) regulating the common carriage of goods by water. The OSRA contains provisions designed to stimulate greater competition within and between conference and non-conference lines and has also reduced some bureaucratic procedures.

OSRA greatly impacted liner conferences, limiting their power and effectiveness, and became a model for Canada and its subsequent reform. It implements three principles which mitigate the effectiveness of anti-trust exemptions in the liner industry:

1. Freedom of carriers and shippers to negotiate rates, surcharges and terms on an individual and confidential basis;

2. Freedom of carriers and shippers to protect contractually the confidentiality of terms and rates, especially rates; and

3. Freedom of carriers to make operational and capacity agreements with other carriers, as long as that does not confer upon them undue market power.

Two years later the FMC issued an interim report on OSRA. A primary aim of OSRA was to produce a more market driven shipping industry. With confidential contracting, post-OSRA, shippers were negotiating one-on-one with carriers.
Conferences for the US trades declined in number, from 32 in 1997 to 22 in 2000, replaced by non-binding discussion agreements which included lines which had been outside conferences. Most carrier agreements were service related rather than price related. Rates and services had become more market-driven. The Federal Maritime Commission (FMC) moved to internet contract filing. Most contracts, after two years, were individually negotiated rather than "standard" contracts.

Two pro-competitive changes in particular were introduced: (1) carriers were required to make public all essential terms of service contracts and (2) conferences could no longer prohibit their members from entering into individual service contracts. The FMC is in charge of monitoring agreements between carriers under the Shipping Act.

Specifically, a few years immediately after OSRA the industry moved to bilaterally negotiated service contract carriage, away from conference rates. After OSRA, there was consolidation among "ocean transport intermediaries" (OTI), which are subject to oversight by the FMC. Non-vessel-operating common carriers (NVOCC) complained that they were at a disadvantage because they must publish their rates, but carriers can enter into confidential contracts with shippers.

In essence, OSRA was able to bring more competition to the industry, but under closer inspection the evidence is not so compelling. OSRA allowed individual carriers to negotiate with shippers on their own, but did not specifically outlaw price fixing through conferences on U.S. trade routes.

In 2002, a bill was submitted to the US House of Representatives on the abolition of the exemption from the Anti-trust Act but it was abandoned. In 2004, an independent body, Anti-trust Modernisation Commission (AMC) had been established for the purpose of conducting evaluation of the anti-trust immunities. The AMC has accordingly taken up, in September 2006, a review of the anti-trust Immunity granted to the shipping industry, under Shipping Act, 1984. Thus, though
nothing has been decided so far in the US case but they also look like to follow the lines of the European Union in abolishing the shipping conferences.

3.3.3 Japan

Japan's Marine Transportation Law of 1949 granted immunity from the Act concerning Prohibition of Private Monopolization and Maintenance of Fair Trade. This earlier exemption was so broad as to exempt every agreement or act between carriers regarding freight rates, fares and fees and conditions of transport. The only caveat is that the exemption would be rescinded where acts substantially restrict competition as to cause unjust raising of rates, fares or fees. In other words, Japanese law permits an agreement between ship operators on freight rates or other conditions of transportation, routes, sailing and/or loading, to be exempt unless ship operators act unfairly or unduly increase freight rates or other charges by substantially restricting competition.

Shipping conferences and other international shipping cartels were also sanctioned under the Marine Transportation Law and were exempted from the Antimonopoly Act on the condition that they were reported to the Minister of Transport. Following the US Shipping Act, the Japanese Marine Transportation Law adopted the principle of open membership whereby it was not permitted to refuse membership to companies applying to become members of a shipping conference. Similarly, the law also introduced tight restrictions on the conduct of shipping conferences, including provisions preventing deferred rebate systems, the practice of fighting ships and the discriminatory treatment of shippers using non-member shipping companies. All carriers, regardless of conference membership, must make tariffs for all cargo public and any falsifications of said tariffs are prohibited under the Law. In addition, carriers are not allowed to unfairly discriminate between shippers with respect to cargo space and loading or unloading of cargo or between Japanese exporters and foreign exporters.
There were no regulations set out, however, regarding penalties or business improvement orders by the government for those engaging in prohibited activities. Furthermore, although the law stated that shipping conferences would not be exempted from the Antimonopoly Act if they used unfair business practices or effectively restricted competition within specific fields of business by unfairly raising rates or tariffs, there were no provisions relating to the involvement of the Fair Trade Commission.

As a result of the enactment of the Marine Transportation Law, the parts of the Far East Freight Conference (FEFC) relating to rate agreements were granted exemption from legal proceedings. As proceedings in the FEFC looked set to drag on, the Fair Trade Commission stepped in and suspended legal proceedings in November 1950, revising the dual rate system at the time in accordance with five principles designed to prevent shipping conferences from placing excessive constraints on shippers. These five principles were:

- The difference between shipping rates for contracted goods owners and non-contracted goods owners shall not exceed 9.5%;
- FOB shipments whereby a foreign buyer specifies a shipping vessel shall be clearly exempted from the Conference contract, with contracted goods owners able to ship their cargo via non-member vessels in such cases without suffering any penalty or sanctions;
- If, after requesting a shipment by sending a notice to the Conference branch manager in Yokohama, a contracted goods owner does not receive a reply stating that there is freight space available within thirty days of the date on which the relevant notice was received by the branch manager within seven days, the contracted goods owner may obtain the required freight space from an alternative source without infringement of their rights;
- The amount of damages payable to the conference by any contracted goods owner due to the breach of the conference contract shall be 50% of the total
shipping rates that the relevant goods owner would have paid if they had shipped the relevant cargo via a conference vessel;

- Either party may terminate the contract by giving three months prior notice in writing to the other party.

In order to clarify the relationship between unfair business practices under the Marine Transportation Law and the Antimonopoly Act, the Fair Trade Commission released the Designation of Specific Unfair Business Practices in the Shipping Industry (known as the “Special Shipping Designation”) in January 1953, the contents of which set out the same prohibited activities stipulated in the Marine Transportation Law.

With Japanese shipping experiencing a rapid recovery, Japan had to start thinking about its interests as a shipping provider as well as a user. This, combined with a prolonged recession and slump in shipping rates in the international shipping industry, led to revisions being made to the Marine Transportation Law in 1959. The result was that dual rate systems, the use of fighting ships and the discriminatory treatment of shippers using non-member shipping companies were removed from the list of prohibited activities under the Marine Transportation Law.

In 1999, the Law was amended as a result of the passage of the Law for the Adjustment of the Immunity System from the Anti-Monopoly Law. The block exemption from the Anti-monopoly Law 1999 was maintained, but the Law was amended to allow the Ministry of Transport to apply specific criteria to each carrier agreement to determine if it was unduly anti-competitive. The criteria are as follows:

1. Users' interests must not be unduly impaired.
2. No undue discrimination must arise as a result of the agreement
3. Participation in or withdrawal from the agreement must not be unduly restricted
4. Contents of the agreement are at the minimum level judging from the purpose of the agreement.
Moreover, in the light of the present scenario, the underlying practice of dual rate system are no longer justified, a public comment was made on April 13, 2006 to abolish the Special Shipping Designation of 1959.

### 3.3.4 Australia

Similarly to other developed countries, Australia exempts liner shipping from anti-trust regulation. Specifically, shipper lines are exempt from part X of the Trade Practice Act 1974 (“the TPA”) which prevents anti-competitive behaviour in all of the Australia’s industries. The reason for exempting the industry is the same as in the other countries, to ensure the stability of rates and supply.

Essentially, Part X allows lines, under certain conditions and obligations, to enter into cooperative arrangements, including the joint provision of services and agreements on capacity, service levels and prices charged.

Part X defines a conference quite broadly, ranging from full conferences to nonbinding discussion agreements, as well as technical agreements covering slot swapping and rationalization of sailings. The agreements must be registered at the Department of Transport and Regional Services.

In 1999, a review of the TPA Part X was carried out by the Productivity Commission (an advisory body to the Government). As a result, in 2000 amendments where made to the Part X of the TPA. Part X would be retained but the Minister for Transport and Regional Services and the Australian Competition and Consumer Commission (ACCC), would be granted increased powers to identify and address concerns about anti-competitive behaviour (including undertaking on its own initiative an investigation with a public benefit test) and to deal with concerns about the operation of agreements which potentially cover a large proportion of a trade.
Specifically, section 10.41 of Part X requires that parties to a registered conference agreement shall take part in negotiations (in relation to negotiable shipping arrangements) with a relevant designated shipper body whenever reasonably requested by the shipper body. In addition, the parties to an agreement must notify each relevant designated shipper body of any changes in negotiable shipping arrangements.

In the Productivity Commission Report 2004, The Department of Transport and Regional Services proposed that Part X should be amended to explicitly make offers made to shippers by the parties to a conference agreement, including a discussion agreement, in the course of negotiations conducted pursuant to S 10.41 [which relates to negotiation concerning changes to conference agreements], binding on those conference parties if accepted by the shippers, so long as the lines involved remain parties to the agreement.

The future of Part X is under review. In October 2005, the Australian Government released a report by the Productivity Commission which had recommended, as a preferred option, the repeal of Part X. If Part X were repealed, liner conference agreements would be subject to the competition provisions of Part IV, unless authorized under Part VII. In fact, any decision has not been made yet.

On 11 August 2005, the Australian Peak Shippers Association (APSA) lodged a complaint with the ACCC alleging that the Australia to Europe Liner Association (AELA) had contravened S. 10.41 of Part X of the Trade Practices Act 1974 (“the Act”) in negotiations on a proposed increase in outward terminal handling charges. APSA alleged that AELA breached S. 10.41 by refusing to allow it to sight contracts between AELA and the provider to AELA member lines of stevedoring services, P&O Ports, during the negotiations.

On 15 February 2006, the ACCC decided, pursuant to s. 10.48(2) of the Act, to broaden the investigation to address the issue of whether AELA had observed the
minimum statutory period of notice of the increase in charges required, under s.10.41(2), to be given to APSA. The parties’ records indicated that AELA had given APSA a period of only 15 days’ notice of the increase, whereas the statute provides for a period of 30 days’ notice, unless the shipper body agrees to a lesser period.

On 10 January 2006, Shipping Australia Limited (SAL), the secretariat for a number of shipping conferences including AELA, issued a media release stating that the members of AELA intended to terminate their conference agreement with effect from 14 March 2006. According to the media release, the termination was a result of a number of developments including member lines having withdrawn or given notice to withdraw from the conference.

The regulatory arrangements principally affect Australia’s outward (export) trades. Inward conference agreements are permitted but are regarded as matters for regulation by the country of export. Thus, Australia has undertaken a fundamental review of its policy towards liner conferences and competition in maritime transport.
3.3.5 India

In India, there is no specific Anti-trust Immunity or Block Exemptions granted to the Liner Conferences. Nor, for that matter, is there any particular statute governing the anti-competitive practices except the Monopolies & Restrictive Trade Practices (MRTP) Act, 1969 which governs all the industries and activities. Although existing for more than thirty years, it has failed to do much in checking the cartels that have operated in several industries.

It was only in 2003, a comprehensive Competition Act was enacted on the recommendations of a high level committee, shifting the focus of the law from curbing monopolies to promoting competition. The Act seeks to repeal the MRTP Act and to dissolve the MRTP Commission from the date it is notified as such by the Central Govt. Such a notification is yet to be issued by the Central Government.

The objectives of the Act, as indicated in the preamble, are to prevent anti-competitive practices, promote and sustain competition, protect the interests of the consumers and ensure freedom of trade. The provisions of the Act extend to the whole of India except the State of Jammu & Kashmir. The term “Enterprise” is very comprehensive and, inter alia, includes private sector undertakings, public sector undertakings, Govt. Departments performing non-sovereign functions for consideration, but does not include government undertakings performing sovereign functions and the departments dealing with atomic energy, currency, defense and space.

