Before the
New Zealand Productivity Commission

SUBMISSION OF THE
UNITED STATES/AUSTRALIA DISCUSSION AGREEMENT
AND THE
AUSTRALIA/NEW ZEALAND-UNITED STATES DISCUSSION AGREEMENT
AND THEIR MEMBER LINES
ON THE JANUARY, 2012
DRAFT REPORT OF THE NEW ZEALAND PRODUCTIVITY COMMISSION
ON INTERNATIONAL FREIGHT TRANSPORT SERVICES

The United States/Australasia Discussion Agreement ("USADA") and the Australia/New Zealand-United States Discussion Agreement ("ANZUSDA") and their respective member lines, through their counsel, hereby submit their comments on the January, 2012 Draft Report of the New Zealand Productivity Commission ("Commission") on International Freight Transport Services ("Draft Report").

Introduction

USADA is a voluntary rate discussion agreement that authorizes its six member carriers or lines, listed in Appendix 1 hereto, to discuss and reach voluntary agreement on rates and charges applicable to liner transport services in the trade from the United States to Australia and New Zealand. It is on file with the U.S. Federal Maritime Commission ("FMC") and the Registrar of Liner Shipping in Australia ("Registrar"). ANZUSDA is a voluntary rate discussion agreement that authorizes its four member carriers or lines, listed in Appendix 1 hereto, to discuss and reach voluntary agreement on rates and charges applicable to liner transport services in the trade from Australia and New Zealand to the United States. It is also on file with the FMC and the Registrar. USADA and ANZUSDA are hereinafter jointly referred to as the "Agreements."

As carrier agreements operating in the trades between the United States and New Zealand, the Agreements and their member lines have a direct and substantial interest in the recommendations made by the Commission in the Draft Report.

Summary of Position

The Agreements generally support the recommendation of the Draft Report with respect to the treatment of what the Draft Report labels as non-ratemaking agreements, i.e., that the existing Shipping Act 1987 exemption remain in place, that it be applied to both inwards and outwards shipping, and that such agreements be subject to registration with the New Zealand authorities. The condition that agreements permit and protect confidential, individual service contracts is superfluous with respect to non-ratemaking agreements which, by definition, do not contain authority with respect to service contracts. However, it is not objectionable.

The Agreements believe that the recommendation with respect to ratemaking agreements is a significant revision to the status quo and is unwarranted based on the evidence cited in the Draft Report. In addition to lacking evidence that supports the recommendation, the Draft Report contains a number of factual misstatements and misunderstandings with respect to the nature and operation of carrier agreements. As a result, the Draft Report seriously understates the importance of carrier agreements for international freight transport in the New Zealand trades. The Draft Report also gives insufficient weight to the treatment of carrier agreements in other jurisdictions, especially those of New Zealand's largest trading partners.

Accordingly, for the reasons set forth in this submission, the Agreements urge the Commission to revise its recommendation to provide that ratemaking agreements be afforded the same treatment (exempt both inwards and outwards, subject to registration) as non-ratemaking agreements, and that ratemaking agreements be entitled to the exemption only if they permit and

protect individual service contracts. Such an approach is a less drastic change to the status quo that will enable the New Zealand authorities to gain additional knowledge and experience with carrier agreements, will avoid potential destabilization of New Zealand ocean freight transport services, all while protecting New Zealand's exporters and importers against any potential abuses that authorities perceive might theoretically result from the operation of carrier agreements.

Submission

A. *The Recommendation Of The Draft Report With Respect To Ratemaking Agreements Is Unsupported By Evidence*

The Draft Report's recommendation with respect to ratemaking agreements is unsupported by evidence and should be revised.

The Draft Report recommends that the long-standing legal treatment of carrier ratemaking agreements be revised radically. Typically, a change in policy requires a showing that the present system is not operating properly and that change is necessary or desirable in order to address specific problems and concerns, or to produce appreciable benefits. This is particularly true when, as here, the recommended change is so significant. However, the Draft Report offers absolutely no empirical evidence that the status quo needs to be changed, or that the recommended change will result in any meaningful benefits. Rather, the Draft Report recommends changing a system that it concedes is working well, and does so solely for the purpose of avoiding a potential problem that it speculates might arise at some unspecified future date.

The Draft Report concludes that New Zealand is relatively well served by liner shipping operators (p. 179), and does not identify any significant problems that have arisen or which exist as a result of the exemption for ratemaking agreements. Indeed, the fact that there have been no

formal investigations under the Shipping Act (Draft Report, p. 178) would seem to be evidence that the present system is working well and that there have been no problems which need to be addressed.

The Draft Report also concludes that:

> ...removing the exemptions is unlikely to result in a decisive shift in shipping services serving New Zealand. The benefit or removing the exemptions is more likely to lie in insurance against a future degradation of outcomes for New Zealand via the use of carrier cooperation as the market moves into a position where the capacity may become constrained.