What is to be noted in the matter of trade practices, from the competition angle, is that there is no specific provision in the Competition Act 2002, providing for grant
of anti-trust immunity or Block Exemption for the shipping lines—be they a conference or non-conference operator. The nearest to the immunity against competitive aspects in the liner shipping one can gleam, in India, is the fact that India had ratified the UN Code of Conduct for liner Conferences which permits rate-fixing and capacity adjustments among the Member-lines of a Conference.

The Competition Act, 2002, prohibits any agreement which causes, or is likely to cause, appreciable adverse effect on competition in markets in India and cartel agreements are presumed to have appreciable adverse effect on competition, in markets, in India. The term ‘Cartel’ has been defined in section 2(c) of the Act as under:

“Cartel” includes an association of producers, sellers, distributors, traders or service providers who, by agreement amongst themselves, limit, control or attempt to control the production, distribution, sale or price of, or, trade in goods or provision of services;

Section 3(3) of the Competition Act, 2002 provides that any agreement entered into between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprises or association of persons, including cartels, engaged in identical or similar trade of goods or provision of services, which—

(a) directly or indirectly determines purchase or sale prices;
(b) limits or controls production, supply, markets, technical development, investment or provision of services;
(c) shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way; and
(d) directly or indirectly results in bid rigging or collusive bidding;

shall be presumed to have an appreciable adverse effect on competition provided that nothing contained in this sub-section shall apply to any agreement entered into
by way of joint ventures if such agreement increases efficiency in production, supply, distribution, storage, acquisition or control of goods or provision of services.

In many jurisdictions, price fixing agreements and resale price maintenance are per se illegal. However, in India an attempt is made to evaluate the pro-competitive features of a restrictive trade practice against its anti-competitive effects in order to decide whether or not the practice should be prohibited. This is known as the “Rule of Reason”.

In line with the international trend, in the Competition Act 2002, cartels meant exclusively for exports have been excluded from the provisions relating to anti-competitive agreements as they are not expected to have appreciable adverse effects on the competition in the Indian markets. Thus, section 3(5) of the Act exempt the right of any person to export goods from India to the extent to which the agreement relates exclusively to the production, supply, distribution or control of goods or provision of services for such export.

Anti-competitive activities, including cartels, taking place outside India having effects on competition in India would fall under the ambit of the Act, and can be inquired into by the Commission. The Act, thus, has extra territorial reach (section 32). If, for instance, cartelization in Europe’s paper industry does not affect India, it is not of our concern then, however, if there is cartelization in the European shipping industry, it will affect India, as we are their trade partners and Indians will have also have to bear the burden of high amount charged by them, and thus, fall under the ambit of the Competition Act, 2002.

Keeping this in mind, Competition Commission of India have reportedly made a reference to the Union Ministry of Shipping recently to advocate the shipping firms not to decide freight collectively and the Ministry should have advised the shipping firms not to indulge in anti-competitive practices.
3.4 *Rationale or justification for these exemptions*

The brief overview of the competition legislation governing liner shipping of various countries in the preceding section suggests that there are more similarities than differences in the general approach to exemptions. While some economies such as the European Union describe the general conditions for granting exemptions, others tend to be more specific by listing particular sectors or activities, such as in the United States. In almost all of the economies reviewed, the competition laws apply to both public and private sector enterprises, and exempt areas that are covered by other government legislation and regulations.

The granting of exemptions does not necessarily imply the weakening of competition law enforcement. Indeed, it may well be that such instances are necessary for furthering the objectives of competition law policy. For example, virtually all competition laws strictly prohibit horizontal price agreements between competitors, as they tend to lessen competition. However, various forms of non-price horizontal agreements do not necessarily have the same effect and may be in the public interest if inter-firm cooperation results in standardization of products, improved quality and increased information, so that consumers have better choices. In fact in case of the developing countries, waivers or exemptions can be seen as compensation for their trade disadvantages since those unfavorable conditions and market failures cannot be overcome in the near future. Moreover, they can be regarded as temporary adjustment allowances to enable developing countries to participate in world trade as equally matched competitors.

This is in line with an argument for waivers: developing countries need help because they cannot compete under the given circumstances. This might be an
unpopular claim which is less likely to meet with approval than the charge that the developed countries are gaining because of unfair trade practices. But open trade is fair trade, and since free trade is not a realistic option nowadays, temporary waivers can, within limits, be considered as an instrument to allow developing countries to engage in international trade.

Now the question arises if exemptions are deemed necessary, what is their underlying rationale, the parameters of the exemptions and whether the stated policy objectives can be attained by means that are less restrictive of competition? It is worth observing that there generally tend to be fewer exemptions in countries which have recently adopted competition laws (mainly developing and transition market economies) as compared with more industrialized nations. However, this could be reflective of the fact that in many of the less developed countries, effective implementation of competition law has yet to take place.

Waivers in competition policy can be looked upon as countermeasures to the neo-protectionist behaviour of industrialized nations, since various policies of industrialized countries, e.g. the artificial price reduction of exports, lead to competition distortions. In a number of jurisdictions, some sectors like liner shipping, air, trucking, professional sports, small businesses and government legislation are regarded as “special” sectors and thus exemptions are granted to them. In most of these cases there are no credible economic bases for exempting these sectors or types of economic activities from competitive pressures.

The main argument against waivers to be heard in industrialized countries will probably be that this kind of protectionism will reduce their share of free trade gains. This involves the idea that it is countries, and not firms, which compete with each other, which is not in fact the case. On the company level, success for one firm within a particular market is almost inevitably associated with losses for a rival firm. On the country level, international trade is a positive-sum game, and success for one country usually translates into success for its partners as well (although the gains from trade can be different). All partners now benefit from the availability of
new and better products, from larger markets abroad, and/or from more favorable terms of trade. Thus, if waivers do increase international competitiveness and hence participation in international trade, all countries will win in the long run, while industries with low productivity will lose.

Since developing countries, too, are at times strongly positioned in special markets, and since industrialized countries also have weak industries, it has to be debated whether waivers should be allowed to developing countries as a group of nations (fulfilling special criteria) or—better—only under certain unfavorable conditions. Here some general criteria have to be found which allow temporary protection in the form of restriction of competition without paving the way for discrimination or privileges. Guidelines have to be carefully designed so that infant, and not ailing, industries are supported.

However, the exemptions apply only if they don’t lead to violation of other provision of the law. Moreover, there are different underlying reasons for each area, the basic thrust of these exemptions is to facilitate the legitimate exchange of information, reduce risk, counterbalance uneven bargaining or economic power, permit cooperation and foster innovation so that the markets can function better and more efficiently.

Developments in technology, organizational methods and applied economics suggest that alternative pro-competition approaches to these sectors are feasible. For example, privatization, deregulation, structural changes and the introduction of competition in several countries in the airline, power and telecommunication sectors have increased productivity, lowered prices and improved services. Arguments advanced for exemptions by specific industry groups (as against generic types of business arrangements) should almost always be treated with suspicion.

Similarly, many other alternatives are available to shipping conferences. We will discuss these other kinds of agreements that liners can engage into, in the coming section of this report.
4. Role of Conferences in India

Indian shipping companies collectively owned about 704 vessels with 8.3 million gross tonnages (GT) or around 13.75 million deadweight tonnages. India ranks 15th in the world by flag of registry forming approximately 1.5% of the total world tonnage with a favorable average age as compared to the world fleet. Contributing approximately 0.3% to the country’s GDP, share of the Indian shipping industry in India’s sea borne trade has declined from 40.7% in FY1988 to around 30-32% over the last few years (ICRA Research Analysis, May 2006).

Conferences have been the primary method of freight rate fixation in the nature of cartels. One such conference operating in India is India-Pakistan-Bangladesh-Ceylon Conference (IPBCC), which is generally considered to be the oldest shipping conference in the world founded in 1875 initially as the ‘Calcutta Steam Traffic Conference’. The founder member included P&O SN Co, British India Steam Navigation Co., Anchor Line, Clan Line, Hall line and City Line. Today, there are 18 members who are major international container operators offering five direct sailing a week between the main ports on the West coast of India and Europe. The member lines also cater to cargo from East Indian ports. The IPBCC accounts for 75 per cent of the total cargo being moved on this sector.

Table 11: Relevant Market Shares
The parties belong to IPBCC (the India Pakistan Bangladesh Ceylon Conference), the main conference on the Northern Europe/Middle East trade, which has collectively [55 – 65 %] of the market. In addition, Maersk operates on that trade in a joint service with Sea Land (the Maersk/Sea Land Alliance). SCL operates on the trade as a member of EPIC (the European Pakistan Indian Consortium). The relevant market shares are given in table 11.

It can be seen from above that the parties’ combined market share would be [10 – 20%]. P&O/Nedlloyd would have [5 – 15 %] of the trade and UASC and CMA [5 – 15 %] each. It should be noted that there are also a number of different alliances active on the trade, most importantly Grand Alliance, New World Alliance, United Alliance and SCI/ZIM/Ying Ming Alliance. The market position of the parties themselves does not give rise to any competition concerns.

Though there is lack of data regarding IPBCC but thanks to the European Commission Final Report, October 26, 2005 that some data on IPBCC trade volume is available. Figure 8 shows historical and projected container volumes along the route from 2000 to 2010, eastbound and westbound, based on trade data. Westbound EU-25 imports were about 426,000 TEU in 2000 and are projected to more than double to over a million TEU by 2010. Eastbound EU-25 exports were about 227,000 TEU in 2000 and will grow even faster to over 650,000 TEU by 2010. The imbalance of westbound volume over eastbound is thus expected to continue.

**Figure 8: Europe-Indian Subcontinent Trade Volume 2000-2010**
Growth of containerized subcontinent imports and exports in general and along this route in particular are forecast to grow strongly in future, as the main economies of the subcontinent continue to grow rapidly. If India and Pakistan and others begin to match the recent performance of China, there is considerable upside potential.

Dedicated Services: There are presently no less than five dedicated regularly scheduled round trip weekly sailing between ports in Europe and ports in the subcontinent. Two are stand-alone operators, three are consortia:

1. EPIC3 offers service on six ships of about 4,200 TEU each
2. Maersk Sealand (AE-3) offers weekly service on six ships of about 4,600 TEU
3. Mediterranean Shipping Company (MSC) –seven ships, 2300-3500 TEU
4. Indian Subcontinent Europe Services (ISES) seven ships, 2200-3300 TEU
5. IRISL Container Line – (Europe Container Line) seven ships, 2200 to 3300 TEU

The trade conference for this trade route, the India Pakistan Bangladesh Ceylon Conference (IPBCC), is headquartered in London. The IPBC Conference has provided data on conference liftings by direction, for 1995 to 2004 annually, and for year to date up to May, 2005 in Table 12. Westbound conference traffic nearly tripled in nine years, while eastbound traffic more than doubled. Thus, the

\[\text{Graph showing TEUs by Year from 2000 to 2010 for Eastbound and Westbound traffic.}\]
eastbound growth has been almost equal to the growth in the world container growth, as discussed in section 1.4.

Some twelve of eighteen vessel operators operating containerships on this trade route in mid 2005 belong to the IPBCC. There are also conference members not deploying their own capacity. Members of the conference include CMA-CGM, Contship, Evergreen, Hapag-Lloyd, K Line, Maersk Sealand, MISC, Norasia, P&O Nedlloyd, SCI, Yang Ming, and Zim/Goldstar. Non-members operating ships on the route include APL, China Shipping, Cosco, Hanjin, IRISL, and MSC.

### Table 12: IPBCC Trade Growth 1995-2004

<table>
<thead>
<tr>
<th>Year</th>
<th>West-bound</th>
<th>% change on Year</th>
<th>East-bound</th>
<th>% change on year</th>
</tr>
</thead>
<tbody>
<tr>
<td>1995</td>
<td>194884</td>
<td></td>
<td>139444</td>
<td>5.10</td>
</tr>
<tr>
<td>1996</td>
<td>219266</td>
<td>12.51</td>
<td>146630</td>
<td>5.15</td>
</tr>
<tr>
<td>1997</td>
<td>241782</td>
<td>10.27</td>
<td>173056</td>
<td>18.02</td>
</tr>
<tr>
<td>1998</td>
<td>271245</td>
<td>12.19</td>
<td>144793</td>
<td>-16.33</td>
</tr>
<tr>
<td>1999</td>
<td>271208</td>
<td>-0.01</td>
<td>182328</td>
<td>25.92</td>
</tr>
<tr>
<td>2000</td>
<td>304447</td>
<td>12.26</td>
<td>178127</td>
<td>-2.30</td>
</tr>
<tr>
<td>2001</td>
<td>306189</td>
<td>0.57</td>
<td>198224</td>
<td>11.28</td>
</tr>
<tr>
<td>2002</td>
<td>343536</td>
<td>12.20</td>
<td>248535</td>
<td>25.38</td>
</tr>
<tr>
<td>2003</td>
<td>487568</td>
<td>41.93</td>
<td>271281</td>
<td>9.15</td>
</tr>
<tr>
<td>2004</td>
<td>578812</td>
<td>18.71</td>
<td>320311</td>
<td>18.07</td>
</tr>
<tr>
<td>2005</td>
<td>YTD</td>
<td></td>
<td>162969</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Year</th>
<th>Total Trade</th>
<th>% change on year</th>
</tr>
</thead>
<tbody>
<tr>
<td>1995</td>
<td>334,328</td>
<td>9.44</td>
</tr>
<tr>
<td>1996</td>
<td>365,896</td>
<td>13.38</td>
</tr>
<tr>
<td>1997</td>
<td>414,838</td>
<td>0.29</td>
</tr>
<tr>
<td>1998</td>
<td>416,038</td>
<td>0.91</td>
</tr>
<tr>
<td>1999</td>
<td>453,536</td>
<td>6.40</td>
</tr>
<tr>
<td>2000</td>
<td>482,574</td>
<td>4.53</td>
</tr>
<tr>
<td>2001</td>
<td>504,413</td>
<td>17.38</td>
</tr>
<tr>
<td>2002</td>
<td>592,071</td>
<td>28.17</td>
</tr>
<tr>
<td>2003</td>
<td>758,849</td>
<td>18.49</td>
</tr>
<tr>
<td>2004</td>
<td>899,123</td>
<td></td>
</tr>
<tr>
<td>YTD</td>
<td>442,818</td>
<td></td>
</tr>
</tbody>
</table>

| 9 Years increase | 383,928 | 197.00 | 180,867 | 129.71 | 564,795 | 168.93 |


As of 2004, by one calculation IPBCC conference member shipping supplied 65% of eastbound TEU capacity, and 59% of westbound TEU capacity on this trade route. See Table 13 (which is not data from the conference). That is, non-conference members supplied 35% of eastbound TEU capacity, and 41% of westbound TEU capacity. A glance at the data shows how carriers use creative
routing schemes to cope with the imbalance of westbound demand over eastbound demand. Both conference members and the non-conference carriers provide more capacity westbound than they do eastbound.

By combining this data with 2004 TEU lifting data supplied by the conference (which is admittedly mixing possibly inconsistent data sources), we can estimate utilization rates by direction. This approach suggests that in 2004 the conference utilized only about 56% of its capacity eastbound, but as much as 98% of its capacity westbound. Even though capacity available westbound greatly exceeds that eastbound, there apparently remains a lot of excess unutilized space eastbound.

The fact that many carriers with much of the routes capacity do not belong to the conference, by itself would seem to suggest that the conference does not rigidly control the trade route container market. The carriers do seem to be achieving very high utilization rates westbound.

Table 13: Europe/Indian Subcontinent Container Capacity
Now, we will review the IBPCC general freight rates by direction, eastbound versus westbound, for the ten year period 1995-2004, for twenty foot and forty foot containers. See Figures 9 and 10. The directional disparity is rather small compared to most other routes, considering the very large discrepancy between east-west cargo volume differentials, east-west capacity offered differentials, and east-west capacity utilisation differentials. For example, in 2004 the eastbound rate was $1,000 per TEU, versus $900 per TEU westbound. That small westbound discount seems suspiciously low, as does the fact that many rates are set rounded to the nearest hundred dollars. By contrast, on the busier Europe/East Asia route, the discount of westbound rates over eastbound rates has recently been over two to one. Also, these Europe/Indian Subcontinent rates do not closely track the trajectory or
profile of Europe/East Asia rates; one would suppose that they should, as the one route overlies the other to a large degree and they are served by many of the same carriers.

**Figure 9: IPBCC- Average Eastbound USD Tariff Rate Levels 1995-2004**

![Figure 9: IPBCC- Average Eastbound USD Tariff Rate Levels 1995-2004](image)

**Figure 10: IPBCC- Average Westbound USD Tariff Rate Levels 1995-2004**

![Figure 10: IPBCC- Average Westbound USD Tariff Rate Levels 1995-2004](image)

*Source: IPBCC*

There is geographical and operational overlap between the Europe-Far East trade and the IPBCC trade with the same ships being used for many segments of the two trades. That is, the Far East ships are being utilised to carry IPBCC traffic, which is an efficient use of the capacity, but it does question the need for the two separate conferences, IPBCC and FEFC. Westbound, recent IPBCC rates from the
subcontinent to Europe are only about half those of the FEFC rates for westbound TEUs going from the Far East to Europe. Eastbound, the rate for a TEU going from Europe to the subcontinent is similar to the rate for a TEU going much farther on the East Asia. The data appears to suggest the discount of westbound rates over eastbound rates, in spite of eastbound slack in the system. One possible explanation is that the IPBCC published rates may not reflect those actually charged.

Still, these IPBCC rates seem to indicate that freight rates fell in the late 1990s for a decade, but started to pick up again in 2001 and have been increasing since then in many ways. The details for this increase in the freight rates charged by IPBCC and their impact on the users of the services will be discussed in the coming section. This is consistent with the fact that two new dedicated container services have sprung up since the turn of the millennium, and that established players have increased capacity offered.

5. Conference Practices

Conferences have a variety of practices that may be able to shed some light on whether they are efficient, and why they succeed or fail. Having firmly established,
shipping conferences agreed terms and conditions covering areas other than shipping rates between shipping companies. These terms and conditions can be broadly divided into three categories to their purposes: (1) steps to control competition between member shipping companies (Price Discrimination and Price and Output rules); (2) steps to prevent shippers from using non-member shipping companies (Loyalty Contracts); (3) steps to directly eliminate non-member shipping companies (Predatory pricing behaviour). In this section these practices will be discussed in detail.

5.1 Steps to control competition between member shipping companies

Though all the above mentioned practices are supposed to prevent competition, however, the two practices, namely, price discrimination (charging different rates from different shippers) and price and output rules (fixing prices and output) are concluded between shipping conferences members as a means of curbing competition based on shipping rates and their capacities and are considered to be the monopolist practices. Therefore, they are strictly prohibited by the Competition laws all over the world.

5.1.1 Price Discrimination

Conference freight tariffs have for a long time been detailed and lengthy documents, with different freight rates for each commodity shipped. An important issue of contention is the extent to which those differing rates are the consequence of cost differences or price discrimination. Differences in cost could arise from; inter alia, differences in density (called the stowage factor), difficulties in handling the cargo, insurance, and the need for refrigeration. Differences in transport demand elasticities could arise from differences in the costs of waiting; more valuable and more readily perishable goods would bear a higher freight rate for quick service. Even after the widespread use of containers, which have made cargoes more homogeneous, these tariffs have remained in effect.
Allegations that conferences price discriminate by charging higher freight rates to higher valued commodities are long standing. One claim is that they are simply attempts to extract additional profits from a monopoly position (McGee, 1960, p.224; Bennathan and Walters, 1969, p.59-64). The alternative view is that conferences price discriminate because the large element of fixed common costs requires price discrimination to cover costs (Jansson and Shneerson, 1987, p.79; Sjostrom, 1992).

On one side, price discrimination is considered to be a destabilizing factor for the conferences. Price discrimination makes entry more attractive because entrants are encouraged to focus on the high priced end of the market. The conference sacrifices stability and durability in exchange for higher profits now. Besides entry, price discrimination is endangered by the prospects for resale, but resale is difficult in any service industry, and in transport it is possible only if the shipper can successfully deceive the carrier about the contents of the shipment.

On the other side, price discrimination increases the stability and durability of the conference because it allows the conference to expand output and therefore is in the joint interests of the conference and shippers. Telser (1978, p.114-117) showed that with U-shaped average cost curves, it is efficient to add an additional producer at a level of demand lower than the level necessary to bring the additional producer into the market under perfect competition.

Figure 11, simplified from Telser (1987, p.114), is the easiest way to see this result. Demand is BB’. MC1 is industry marginal cost with one producer, and MC2 is industry marginal cost with two identical producers. Average cost is U-shaped and reaches a minimum at average cost AA’ and output L. With one producer, efficient output is K. At that output, total value (the area under the demand curve) is OBCK. The cost of output L is OADL, and the cost of the extra output K-L is LDCK. Therefore, total surplus is ABCD.

**Figure 11: Finding the efficient number of producers**
With two producers, efficient output is $J$. Perfect competition cannot sustain that outcome because with two producers, price would be below $A$ (price would not cover average cost). To see whether it is efficient to add a second producer, we will first calculate total cost if output is $J$. With output $H$ (equal to $2L$, because average cost is minimized for one producer at $L$ and for two producers at $2L = H$), cost is $OAGH$. If output is reduced from $H$ to $J$, costs fall by $JFGH$. Therefore, the cost of output $J$ is $OAGFJ$. Total value is $OBFJ$, so net surplus is $ABE - EFG$. The net gain in surplus from switching from one to two producers is therefore $CDE - EFG$. It is efficient to add a second producer if $CDE > EFG$. This occurs for a lower demand than the demand required to sustain a second producer under perfect competition (when $EFG$ falls to zero).

A number of attempts have been made to find out whether conferences practice price discrimination, and the answer remains mostly that we do not know (Sjoström 1992). A number of attempts have been made to measure price discrimination by regressing the freight rate for different commodities against, *inter alia*, the price of the commodity and a group of variables intended to capture differences in transport.
costs but the fundamental difficulty is identifying variables that capture differences in demand elasticities without also identifying differences in costs. Clyde and Reitzes (1998) find no evidence for discriminatory pricing, contrary to the anecdotal evidence in McGee (1960, 224) that independent lines focus their entry on high valued commodities.

5.1.2 Pricing and Output rules

Conferences not only fix prices, they set both minimum and maximum outputs. It is much easier to make sense of the role of maximum output rules. In a cartel model, maximum output rules prevent price from falling to competitive levels.

Why though a minimum output rule? One explanation consistent with cartel model is entry deterrence. In an open conference system, if conferences are successful in imposing entry barriers to non-conference lines, the entrant may attempt to bypass those barriers by joining the conference. If the minimum output is set high enough, the entrant may end up expanding capacity on the route to unprofitable levels. This limit-pricing strategy requires the conference to commit to the minimum output rules by guaranteeing its sailing schedules. As with any irreversible commitment, however, this would expose the conference to the risks of a mistake. An entrant might overestimate demand and therefore mistakenly enter, leaving the conference with excess capacity (McGee 1980).