Draft Report, p. 189 (similar conclusions are also stated on pages 171 and 187). In other words, the recommendation of the Draft Report is to make a drastic change to a long-standing law that has produced good service and no problems in order to obtain little or no immediate actual benefit, and to insure against theoretical future problems which are wholly speculative in nature (and which have not occurred to date under the present system).

The only "evidence" cited in support of this recommendation are a 10-year old OECD study that has been ignored outside of Europe[1] and a 7-year old Australian recommendation that has not been implemented. These documents hardly constitute the type of evidence that justifies a policy shift of the magnitude recommended by the Draft Report.

The Agreements respectfully submit that the desired "insurance protection" can be achieved with less drastic changes to current law. The suggested revisions are discussed in the final section of this submission. As noted therein, adoption of this approach would also permit the New Zealand authorities to gather further information upon which to make sound decisions about any future policy direction without risking destabilization of the New Zealand ocean trades. In contrast, implementation of the changes recommended in the Draft Report, i.e.,

[1] See discussion of the European treatment of carrier agreements below.

elimination of the exemption for ratemaking agreements, would directly present the risk of such destabilization.

B. *Factual Errors In The Draft Report Understate The Role Of Carrier Agreements And Undermine The Validity Of The Commission's Recommendations*

The Draft Report contains a number of factual errors that understate the role of ratemaking agreements and undermine the validity of the Commission's recommendation.

1. The Role of Ratemaking Agreements

The Draft Report candidly acknowledges that the Commission has "limited information" on the prevalence of conference agreements, discussion agreements and other agreements in New Zealand. Draft Report, p. 179. This is confirmed by the Commission's analysis of the state of such agreements, which finds that only two such agreements exist and that discussion agreements are not overly prevalent in New Zealand. Draft Report, p. 180.

As a matter of fact, there at present at least four active discussion agreements in the New Zealand trades: USADA, ANZUSDA, the Canada/Australia-New Zealand Discussion Agreement, and the Asia New Zealand Discussion Agreement. More important than the number of agreements, however, are the trades covered by those agreements. The foregoing agreements cover the trades between New Zealand and most of its largest trading partners (i.e., China, United States, Japan and Korea), among others. Thus, it is not accurate to conclude that such agreements are "not prevalent" when they in fact exist and are active in the liner trades between New Zealand and its largest non-Australian trading partners. Moreover, given the broad geographic scope of these agreements, we do not believe it is accurate for the Commission to conclude that reliable shipping services are not dependent upon such agreements.

In particular, the conclusion on page 181 of the Draft Report that ratemaking agreements had little or no role in ensuring the continued provision of reliable shipping services during the

global financial crisis (which conclusion is based solely on the number of such agreements) is undermined by the existence and operation of such agreements in New Zealand's largest ocean trades. It is precisely during periods of downturn that ratemaking agreements serve as breaks on destructive competition by facilitating the exchange of trade-related information.[2] Thus, the Agreements maintain that it was, at least in part, because of ratemaking agreements that destructive competition did not play out in the New Zealand trades.

The Draft Report also concludes that other forms of cooperative agreements appear more prevalent and may have displaced ratemaking agreements as the preferred form of collaboration. Key Points, p. 171. While it is true as a general proposition that there are usually more operational (non-ratemaking) agreements in any given trade than ratemaking agreements, this is because operational agreements such as space charters and vessel sharing arrangements typically involve fewer parties than ratemaking agreements. Compare Appendices 2 and 4, discussed below. Moreover, as explained in the immediately following section, the functions of these two types of agreements are different. Thus, any conclusion that ratemaking agreements have been supplanted by operational agreements and are no longer necessary, based simply on the number of each type of agreement, is flawed.

2. <u>The Functions of Ratemaking and Non-Ratemaking Agreements</u>

The Draft Report also contains a number of fundamental inaccuracies with respect to the nature and operation of ratemaking and non-ratemaking agreements that further undermine the

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[2] This is consistent with a finding of the Federal Maritime Commission in its recently released study of the EU experience, cited *infra.,* in which the FMC found that:

> One possible and reasonable hypothesis worthy of examination and development is that a carrier discussion agreement like TSA (that is, one with pricing authority but no capacity management authority) may be ineffective in improving member lines' average revenue per container in a market characterized by pricing under confidential, one-to-one contracts, but effective in helping to reduce rate volatility.

FMC EU Study, p. 221.

validity of the recommendation with respect to ratemaking agreements.