Alternatively, consistent with a cartel model, the minimum output rule may be a way of excluding small, high cost sellers from the conference. The willingness to adhere to a minimum output may be a way of signaling low costs. Every agreement has to ensure that it is eroded by attracting high cost entrants.

5.2 Steps to prevent shippers from using non-member shipping companies
Due to the fact that there were no particular restrictions on entry into the international shipping market, member shipping companies were always up against competition from non-member companies and new companies entering the market once their agreement were made public. This led conferences to use Loyalty arrangements with users as the main method to eliminate competition from independents. Conferences use two kinds of loyalty contracts: the dual rate contract (sometimes called contract rates) and the deferred rebate.

5.2.1 Dual Rate System

Under a dual rate system, the shipper signs an agreement to deal exclusively with the conference stating that member shipping companies will provide shippers with shipping services at a contract rate lower than their standard non-contract rate on the condition that they only use that member company for the duration of a specified contract period. If the shipper uses a non-conference carrier, the conference imposes a fine.

5.2.2 Deferred Rebate System

Under a deferred rebate system, if the shipper deals exclusively with the conference for, say, six months (the typical length of time), and then deals exclusively with the conference for next six months, the shipper receives a rebate of an agreed proportion of his freight bill from the first six months. The deferred rebate was a novel contract first introduced successfully by the U.K.-Calcutta Conference in 1877 (Marshall, 1921, p.439; Marx, 1953, p.46-47) after being proposed in 1873 on the Yang-tse River trade (Marriner and Hyde, 1967, p.156-57). The deferred rebate system was prohibited in U.S. trades by the 1916 Shipping Act.

Under both systems, the conference must monitor its customers to determine whether the contract has been broken. There is evidence the contracts have become largely unenforceable in recent decades. There are two distinctions between the two
systems. First, under the deferred rebate system, the shipper loses interest on the price cut. Second, the conference incurs lower enforcement costs with the deferred rebate because it is returning money, rather than trying to collect it (McGee, 1960, p.232-35). Perhaps because of these differences, discounts under deferred rebates tended to be larger than under dual rate contracts, typically double the size (Marx, 1953, p.201-202).

Whichever system a conference used, deferred rebate and dual rate systems usually applied to only certain commodities. For example, the Far East Conference introduced the deferred rebate when it was formed in 1879, but certain bulk commodities such as rice and silk were excluded from the loyalty arrangement (Hyde, 1957, p.60-61). Moreover, the loyalty requirement was typically waived if the conference were unable to provide sufficient capacity within a reasonable time (Marx, 1953, p.203).

Loyalty contracts are designed to encourage customers to use a particular seller exclusively. The shipper is charged a lower price in exchange for dealing exclusively with the conference. One question is whether they serve to exclude new entry, or whether they serve to reduce costs by gaining economies of regularity, such as easier planning. A second question is, assuming they serve to exclude entry, whether such exclusion is efficient.

Marín and Sicotte (2003) use an event study based on U.S. shipping lines. They find that dual rate contracts were profitable for shipping conference members, which suggests they were enforceable. They also find they were unprofitable for their large customers, which is consistent with Davies (1973, p.110). They have no evidence on smaller shippers, but they speculate that absent an ability to negotiate for concessions, smaller shippers were even worse off than large shippers.

It was common in the nineteenth century for conferences to prohibit their agents from acting for non-conference lines, even though there were difficulties enforcing
the provision (Jones, 1985, p.31), and the practice continues today (Sjostrom, 1986, p.54).

5.3 Steps to directly eliminate non-member shipping companies

As explained in the previous section, the conference members were always looking for chances either to prevent shippers from using non-member companies or to eliminate the non-member companies directly. One of the practices used by the conference for this purpose was predatory price behaviour.

5.3.1 Predatory pricing

As discussed in sub-section 3.4.1 predatory pricing refers to the cutting of prices to the level below the Average Variable Cost (AVC). The most common allegation of predatory pricing revolved around the use of “fighting ships”. The conference would, in response to an entrant, lower the rates on one of its vessels to compete with the entrant until the entrant lost money and left the market.

McGee (1960) casts doubt on the use of fighting ships. McGee (1960) remains an influential analysis of shipping conferences as monopoly devices. McGee (1960, p.234) dismissed fighting ships as normal instances of competition, rather than predatory pricing, and cast doubt on the proposition that fighting ships could be or were successfully used for predatory pricing.

Two recent contributions to our understanding of the ways in which conferences may have used predatory pricing to control entry are Scott Morton (1997) and Podolny and Scott Morton (1999). Scott Morton, studying pre-World War I conferences, finds evidence supporting the “long purse” theory of predation, whereby firms can profitably engage in predation if their financial resources are large relative to the prey. A long purse theory requires that capital markets are sufficiently costly that the prey cannot gain access to capital to survive the price
war, whereas the predator can, most likely because the predator already owns larger liquid assets before the war commences (Bork, 1978, p.147-148; McGee, 1980).

Podolny and Scott Morton (1999) extend Scott Morton’s (1997) results primarily by finding that entrants with high social status were less likely to be preyed upon. The argument is that the social status of the entrant is a measure of the extent to which an entrant could be relied upon to cooperate with the conference. They also show that the effect of social status declined with the age of the entering firm. This is consistent with the idea that information about a firm becomes more public over time and therefore the conference had less need to rely on social status as a proxy.

6. The Impact of Conferences
There is a traditional consensus among liners that conferences contribute to stability of supply conditions. It, however, appears that the existence of conferences (with non-mandatory, but open membership) not only leads to higher prices on average, but also to more uncertainty with respect to entry and investment decisions. Besides, conferences are engaged in setting surcharges as well which make up a significant portion of the total ocean freights. Thus, in totality the impact of conferences can be seen as the reduction in the social welfare.

Price movements are a common phenomenon in many markets. In some markets, like oil, we experience long and protracted price swings. In other markets, like hardware and software, dramatic price falls have been observed. There are also markets with excessive price fluctuations and supply conditions that are comparable to the liner shipping industry, like the airline industry. However, in none of these cases did we see a collapse of investments or a breakdown of companies on a massive scale.

Many a time, it has been argued that if conferences are removed, prices can become stable in the liner shipping industry. However, the standard explanation of ‘inherent instability’ rests on the possibility that there may not exist a price equilibrium in the liner shipping market. This argument can be illustrated by a simple example, as put forth by Sjostrom 1989 and Telser 1996.

6.1 Instability in prices

6.1.1 Stable demand and supply conditions

Suppose a market with two liners, one ship each, and three shippers. Each shipper wants to ship exactly one good and is willing to pay at most 10 Euro for the transfer. Each liner has a transport capacity of two goods and the cost per trip is 5 Euro. This example has some of the properties mentioned above: demand and supply are lumpy, and inelastic for a wide range of prices. In particular, one liner can operate at full capacity while the other has to put up with half capacity. They
show that there is no stable price (per good transferred) that clears the market. Moreover, there is not even a stable combination of two different prices by the two liners that could prevail.

To see this, suppose liner A sets a rather high price, say $P_A = 8$. Liner B would then undercut him slightly, say $P_B = 7.5$, in order to attract two shippers and earn $15-5=10$. Since liner A would then earn only $8-5=3$, he would now have an incentive to change its initial price and undercut liner B. The same argument can be applied to any price higher than 5, which shows that there is no stable price equilibrium in which a firm chooses a price higher than 5. Now suppose that liner A sets a rather low price, say $P_A = 4$. Its rival will then compare two alternatives. He can undercut liner A (this yields at most $8-5=3$), or rather set a very high price and be satisfied with only one customer (this yields at most $10-5=5$). Whatever he does, liner A will again have a reason to revise its price. In particular, if liner B chooses a very high price, say $P_B = 9.5$, then liner A would want to increase its price to, say, $P_A = 9$. The same argument can be applied to any price below or equal to 5. In short, liners find no price at all that makes them satisfied with their choice, given the response by the other firm. They always find a reason to revise it.

The example shows that, indeed, prices can be inherently unstable. But what is the consequence? It does not mean that the market breaks down. In our example, liners would simply try to take each other by surprise. One can actually calculate the probability density function of their price-mixing behavior (mixed-strategy equilibrium). Choice will be confined to prices between 5 and 10, so that both liners will almost always make a positive operating profit. If the situation of our example would come up regularly, firms will sometimes turn out to be lucky (“this time I managed to undercut my rival slightly” or “this time I rightly chose a high-price, since my rival’s offer was just too cheap to undercut”) and sometimes not so lucky.

From everyday experience they are well-acquainted with such pricing behavior. It resembles the well-known sales offers by large retail stores – with the latter being
far from a breakdown. Recent examples from the transport sector are the irregular price cuttings and sales offers in the airline industry. There may be some indications that this industry could be ripe for a consolidation; but no-one expects that airfares will ever rise again to the heights of former times. In our simple example, the expected profit of each liner would be about 5 and the expected price about 7; a stable cartel, in contrast, would fix the price at almost 10, leaving no surplus for the shippers.

6.1.2 **Unstable demand and supply conditions**

In the above example there is price instability in spite of stable demand conditions. Let’s now extend the example by adding demand uncertainty. Suppose that there may turn up either two, three, four, or five shippers in the market (each event with probability 0.25). If only two shippers turn up, capacities of the two liners are grossly oversized, so that prices will be driven down to 2.5. Only one ship will make the trip, and both liners’ operating profits will be zero. The case with three shippers has been discussed above; it results in a price-mixing behavior yielding an expected operating profit of about 5 that can be used to cover fixed cost elements. When four shippers turn up, capacities are just right and, if shippers have difficulties negotiating, the prices will be quite high. Prices will be particularly high when there are five shippers; rates are then competed upwards due to capacity shortage.

Taking the expectation of operating profits over all four market situations yields a strictly positive expected operating profit that can be used to cover fixed cost elements. (If expected profits are extraordinarily high, market entry by other liners would bring them down to normal rates.) Thus, there is again no reason for a breakdown of the market or a collapse of investments. There is of course price variability but, as in many other industries, price swings cancel out in the longer run. Particularly the larger carriers will be able to diversify price risk internally so that it should not affect their investment decisions very much. Note finally that the
price-mixing behavior appears only in one out of the four situations (namely, when just three shippers turn up); it seems to be a rather rare phenomenon.

Thus, their example suggests that prices in the liner shipping industry may be, but need not be, inherently unstable in the absence of conferences. Moreover, if they are unstable, this need not be a problem. Things will be different when there are conferences. Not only can average prices be expected to be higher, there might also be more instability in the market. Next, we move to this.

6.2 The Market Instability

How do conferences affect the market result? If all liners join the conferences and choose to maximize their joint profits, prices would clearly be higher. In the example given above, price would be set at (almost) 10, regardless of the number of shippers who turn up, to extract surplus from the shippers.

Since conference membership is not mandatory, but open to everyone, one might wonder how many liners will actually join in. Therefore, competition between conference liners and independent liners is of significant importance. When a liner chooses to join the conference or not he will compare two effects. On the one hand, it is attractive to become an independent liner and be able to undercut the conference price (second-mover advantage in price competition). This is based on the realistic presumption that the conference, which dominates the market and has some inertia in its decisions, is a price leader and independent liners are the followers. Of course, the conference will anticipate competition by the independent liners and start out with a rather low price. Therefore, on the other hand, reducing the number of independents by joining the conference has the advantage that one can profit from a rather high price, since the conference price will be the higher the lower the number of independent liners. Comparing these effects, each liner will decide to join the conference or not. Depending on the total number of firms, it turns out that either all join in, or that there is also a group of one or more independent liners around it. Generally, the following holds. For any given
number of carriers, prices are the lower the larger the number of independent liners is. Quite plausibly, price will be somewhere in between the case of full conference membership and the fully competitive case (i.e. without conferences). Moreover, the larger the number of carriers in the market the larger will be the subset of independent liners. Thus, the larger the number of carriers in the market the lower will be the price. In any case, a ban of conferences would always lead to a further price reduction.

Table 14: Pay-offs of a conference liner (first number) and a potential entrant (second number) when the potential entrant chooses from (N,C,I)

<table>
<thead>
<tr>
<th></th>
<th>N</th>
<th>C</th>
<th>I</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>3, 0</td>
<td>0.5, 0.5</td>
<td>-1, 1</td>
</tr>
</tbody>
</table>

Moreover, competition between conference liners and independent liners turns out to be another source of market instability once the possibility of entry is taken into account. A potential entrant can choose between three alternatives: becoming a conference liner (C), becoming an independent liner (I), or not entering the market at all (N). Table 14 illustrates a situation of inherent instability. It assumes that, with a given number of firms before entry, everyone would join the conference. The potential entrant, liner A, can choose from the strategies (N,C,I). For each strategy the table lists the payoffs of each conference member and of the entrant, assumed in this example. As the numbers indicate (0<0.5<1) the entrant would prefer to enter as an independent liner (here the second-mover advantage dominates). However, once this has happened, the market is not profitable any more for conference members (the -1). Hence, one of them, say liner B, should leave the market (assuming that it is not profitable to become a second independent liner). After this has happened, the number of liners in the market is the same as before, and, as already stated, for that number it is optimal for all of them to join the conference. Thus, the entrant A, who came in as an independent liner will now have an incentive to join the conference. But if he does, this will invite the other liner, B, who dropped out of the market, to reenter again as an independent liner. And so on.
One might argue that the independent liner A will not join the conference if this triggers re-entry of liner B. But why not? If liner B re-enters, some other conference liner (say, liner C) might drop out of the market as a response. Moreover, the sequence of moves is not always as clear as indicated above. There may also be some uncertainty or inertia in liner B’s re-entry to the market. Therefore it is quite plausible to expect some circling of market participation and of conference membership in the above example. Is this a problem? It is more of a problem than the mixing of prices that we observed in our first example. Mixing and circling with market entry and exit is directly related to investment decisions, and there are also real transaction costs of entry and exit (like fixed costs of renting harbor facilities and making some specific investments in harbors; costs of licenses, advertising, and reallocation of ships).
6.3 Loss in the social welfare

Shipping conferences have been embroiled in a long-running controversy about their ultimate effects on social welfare. On the one hand, there is a school of thought that the cartel behavior is clearly detrimental, because through their participation in cartels firms are able to charge higher rates than would otherwise be obtained. On the other hand, the conferences themselves defend their practices as necessary for the very existence of the liner industry and undeniable benefits that regularly scheduled service brings for businesses and passengers. They argue that competition in liner shipping is unsustainable and destructive, and that the conferences are an efficient solution to an otherwise intractable market problem. If competition were to reign, the conferences argue that rates would immediately fall to un-remunerative depths and firms would all be driven to bankruptcy, or that only a monopoly would remain, which would be far worse than the cartel system. However, the main point still remains valid that conferences are cartels charging high prices from the shippers, thus leading to the dead weight loss to the society as well as X-inefficiency (discussed in section 3.1), though to show that is quite difficult in light of the present data. Apart from that social welfare falls as due to cartelization the incentive to innovate declines significantly since service providers are working co-operatively, therefore, they don’t need to invest in the research & development as they are not interested in cutting their costs. In fact, cartelization leads to the productive and static inefficiency further affecting the social welfare adversely.
6.4 Conferences set Surcharges

Much cargo is carried under contracts which specify a route-dependent ocean freight rate, plus a number of other charges to be levied at prevailing rates at the time the service is rendered. These surcharges appear on the bill of lading or invoice as extra charges to the shipper. There are a host of other such charges, including those that account for fuel price and exchange rate fluctuations, the fee charged for off-loading at various different ports, war risk if any, hazardous cargo if applicable, peak season charges if applicable, charges for boxes of non-standard dimensions or of special requirements, the Panama Canal surcharge if applicable, and a number of other less common charges. These surcharges fluctuate, even if the ocean freight rate is fixed under a long-term contract, and shippers often bear the brunt of that fluctuation. Alternately, some shippers and carriers negotiate “all-in” rates including all surcharges, passing the fluctuations back to the carrier. Conferences can and do set most surcharges, although in theory that can be modified by contract, and sometimes are. Non-conference carriers typically follow the conference surcharges. As these constitute a large percentage of the total shipping costs, conferences thus directly set a significant portion of the price for ocean transport service. The most common surcharges (usually) are the Bunker Adjustment Factor (BAF), the Currency Adjustment Factor (CAF) and the Terminal Handling Charge (THC). The BAF and CAF are generally set by defined formulae, are generally accepted references, and are subject to controversy. THC’s are opaque, and although ubiquitous are subject to a great deal controversy.

Moreover, the fact that conferences do not manage capacity questions the relevance of their activities for the stability of supply. Note that the end of the EECSAC at the East Coast of South America route had no significant effect on moving cargoes. Moreover, the West African trade shows that conferences essentially can contribute to instability. Entries into the conference were followed by exit of carriers during the last couple of years. This shows that conferences can be a source for instability.
Even after this discussion regarding the practices and impacts of the shipping conferences, according to the European liner Affairs Association (ELAA) the rationale for block exemption was the presumption that the liner shipping industry, in contrast to other industries, operates under unique conditions of ‘inherent instability’. The following specific features of the industry are brought forward (ELAA 2004). Demand is inelastic, but of great variability (sensitive to business cycles, exchange rates, and other), and unbalanced on important trade routes. Supply conditions are characterized by high fixed costs (of, e.g., ships) and lumpiness of capacities, implying inelastic supply both in the short and medium term. Since there is no or little regulatory intervention, periodic incidents of over- and undercapacity would evolve in the absence of conferences, with the consequence of erratic price movements. These would imply high risk for some operative decisions and for investments. The result could be a collapse of investments and a breakdown of the market on certain routes. To avoid this, conferences are deemed necessary pre-conditions for the provision of reliable schedules to shippers.

European Shippers Council (ESC), however, is critical of the stabilizing effects of conferences (ESC 2004). They complain that conferences act as a barrier to trade, inflate shipping prices and threaten the sustainability of international shipping services.
7. **Impact of Conferences on Indian economy**

Cartels are considered to be per se illegal in many jurisdictions whereas in India, we follow the rule of reason where we compare the pro-competitive effects of a restrictive business practice with the anti-competitive effects. As mentioned, 95% of India’s international trade by volume and 70% by value are seaborne. The IPBC Conference accounts for 75 per cent of the total cargo being moved on this sector. However, the benefit to India due to the existence of IPBCC is restricted to the recognition of SCI as its member; other effects are considered to create problems especially in the form of high freight rates. Thus, in this section we will look at the problems faced by Indian shippers and suggestions made to resolve this issue.

Though the involvement of Indian ship-owners in the system of conferences is not very significant but it has affected Indian exporters and shippers in many ways. Bunker Adjustment Factor (BAF), Currency Adjustment Factor (CAF) and Terminal Handling Charges (THC) are basically the major and regular surcharges recovered from the shippers. Documentation Fees, Equipment-related charges like repositioning of empties, transfer fees, insurance, cleaning etc. are the other arbitrary charges recovered as Ancillaries. Of these, THC by far accounts for a sizeable portion of the various surcharges/ancillaries recovered from the shippers. One point to note is that Shipping Corporation of India is the only local Company which is a member of the IPBC Conference. Other members of IPBC Conference are mainly from European Union and the US but still its practices have affected Indian shippers.

Northern India Shippers’ Association (NISA) reported that shippers have been facing multiple problems due to unjust attitude of service providers such as shipping lines, shipping agents, consolidators and others involved in the chain of transporting goods from different centers in the country to their point of destination. According to them, service providers levy a number of charges which are absolutely illegal and belie any justification.
Western India Shippers’ Association (WISA) has also been convinced with the appreciable adverse effects of the shipping conferences. According to them, in actual practice, there is no mechanism in action to even monitor the working of these shipping lines from the point of view of anti-competitive practices. However, it is only in year 2005-06, the Ministry of Shipping have initiated action to draft a shipping Trade Practices Act (STPA), 2006 to govern the shipping trade in the country.

7.1 **Problems faced by the Indian shippers**

The Shipping liners announce Rate Restoration Initiatives (RRI) from time to time which increase the transaction cost substantially, thereby reducing the competitive edge of the Indian product internationally. For example, in April 2005, the lines have decided to impose a peak season surcharge of $300 per TEU, $400 per FEU and $450 per Forty foot Equivalent units (FEU) high cube from June 15 to October 31, 2005.

In India, the main problem faced by the user groups like the engineering exporter members of EEPC India, with respect to freight rates fixation at conferences are the following:

- Freight rates are decided unilaterally which leads to considerable uncertainty, especially when there is a pick up in the world;
- Shipping Liners have a tendency to impose other extraneous charges during peak time such as rollover charges like peak season surcharge, fuel surcharge, etc. which are generally over and again the ‘reasonable increase’ in freight rates that can be expected when demand increases more than supply;
- Given that India has only national carrier, the Shipping Corporation of India (SCI), which accounts for about 2% of total sea cargo from India, the ability of the national carrier to set the competitive rates is rather limited, thereby creating substantial monopoly profits for the cartelized shipping liners.
Now, we will discuss some data available on the BAF, CAF and THC charged by the IPBC Conference. Many in the shipping industry feel that shipping lines should stop collecting terminal handling charges (THC), which account for 20-25 per cent of the freight, and have sought government intervention in the matter. The THC is affecting the competitiveness of Indian ports, according to shipping industry sources. Part of the terminal handling charges (THC) relates to port activity and come under Tariff Authority for Major Ports (TAMP). The other part of THC relates to charges for a number of activities covered beyond the port operations. TAMP is a regulatory authority. Whatever the Conference does it has to take cognizance of the TAMP guidelines.

Collecting terminal handling charges (THC) is another major issue in global maritime trade. Countries such as China, Indonesia and Australia have taken action against shipping lines collecting THC — from shippers (manufacturers, importers, exporters and retailers) — for moving boxes between container terminals (on the shore) and ships.

According to a source in a major shipping line, the THC is required to recover costs of container handling at terminals. By separating the shore-side charges from ocean freight rates and making THC a separate cost item helps the lines prevent irrational price-cutting or excessive competition among the lines. THC affects the competitiveness of the trade (both imports and exports) because the charge has to be factored into the overall transaction costs. The THC is one of the ever-increasing number of surcharges and ancillaries levied and recovered by the shipping lines, said Mr. Narasimhan.

<table>
<thead>
<tr>
<th>Terminal/box size</th>
<th>up to 23 tonne</th>
<th>23-27 tonne</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Rs</td>
<td>US$</td>
</tr>
<tr>
<td>TUE</td>
<td></td>
<td></td>
</tr>
<tr>
<td>JNPT</td>
<td>13,060</td>
<td>287</td>
</tr>
<tr>
<td>NSICT</td>
<td>11,990</td>
<td>264</td>
</tr>
<tr>
<td>FUE</td>
<td></td>
<td></td>
</tr>
<tr>
<td>JNPT</td>
<td>22,150</td>
<td>487</td>
</tr>
<tr>
<td>NSICT</td>
<td>20,220</td>
<td>445</td>
</tr>
</tbody>
</table>

Table 15

Source: WISA

91 Nikhil Gupta, GIPE
The IPBC Conference sets the THC rates in the Indian Ocean region. Table 15 indicates the rates notified by the IPBCC, effective May 16 2006, in respect of the CFS-stuffed export containers. Though IPBCC rates are supposed to be applicable only to its constituent members, it has become a universal practice for non-conference members to follow the conference notified THC and other surcharges, said Mr. Narsimham.