Ratemaking agreements as they function today in New Zealand and elsewhere, are agreements in which carriers discuss and exchange information on trade conditions and attempt to reach voluntary and non-binding agreement on guideline rates and charges that they will each independently assess their customers for transportation service. As noted below, ratemaking agreements to do not discuss or control the amount of vessel capacity deployed in a trade. Non-ratemaking or operational agreements are those vessel sharing or space charter agreements pursuant to which carriers cooperate operationally by sharing vessels. These agreements do not involve the discussion of rates or charges.

Having said this, the Draft Report appears to confuse ratemaking and non-ratemaking agreements in several respects. As an initial matter, the Draft Report characterizes both conference agreements and rate discussion agreements as agreements that involve the management of vessel capacity. Box 25, Page 172. However, in reality, specific vessel capacity and deployment by individual carriers is not discussed or agreed upon in discussion agreements. As evidence of this, attached hereto as Appendix 2 is a copy of the ANZUSDA.[3] Because ratemaking agreements do not result in specific and concerted capacity management, the anticompetitive impact of such agreements is not as extensive as the Draft Report assumes. Thus, even the minimal benefits the Draft Report assumes would result from the elimination of the exemption for ratemaking agreements is overstated. Indeed, the information exchange among the members of discussion agreements assists each of them in most efficiently and effectively dealing with their individual capacity deployment decisions.

[3] To demonstrate that the same is true of conferences, we have attached hereto as Appendix 3 a copy of the New Zealand -United States Container Lines Association, a now-defunct conference that was the last surviving conference in the New Zealand-U.S. trade and an accurate representation of the typical conference agreement in the U.S. trades.

Similarly, the Draft Report states that non-ratemaking agreements should be exempt only if they permit and protect individual service contracts. Key Points, p. 172. This shows a fundamental misunderstanding of non-ratemaking agreements, which by definition do not contain any authority whatsoever with respect to service contracts (as the Draft Report appears to acknowledge in its discussion of non-ratemaking agreements in Box 25, p. 173). Attached hereto as Appendix 4 is an example of a typical non-ratemaking agreement presently in effect in the U.S.-Australia/New Zealand trade, which demonstrates that operational agreements by definition do not address the issue of individual service contracts in any way.

The Draft Report also reaches an erroneous conclusion with respect to the competitive impact of both ratemaking and non-ratemaking agreements. The Draft Report incorrectly concludes that consortia agreements preclude competition between parties for the particular undertaking of the joint venture. Draft Report, p. 175. The fact is that carriers who share vessels or charter space to/from one another continue to compete with one another on price and other aspects of service.[4]

The Draft Report also appears to assume that rate discussion agreements have a greater anti-competitive impact than do conference agreements, since there are no outside carriers to counterbalance the activities of the agreement. Draft Report, p. 175. This conclusion is flawed in two important respects. First, discussion agreements typically do not include all carriers operating in a given trade. For example, Mediterranean Shipping Company is a major global carrier that offers service between the United States and New Zealand but does not belong to the

[4] See, e.g., Article 5 of EU Regulations 823/2000, a block exemption for liner consortia, which makes competition on price a condition of qualification for the block exemption. Of note, that requirement was adopted by the EU at a time when conferences were still permitted and still operated in the EU trades, thereby demonstrating that even parties to a ratemaking agreement compete with one another on price. See also, *Global Strategic Alliances: Where We Are Today,* U.S. Federal Maritime Commission, bureau of Economics and Agreement Analysis, Winter 1996, pp. 1-2 (goals of multi-trade operational partnerships among carriers are operational cooperation with individual marketing).

discussion agreement in that trade.[5] Second, internal competition on price exists between members of both conferences and discussion agreements. U.S. law, for example, requires that a conference permit any member to deviate from the common conference price by exercising its right of independent action (see, e.g., 46 U.S.C. §40303(b)(8))[6] and, more recently, by entering into individual service contracts. 46 U.S.C. §40303(a)(1). Discussion agreements, which have become more prevalent and which are wholly non-binding, are likewise required to permit their members to enter into individual service contracts and, because they are non-binding, lack the ability of a conference to enforce guideline rates that may be adopted by the members.[7] Thus, price competition among members of a discussion agreement is at least as strong as competition between conference and non-conference lines, since all carriers have their own individual tariffs and service contracts and are not bound by any agreements reached within the discussion agreement.