IPBCC member lines had continuously notified their customers regarding the ongoing congestion problems in the NEW Mumbai area and at the port of Chennai. On 22nd March 2005, IPBCC announced the withdrawal of their Emergency Congestion Surcharge. In New Mumbai, however, the line indicated a justified increase of $5.00/TEU from 1st February 2006 but in recognition of the ongoing efforts by the respective local authorities to improve the situation agreed the lines to suspend the New Mumbai Congestion charge for the period 1st February to 28th February 2006. The lines will continue to review the additional costs throughout January 2005 and reserve the right to re-apply the charge without further notice.

**Table 16: BAF and CAF rates**

<table>
<thead>
<tr>
<th></th>
<th>BAF June 2007</th>
<th>BAF July 2007</th>
</tr>
</thead>
<tbody>
<tr>
<td>FCL Cargo</td>
<td>US$ 215.00 per TEU</td>
<td>US$ 220.00 per TEU</td>
</tr>
<tr>
<td>LCL Cargo</td>
<td>US$ 21.50 w/m</td>
<td>US$ 22.00 w/m</td>
</tr>
<tr>
<td>Breakbulk</td>
<td>60.0% plus</td>
<td>61.0% plus</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th></th>
<th>CAF June 2007</th>
<th>CAF July 2007</th>
</tr>
</thead>
<tbody>
<tr>
<td>1st to 30th</td>
<td>12.52%</td>
<td>1st to 31st</td>
</tr>
</tbody>
</table>

Table 16 gives a view on the increasing rate of BAF and CAF charged by the conference. Though the increase is not very high in these charges, for Full Container Load (FCL) Cargoes, BAF was $215 per TEU in June 2006; it has increased by 2.3% in one year time to reach $220 per TEU. Similar is in the case of Less than container load (LCL) Cargoes that reached $22 w/m in June 2007.
Coming to CAF, the increase was more pronounced as it was 3.27% during the same period.

The member lines of the IPBCC planned to implement a freight rate hike through a rate restoration initiative that will affect container shipments. Consequently, freight rates between Europe and the ports in India, Pakistan, Bangladesh and Sri Lanka (Ceylon), were supposed to rise by $50 per TEU and $100 per FEU, starting November 1, 2006. The increased freight rates were supposed to be valid till end of the March 2007.

Nonetheless in January 2007, IPBCC members have advised their customers that as a part of the Business Plan for 2007, they have agreed to implement a rate restoration in the eastbound trade. According to the members, they are facing considerable increase in the costs, and delays and congestion continue to have a detrimental effect on the carriers’ ability to operate efficiently.

A Conference Rate Increase of **US$ 50.00 per Container** is going to be in effect from 1st July 2007 (Increased rate levels will be valid until 30th September 2007 only). In addition, and as part of the Business Plan, Members will keep ancillary tariff items such as Special Equipment Additionals and Surcharges, under review.

The HINDU Business Line of May 8, 2007 has noted that Ocean Freight rates have shot up worldwide including India and this coupled with port congestion has compounded the problem further. The Indian rate rise has been moderate by comparison to other countries. This has enabled Indian spot suppliers to raise the spot f.o.b. fines price by 33% (from $52.50/tonne to $70/tonne) over the past year while the contract price has risen by only 9.5%.

Not only this, the member lines of the India/Pakistan/Bangladesh/Ceylon Conference (IPBCC) are to enforce the westbound rate restoration from July 1, second time in the current year, but whether the move will succeed is anybody's guess. The skepticism is because the present market dynamics do not guarantee
IPBCC what its member lines reportedly aim to achieve. Merchandise exporters of the country have expressed serious concern over the twenty percent raise in freight charges on westbound cargo by the member shipping lines of the India-Pakistan-Bangladesh-Ceylon Conference (IPBCC) from July 1, 2007.

A Conference Rate Increase of USD 600/20' and USD 1200/40' to be implemented in three stages as follows:

- 1st May 2007 an increase of USD 200/20’ and USD 400/40’
- 1st July 2007 an increase of USD 200/20’ and USD 400/40’
- 1st September 2007 an increase of USD 200/20’ and USD 400/40’

Though IPBC rates are supposed to be applicable only to its constituent members, it has become a universal practice for non-conference members to follow the conference notified THC and other surcharges, said Mr. Narasimhan.

Though high prices charged by the ship-owners cover a large portion of the problems occurred due to the practices of the shipping conferences, unfortunately, this is not the only problem faced by the users of these services. Visakhapatnam, Kolkata and Paradip ports are the gateway of metals (aluminium). The exporters are faced with the shortages of TEU dry containers on a regular basis from these ports and the non-availability of containers is seriously hampering exports.

Thus, the problem is that the ship owners are trying to transfer all their risks which is a part of this business to the consumers in one or the other form which is neither acceptable nor justified. Hence, the shipping conferences needs to be reviewed very thoroughly and some quick measures are expected to be taken.
7.2 Suggestions made by the affected parties to resolve the issue

It is a known fact that members of IPBCC have formed consortia of container operators offering lower freight rates than what is fixed by the Conference thus eroding the functioning of IPBCC by creating competition in the market. Thus, most of the shippers’ associations all over the world prefer to replace conferences by consortia and alliances. In fact, EC itself is in favor of it. Some other forms of agreements like Individual service contracts (ISCs) should also be allowed to increase the competition in the market and reducing the market shares held by the conferences.

It has been suggested that the only way to break the cartelization in the shipping liners is to augment capacity and strengthen the hands of the SCI. It is felt that even if SCI can increase its share of cargo from 2% to 5%, it will create enough ripples in the industry that India’s largest shipping company is willing to play a role that is intended to break the cartelization amongst the shipping liners with respect to freight rate and other user charges. However, as mentioned SCI accounts for about only 2% of total sea cargo from India and thus rest of the portion is taken care by the other carriers operating on the route, therefore with such a little share being handle by SCI, augmenting its capacity does not seems to be effective. In fact it can create many questions in the minds of other carriers leading to unnecessary chaos in the market. In fact if SCI’s capacity is increased it can lead to their increased role in freight rate fixing which itself can lead to many difficulties.

The other possible alternative, suggested is to have a Shipping Regulator in lines of the Electricity Regulator or the Telecom Regulator or even the Insurance Regulator. The Shipping Regulatory Board could comprise a set of nominated members with experience in the industry and would seek “Freight Rates Petitions” from the Shipping Liners who would give their desired Freight rates based on the their cost of operations plus a reasonable profit margin. The broad parameters of the Petition could be shared by the Regulatory Board with the user industries and other
stakeholders to seek their comments. On the basis of getting an all round view, the regulatory Board could map out the Freight Rates to be charged by Shipping Liners operating from India to different parts of the world. The rates so fixed should hold well for every quarter of a year, unless there are certain exceptional exigencies which could be enumerated by the Regulatory Board.

The suggestion of having a Regulatory Board, however, does not look suitable in case of the shipping industries as it is related to the external trade and such Regulatory Boards are not assumed to have extra-territorial reach. Though, Competition Commission of India (CCI) can be an effective alternative to check these kinds of anti-competitive practices as any activity taking place outside India having adverse effects on competition in India falls under the ambit of the Act under section 32.

Related to the shortage of containers, it has been suggested that adequate number of containers be made available to exporters to further enhance exports. However, shippers have a reason to rejoice as the shipping ministry has thought of bringing some transparency in the maritime operations through Shipping Trade Practices Act (STPA) in 2005-06, that aims at tightening the regulation of shipping intermediaries. However it is extremely important to harmonize the two laws in the larger national interest. It is, therefore, essential that there should be consultation with the Competition Commission of India in a manner that will enable the Commission to offer informed and constructive suggestions.
8. Other forms of Agreement

The container Revolution, the second and the last great technological revolution in liner shipping (the first took place in the second half of the 19th century, with steamships), began in the mid-1970s and continues today. The widespread use of containerized liner services brought with it the economic concentration of the liner shipping sector which reduced the number of services and individual companies and, also, forced surviving shipping companies to tighten their links of co-operation. The process of change which occurred in liner shipping while containers were being massively introduced in new shipping trades were characterized by what ship-owners called an 'orderly approach, broadly respecting the positions of other conference lines and also effecting the change within established conference structure'. The container revolution, therefore, led to major structural changes, new forms of co-operation between ship-owners. The shipping companies made use of old types of agreements adapted to the new situation. Trans-shipment agreements, straight chartering agreements (in this case, of container slots) and joint service agreements evolved with the containerization and nowadays constitute the industrial basis for operation of scheduled services on many routes.

Nowadays and despite the disuse of their most integrated varieties, the consortia of all kinds continue being the preferred form of industrial co-operation between shipping companies, generally within conferences although, in recent years, an increase in the trend to join in consortium has also been observed between outsiders.

Thus, conferences are not the only form of liner shipping organization. Liner services could also be provided by consortia and alliances. Besides that, we will look at the forms of agreement between lines which already exist in some parts of
the world, notably the US and Australia, such as the discussion agreements and Individual confidential service contracts.

8.1 **Alliances and Consortia**

Liner conferences do not involve any operational co-operation between shipping lines- the only co-operation concerns price fixing. Today, shipping lines co-operate operationally through consortia agreements and Alliances. To ensure that supply meets demand, co-operation is only required with regard to the supply of vessels. Slot charter and space sharing agreements minimise the investment risks of ship owners. The world’s largest shipping lines, such as Maersk/Sealand, have shown they are quite able to manage their own services profitably outside of alliances and consortia. For those lines not wishing to merge with others and give up their corporate independence, partnerships through alliances and consortia have offered an alternative structure.

Unlike shipping conferences, consortiums and alliances coordinate space charters for container vessels, the shared use of terminals and shipping schedules rather than determining shipping rates or surcharges.

*Figure 13: Shipping tonnage for the main alliances on major shipping routes*
This means that, although they do not necessarily fall under the category of cartels, consortium and alliance agreements may be looked at by CCI by the rule of reason. Alliances currently in operation on European, North American and other major shipping routes are given in figure 13.

Alliances have become the preferred operating structure for carriers who talk a global game, providing many commercial advantages (service coverage and frequency) and financial advantages (scale of economies) to carriers. Alliances have been the most highly integrated form of partnership to emerge so far. Now, little more than half the capacity of the top 20 lines is operated by alliance members, and through a combination of these factors three of the five largest lines, Maersk Sealand, Evergreen and MSC - are now operating outside the alliance structure.

The impact of global alliances in the container business has forced fundamental structural changes in the traditional liner trade, causing its near demise. The sector should aim to serve niche markets and build up a trade that is specialized and distinctive. In 2005, the announcement by the two major shipping alliances — the Grand Alliance and the New World Alliance — that they are joining in a
cooperative slot-exchange agreement on the Asia-Europe and Asia-Mediterranean trades and planning to start a service from Asia to the US received the attention of the world of shipping.

On the other side are liner consortia, industrial co-operation agreements between liner shipping companies aimed primarily at supplying jointly organized services by means of various technical, operational or commercial arrangements. Thanks to consortia agreements, ship owners can organise jointly the services they supply (in particular container liner shipping) and thus provide users with a better service while rationalizing their maritime transport activities and securing economies of scale and cost reductions.

The European Commission has also shown itself favorable to authorizing liner consortia. When adopting Regulation 4056/86, the council invited the commission to study the situation of consortia as regards the competition rules and to consider presenting new proposals, if necessary. As a result, the regulation 870/95 (currently Regulation 611/2005) known as consortia block exemption was adopted to promote technical and economic progress by facilitating and encouraging greater utilisation of containers and more efficient use of vessel capacity.

Article 1 of the Regulation 870/95 defines a consortium as:

“`consortium` means an agreement between two or more vessel-operating carriers which provide international liner shipping services exclusively for the carriage of cargo, chiefly by container, relating to a particular trade and the object of which is to bring about cooperation in the joint operation of a maritime transport service, which improves the service which would be offered individually by each of its members in the absence of the consortium, in order to rationalize their operations by means of technical, operational and/or commercial arrangements, with the exception of price fixing.´”

However, in competition policy terms, the existence of the conference system combined with the growth in operational co-operation through consortia and
alliances could possibly raise the potential for sensitive market information to spill over to other non-Conference market actors.

When surveyed in interviews, a large number of shippers expressed their appreciation for consortiums and alliances, citing reasons such as (1) the convenience of being able to secure space and (2) the piece of mind that comes from stable shipping with guaranteed tonnage. Nonetheless, some ship owners also stated that it would be unacceptable if consortiums and alliances were to follow suit with other agreements and standardize shipping rates or surcharges.

8.2 Discussion agreements

A discussion agreement is a sort of framework agreement by virtue of which carriers which are members of conferences and outsiders are able to coordinate flexibly their competitive conduct on the market in relation to freight rates and other service conditions. The scope and content of such agreements may vary.

Discussion agreements exist in particular on the US trades. They emerged in the 1980s in response of the emergence of strong non-conference carriers noticed by the conference members. While conference carriers were unable to convince independent carriers to join them and engage in binding rate fixing, they were able to bring them under the discussion agreement umbrella of voluntary ratemaking and capacity management. In the US many discussion agreements include most of the major carriers operating within their respective geographic scopes and thus have generally high market shares.
While discussion agreements, unlike conferences do not set fixed common prices for specific commodities, they provide a forum for members to discuss the trade. Under US law, carriers are permitted to collect exchange and discuss market information, discuss and propose common approaches to pricing develop and propose standardized surcharges, and to coordinate their conduct in the market in relation to other conditions of service. While the rates set by discussion agreements are non-binding, in practice most of the members to the discussion agreements seem to follow them, at least when they are dealing with small and medium sized shippers.

Furthermore, while the Ocean Shipping Reform Act of 1998 (OSRA) made it possible for conference members to negotiate confidential individual service contracts (discussed in the next section) with a shipper at rates differing from the conference tariff, OSRA also allows carriers participating to the discussion agreement to adopt voluntary guidelines applicable to their members’ individual service contracting. These may cover minimum rates for specific commodities, surcharge and specific charges. A few discussion agreements’ guidelines also specify the minimum volume necessary to quality for a service contract, set limitations on credit and discount policies and agree on set percentage increases for inland rates. Moreover, some guidelines also involve a voluntary agreement to provide information to the secretariat or to other members about contracts being negotiated.

Discussion agreements also exist in Australia. For example, the Asia-Australia Discussion Agreement (AADA) permits the parties to the agreement to discuss, consult and develop consensus on their rates, charges, classifications, practices, terms, conditions, rules and regulations applicable to the transportation of cargo in the trade, notice periods for changing rates, receiving and demurrage charges, free time practices, detention and demurrage, container freight stations and the time and currency in which the parties collect their rates and charges. There is no
voting on the issues discussed or consulted, the agreement operates on a non-binding consensus basis. This has however not prevented parties from forming and sustaining a consensus on various matters, including pricing.

Discussion agreements involve normally the exchange of sensitive business information between competitors and should therefore respect the settled case law of the Court on exchange of information. More importantly, as shown in the US, the inherent flexibility of discussion agreements makes them attractive to traditionally independent lines. In that respect, discussion agreements could, in competition policy terms, be even worse than conferences, since they are liable to eliminate effective external competition to conferences. Not only this, the compatibility of discussion agreements of the same type of those existing in the US and Australia with Article 81 EC Treaty is also questionable.

8.3 Individual Confidential Service Contracts

Individual Confidential service contracts apply to 80 per cent to 90 per cent of the cargo carried by containerized liner shipping lines, according to the lines themselves. The European Commission’s evaluation of the major liner conferences behaviour in decisions such as the TACA and Revised TACA indicates that Individual Service Contract’s (ISC’s) have replaced the liner conference in commercial reality.

It follows that liner conferences neither produce any economic benefits of value to customers nor can be said to be indispensable in the light of ISCs and the alternative forms of operational co-operation applied by shipping lines in consortia and Alliances. Liner conference price fixing, therefore, has
only one objective, as it always had, to maximize the profits of the shipping lines by enabling them to charge prices above competitive levels. As a result, liner conference price fixing cannot escape the prohibition of cartels under Article 81(1) since it is incapable of satisfying the conditions of Article 81(3) as mentioned in the section 3.3.1.

The ESC continues to support the concept of freedom for carriers and their customers to conclude confidential service contracts in its firm belief that these are modern business arrangements for a modern industry. Shippers should always have the option of freely negotiating rates, surcharges and other terms of carriage on an individual and confidential basis with the carrier(s) of their choice without the interference of any regulatory body or other administrative bureaucracies such as a conference.

One way of ensuring an alternative form of stability which is sometimes looked for by shippers would be to enter into longer term multi-year contracts. In the present environment, two or three year contracts are rare. In bulk shipping, such arrangements are already more common. It is believed that this sort of commercial arrangement would benefit both carriers and customers. Such arrangements could include review periods, for example to take the price of the oil into account and build in a certain flexibility where needed. Some shippers, however, will not wish to include these arrangements, but will prefer to follow the market, with prices going up and down. Shippers will clearly need to make a choice; they can't have it all. In the US trade, such contracts are legally required. It is ESC’s view that the trend towards one-to-one negotiations with commitments from both parties should be strengthened and promoted within all trades.

In fact, the Japanese Ministry of Land, Infrastructure and Transport (MLIT) explains in Japan, extensive consultations are carried out between carriers and shippers. This countervailing buyer power results diminishes an eventual unilateral power by conferences. Ultimately the actual level of rates including surcharges is
decided between individual shipping operators and the shipper. The policy of the MLIT as the supervising authority to liner conferences is to establish and even develop the collective and collaborative relationship between carriers and shippers.

To conclude, conferences serve no other purpose than to raise shipping rates. Besides, conferences stifle commercial flexibility and development of business partnerships with customers. No doubt the alternatives available to the conference system are very much dependent on the kind of jurisdiction in the respective part of the world, like we mentioned that discussion agreements are operating in the US but at the same time could be worse than conferences, if adopted inappropriately. To sum up, these alternatives already available on the market show that shipping lines do not need any longer to engage in price-fixing, supply and market regulation to provide reliable shipping services.

9. Recent changes in different jurisdictions to enhance competition and efficiency in the liner shipping Industry

For too long the majority of container shipping has been protected by regulations that have distracted it from the reality of changing customer needs trading in global markets. Regulations around the world allowed shipping lines to operate to serve their own interests rather than those of their customers. Their main practices involved collective price agreements, managing capacity collectively and setting surcharges to raise rates.
This system of providing exemptions to liner shipping has backfired and become a major issue of contention with their customers, for, despite the shipping companies’ determination to maintain their protection; they have been found to have abused their privileges. As a result, liner shipping conferences resulted in an unsustainable liner shipping industry that benefits none of their customers.

Since the late 1990s governments have begun to repeal the laws that previously were seen to protect the container liner shipping industry. A number of legal challenges followed through the 1990s reducing the dominance and influence of such conferences. Between 1992 and 2000, shippers made a case against the TAA (Trans Atlantic Agreement) and TACA (Trans Atlantic Conference Agreement) conference lines for illegally

- fixing prices between conference lines and non-conference lines;
- fixing prices for inland transport (also a charge made against the FAR Eastern Freight Conference);
- managing shipping capacity in order to drive up the rates;
- agreeing not to enter into individual service contracts and agreeing terms and conditions (post 1996);
- attempting to change the structure of the market by making new entrants join the conference (in the TACA case).

In 2002 the OECD secretariat concluded an industry review and recommended countries should review their laws and reduce the protection afforded to the conferences. According to their review, the liner shipping industry had failed to demonstrate that price fixing was indispensable to the provision of regular, efficient and sustainable liner shipping services, or customers had not shared in the benefits of price fixing and there were other mechanisms available to shipping lines to better enable them to seek greater efficiency, effective services and sustainable business ventures.
The Study by the EC concluded in October 2005 also conclusively confirmed the findings of the OECD Report that the liner Conferences did not merit the anti-trust block exemption. On the basis of the review, the European Commission has issued an order in September 2006 repealing the Block Exemption Order to become effective from October 2008.

Thus, international shipping cartels are losing their power over the market due to factors such as the emergence of shipping companies from developing countries, limiting their current function largely to that of coordinated price action, including rate restoration and surcharges, extending to outsiders as well as members. Elsewhere, with the system of exemption from competition law being repealed in the European Union and under review in other countries, the climate surrounding shipping conferences and other international shipping cartels is undergoing some changes.

As mentioned previously, despite shipping companies’ claims that they are still a necessity, users have singled out a number of problems with shipping conferences and other international shipping cartels. In this section, we will look at the recent developments that have occurred in different parts of the world, namely, European Union, United States, India and Japan regarding the liner shipping conferences and the existing exemptions given to them.

9.1 European Union

9.1.1 Repeal of Regulation 4056/86

In 1986 the European Council of ministers adopted Regulation 4056 to bring the industry into line with European Community competition law. Despite opposition from shippers, the exemption was granted from competition rules under the treaty of Rome on the basis that the conference system yielded benefits for their customers- one of the four conditions for exemption under Article 81(3). However,
the Council has agreed on 25th September 2006 to repeal Regulation 4056/86 putting an end to the possibility for the liner carriers to enter in the agreements to fix prices and regulate capacities as of October 2008.

The process of reviewing the exemption from EC Treaty competition rules for liner shipping conferences was launched in March 2003. Three developments led support for a review. Firstly, the modernisation of the general Regulations which laid down the rules and procedures to implement Article 81 and 82. Regulation 1/2003, which replaced Regulation 17/62, came into force in May 2004 and the completion of the procedural review has made it seem appropriate to consider whether the substantive rules can also be modernized and simplified.

Secondly, in recent years the Union's major trading partners have also conducted reviews of their own liner shipping exemptions. The United States, for example, in 1998 adopted the Ocean Shipping Reform Act amending the US Shipping Act. In a report of April 2002, the OECD doubted on the general wisdom that collective rate setting was an indispensable pre-requisite for reliable liner shipping services and invited its Member countries to review the way in which competition rules were applied to the sector.

Thirdly, the growing trend towards container transport also led to a re-organization of the sector into consortia or alliances as the shipping companies tended to share out the costs of bigger vessels and to organise services differently.

Based on its review, in June 2004, European Commission published its discussion document proposing a repeal of the block exemption for the liner shipping conferences. The Commission concluded:

- There were no conclusive evidence that the justification for a block exemption in 1986 remain today;
- Discussion agreements did not appear to provide a less restrictive alternative; and
Even with the repeal of block exemption it is highly unlikely that a conflict would arise between the laws of the EU and others elsewhere.