C. *The Recommendation Is Inconsistent With The Conclusions Reached And Approach Taken By Most of New Zealand's Largest Trading Partners*

Although the Draft Report does address the treatment afforded to carrier agreements by other jurisdictions, it does so in a rather cursory fashion that is, in many respects, incomplete and or inaccurate. The fact is that virtually all of the major trading nations in the world have recognized the importance and unique nature of ratemaking and non-ratemaking agreements in promoting essential liner services and preserving competitive choices for importers and exporters. In consequence, these countries have recognized that the public interest benefits of these agreements outweigh any potential for competitive harm, and therefore decided these

[5] *See also,* 49th Annual Report of the Federal Maritime Commission, Fiscal Year 2010, pp. 17-28, discussing the market shares of carrier discussion agreements in various U.S. trade lanes, all of which were less than 100%.
[6] This is a citation to the United States Code, the federal statutory law of the United States. 46 is a reference to the title of the Code, and the section number refers to the section within that title.
[7] *The Impact of the Ocean Shipping Reform Act of 1998,* Federal Maritime Commission, September 2001, p. 25.

agreements should receive exemptions from their respective competition laws. Within the last 13 years, the United States, Canada, Singapore, Japan, China, and Australia have each retained competition law immunity for cooperative carrier agreements after extensive reviews of the economic effects and benefits of these agreements. Other countries in the Pacific Rim, such as Korea and Taiwan, also have longstanding competition law exemptions for carrier agreements.

A more thorough and accurate examination of the legal regimes in the most relevant of these countries, and the reasons for those regimes, shows that the basis for the Draft Report's recommendation with respect to ratemaking agreements is unfounded and inconsistent with prevailing international norms, particularly as reflected in the policies of New Zealand's largest trading partners.

1. The United States

In the United States, agreements between or among liner carriers are governed by the U.S. Shipping Act of 1984, as amended by the Ocean Shipping Reform Act of 1998 ("OSRA"). Such agreements must be filed with the U.S. Federal Maritime Commission ("FMC") and become effective 45 days after filing unless that agency formally requests additional information about the agreement or obtains an injunction against the agreement in U.S. federal court on the grounds that the agreement is likely, through a reduction in competition, to result in an unreasonable increase in transportation cost or an unreasonable reduction in transportation service. Once an agreement enters into effect, it is exempt from the application of the U.S. antitrust (competition) laws. See, 46 U.S.C. §§40301 through 40307 and 46 U.S.C. §41307(b). However, OSRA includes various prohibitions on carrier and agreement conduct (see 46 U.S.C. §§41104 and 41105), many of which are modeled on prohibitions found in the antitrust laws.

As of January, 2012, there were approximately 242 carrier agreements on file with the FMC. Of these, 3 are conferences, 22 are rate discussion agreements, 9 are non-rate discussion agreements, and the remainder are various types of operational (non-ratemaking) agreements.[8]

The Draft Report's analysis of the U.S. regulatory regime contains fundamental misstatements of fact, which erroneous statements are then used to support the recommendation contained in the Draft Report. A correct understanding of the U.S. regime and experience demonstrates that the recommendation of the Draft Report is ill-advised.

The Draft Report concludes that conference agreements were not indispensable to the provision of reliable liner shipping on U.S. routes because there was no degradation of service quality when U.S. law was revised in 1999 to require all carrier agreements to permit their members to enter into confidential, individual service contracts. Draft Report, pp. 176 and 181. This conclusion is, to put it bluntly, wrong. The revisions to the U.S. Shipping Act of 1984 made by OSRA did, among other things, prohibit carrier agreements from restricting their members' ability to enter into confidential, individual service contracts. This made conferences, which had to that point in time prohibited their members from entering into such individual service contracts, a less attractive form of cooperation. However, at no time did the United States withdraw its antitrust exemption for conferences or discussion agreements, as demonstrated by the provisions of the U.S. Code cited above, and the types of agreements on file with the FMC. Thus, to the extent the Draft Report relies on the U.S. experience as a basis to conclude that elimination of ratemaking agreements is not destabilizing, or that such agreement are necessary to ensure stable services, that reliance is misplaced because the United States never eliminated its antitrust exemption for such agreements.

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[8] *Carrier Agreements in the U. S. Oceanborne Trades*, Federal Maritime Commission, January 5, 2012.

The Draft Report also suggests that the United States may be considering elimination of its antitrust exemption for carrier agreements. Draft Report, p 176. This, again, is incorrect. There was a bill that would have eliminated antitrust immunity for certain agreements introduced in 2010, but it was not acted upon. The primary sponsor of that legislation, Representative Oberstar, was defeated in his bid for re-election and no new legislation of this type has been introduced since.[9]

The United States has provided carrier agreements, including conferences and discussion agreements, with antitrust immunity since 1916, and is not currently contemplating any change to that regime.

2. Australia

Australia has long provided and continues to provide an exemption from its competition law (the Trade Practices Act 1974) in Part X of that Act ("Part X"), which Act is now known as the Competition and Consumer Act 2010 ("CCA").

Under Part X as it existed up until approximately 2000, conference agreements in the outwards Australia trades were required to register with the Registrar of Liner Shipping, and were exempt from the competition laws. Inward conferences were not required to register, but were also exempt. Following a review of Part X in 1