The European Commission adopted a White Paper in October 2004 in which it suggested to bring more competition in the maritime sector to the benefit of Europe’s overall economy and of exporting firms in particular. The paper considered repealing the generous exemption from competition rules which has benefited the sector for almost 20 years and which allows it to fix the price for transporting goods between the European Union and respectively the Far East and the United States, as well as between the EU and other regions. Then the Commission adopted a legislative proposal on 14 December 2005 and the European Parliament issued a report in July 2006.

Thus conference activities and in particular price fixing and capacity regulation will no longer be permitted after October 2008. To ensure that the new regime fosters competitive markets, the Commission will issue Guidelines on the application of the competition rules to maritime transport before the end of the transitional period of two years. Their purpose is to explain how competition rules apply to maritime transport services in general and in particular to the liner and tramp sectors.

As an interim step in the preparation of the Guidelines, the Commission will shortly publish a staff “issues paper”. It will set out, with a view to collecting stakeholders’ comments, a preliminary assessment of the issues relating to information exchanges raised by the industry’s revised proposal concerning the impact of information exchange in the liner market.

9.1.2 Impact of the Repeal of the Regulation 4056/86

The Commission has concluded that a repeal of the block exemption will bring about substantial benefits to EU industry and consumers, in particular as regards transport prices, reliability of liner shipping services, competitiveness of the EU liner shipping industry and small EU liner carriers.
The Commission’s main findings of the potential economic impact of repealing the Conference block exemption are:
- transport prices for liner shipping services will decline
- service reliability on deep sea and short sea trades is expected to improve
- service quality will either be unaffected or will improve
- there will be either a positive impact or no impact on the competitiveness of EU liner shipping firms
- small liner shipping carriers will not experience particular problems and
- no negative impact or even a positive impact on EU ports, employment, trade and/or developing countries.

9.1.3 Alternatives to the Regulation 4056/86

With respect to the question of what should replace Regulation 4056/86, most member states that support the review indicate that the alternative regime should be in full compliance with Article 81(3). ELAA has presented to the Commission a proposal for a new regulatory structure for liner shipping services operating to and from the EU, which it believes could replace Regulation 4056/86. The Commission has taken note of this proposal and has stressed that it is not the result of any negotiation or agreement with the Commission. The proposal merely reflects what the ELAA considers to be an appropriate business framework for liner shipping co-operation. In essence the ELAA proposal amounts to:

- Exchange and discussion between lines of aggregated capacity utilization and market size data by trade and on a region/zone to region/zone basis (data with a month delay);
- Exchange, discussion and evaluation of commodity developments by trade (based on data aggregated with a month delay);
- Discussion and evaluation of aggregate supply and demand data by trade/commodity; forecasts of demand by trade and commodity would be published;
• Lines will obtain their own market share by trade, by region and by port (data aggregated with a month delay);
• Price index differentiated by type of equipment (e.g. reefer, dry) and/or trade (data aggregated with a quarterly delay). This information would be made publicly available;
• Surcharges and ancillary charges based on publicly available and transparent formulae; the details of which would be discussed with shippers.

An important difference of the ELAA proposal compared to the present conference activities is that the ELAA proposal makes no reference to “naked price fixing” (that is, jointly setting conference tariffs) or the regulation of capacity. However, it does contain elements of pricing (notably a price index) as well as capacity forecasting (envisaged exchange of information on capacity utilisation and market size).

Furthermore, while the exchange of information is central in the ELAA proposal, Regulation 4056/86 does not explicitly allow carriers to exchange information. Allowing conference carriers to fix freight rates and regulate capacity, as well as some other activities, implicitly seems to assume that some form of information exchange between carriers in the context of a conference takes place. Carriers themselves have stated that in practice conference members today are already involved in a rather extensive exchange of information. Conference members provide data to the conference secretariat and they meet on a regular basis to discuss various topics. In fact, according to the ELAA, its proposal would not amount to substantial differences with the current practice of conferences on trades to and from the EU in this regard.

9.2 India

It should be clear by now that the system of consultations among liner service providers, as regards determination of prices or services, is in the form of
cartelization which is presumed to have appreciable effect on competition and therefore, treated as void in the Competition Act, 2002. There is no justification for legitimizing such a conduct by the maritime transport logistics services providers. While EU has announced the repeal of the exemptions enjoyed by the shipping conferences traditionally, there is no question of introduction of these exemptions at this point of time in India.

The situation of India is particularly critical in the absence of any statute to oversee the monopolistic manipulation by the services providers in the shipping industry. In fact the Mumbai-based Western India Shippers’ Association (WISA) has urged the Shipping Ministry to initiate steps for an early repeal of the present anti-trust immunity to liner shipping conferences.

As stated by Mr. S.R.L. Narsimhan, the Shipping Secretary, “The withdrawal of anti-trust immunity enjoyed by the liner shipping conferences is urgently needed to ensure that the shippers can operate in a fair and competitive environment in the ocean freight segment without the cartelistic, even quasi-cartelistic, influence exerted by the liner conference system”.

The global shippers are represented by the European Shippers Council (ESC), Asian Shippers Council (ASC) and Global shippers’ Forum (GSF). The Indian shippers, under the umbrella of ASCOBIPS (Association of Shippers Council of Bangladesh, India, Pakistan, and Sri Lanka), are represented at Asian Shippers Council which again is the founder-member of Global Shippers’ Forum.

While transparency in the operations of the maritime transportation services is important and welcome, a comprehensive regulatory framework to address the sector appears, prima facie, unjustified. The normal rules of competition should apply to the sector and the Competition Act, 2002 should be able to address the concerns related to unfair trade practices, including cartelization of service provision.
It is only in the year 2005-06; the Ministry of Shipping has initiated action to draft a Shipping Trade Practices Act (STPA), 2006 to govern the shipping trade in the country. The purpose of the Act is to bring about transparency in the trade practices adopted by maritime transport service providers. However, it is important that the proposed legislation should take account of competition concerns that exists in regard to shipping and ports or that may arise on account of the proposed legislation.

The draft Act defines the term “fair trade practices” the definition is at variance with similar terms/expressions defined in the Competition Act, 2002. Differently treatment of this concept could lead to uncertainty among parties and general confusion within the economy. It would also render decisions making difficult for both the authorities.

The Shipping Trade Practices Act suggests that there should be mechanism for consultation between service providers and service users. However, it is not clear how the suggested process will steer clear practices prohibited under the Competition Act, particularly cartelization.

In view of the above situation, the draft Act is being vetted by Ministry of Law. The draft has to get clearances from other ministries as well. Securing Cabinet approval before Budget session seems to be difficult. Thus, it may be useful to arrange a meeting between the Department of Shipping and the Competition Commission of India in order to develop and the port sectors and how these interface with the Competition Act.

9.3 Japan

9.3.1 Reviewing exemptions of Antimonopoly Act (1999)
The increasing relaxation of regulations in Japan from the start of the 1990s onwards in an effort to create a free and fair economy and society was coupled with a growing recognition of the need to actively develop a competition policy. This generated increased awareness of issues relating to changes in the competitive environment in the field of international shipping, as mentioned previously, and led to reviews to the system of exemption for international shipping cartels in 1999. In light of factors such as the continuing acceptance of exemption systems in other countries however, the decision was made to retain exemption for international shipping.

9.3.2 Regulations regarding the involvement of the Fair Trade Commission (Marine Transportation Law, Article 29, Clause 3 and 4)

Revisions to legislation in 1999 stipulated that international shipping operators have to report any agreements, which then have to satisfy four requirements, including that they do not unfairly harm users’ interests. If the contents of the agreement do not satisfy these requirements, the Minister of Land, Infrastructure and Transport then has to issue an order to either change or restrict the contents of the relevant agreement. Regulations were also established stating that details of any cartel reported to the Ministry of Land, Infrastructure and Transport should be relayed to the Fair Trade Commission immediately. If the Fair Trade Commission then deems that any cartel fails to satisfy the aforementioned four requirements, the Fair Trade Commission may require that action should be taken by the Minister of Land, Infrastructure and Transport (regulations regarding the involvement of the Fair Trade Commission).

9.3.3 The abolition of the Special Shipping Designation (2006)

As mentioned above in section 2 (2), the Special Shipping Designation which was issued on 1959 was formulated in line with “the five principles of fair trade”, which
allow certain practices such as dual rate systems. In view of changes in the business climate in the international shipping industry, not least the fact that the underlying practices of conference tariffs and dual rate systems are no longer effective in today’s international shipping market, a public comment abolishing the Special Shipping Designation of 1959 was issued on April 13, 2006. Its abolition means that the definition of unfair business practices under the Antimonopoly Act in the international shipping industry has now reverted back to the original General Designation.

9.4 The United States

Although a bill on the abolition of exemption from the Antitrust Act in the shipping Industry was submitted to the US House of Representatives in 2002, it was later abandoned. Other developments have included the release of a public comment covering eight different fields, including the exemption of international shipping from antitrust legislation, by the Antitrust Modernization Commission (AMC) which is an independent committee set up in 2004, calling for the provision of the necessary information to evaluate the relevance of the exemption system in May 2005.

In September 2006, AMC of the USA has initiated a review of the exemption. The AMC has accordingly addressed the Federal Maritime Commission (FMC) to identify the benefits and costs of the antitrust immunity in the Shipping Act 1984, to assess the overall commercial impact of that immunity and recommend whether the existing immunity should be retained, modified or repealed. The AMC has also invited views and suggestions from others. The review is reportedly in progress.

9.5 Australia

Australia has undertaken a fundamental review of its policy towards liner conferences and competition in maritime transport. Part X is under review. In
October 2005, the Australian Government released a report by the Productivity Commission which had recommended, as a preferred option, the repeal of Part X. If Part X were repealed, liner conference agreements would be subject to the competition provisions of Part IV, unless authorized under Part VII. In fact, any decision has not been made yet.

10. Concluding Remarks
As, by now, it must be cleared by the report that the characteristics of the liner shipping market and the conference practices make the conferences known as ‘shipping cartels’. Therefore, they impact their users negatively in many ways. They were provided exemptions on the basis that they will bring stability in the prices and market. However, it has been shown that they bring instability to the market as well as prices. Moreover, as cartels they lead to a loss in the social welfare through dead weight loss and X-inefficiency. Thus, the immunity that these conferences used to enjoy in many jurisdictions is now under review. In fact, European Union, have already had taken the first step by removing the Regulation 4056/86 providing immunity to the conferences. Conferences have been asked to wind up by October 2008. Even IPBCC has been asked so. Whether other jurisdictions also take the same decision is still to wait for. Therefore, conferences that were enjoying exemptions in many countries for such a long time will have to tight their belts now to adapt themselves to the changes.

The main question still unanswered is whether Regulation 4056/86 which has been repealed by EU is required to be replaced by some other from of regulation or not. And if yes, what should be the form of that alternative. Most probably, if some alternative is adopted it would be from the other forms of agreement we have discussed in the report.

India, however, is to say a cartel heaven as long as the Competition Act, 2002 does not get amended. In this situation these cartels can very well freeze out competition and capture the markets so long as there is no regulatory authority effectively in place to check them. Once Competition Commission of India (CCI) gets functional, competition can freely flow in the markets leading to increase in the efficiency of the producers and satisfaction of the customers.

References:
   http://www.accc.gov.au/content/index.phtml/itemId/720053/fromItemId/352027
   http://www.brs-paris.com/newsletters/liner_studies/no29/
13. Competition Commission of India, Brief note on the provisions of the Competition Act, 2002 and the jurisdiction, powers and duties of the competition commission of India http://www.competition-commission-india.nic.in/


Other useful articles from:

70. Western India Shipper’s Association
71. Hindu Business Line
72. Engineering Export Promotion Council
73. Northern India Shippers’ Association
74. Federation of Indian Export Organisation

Other relevant Websites used: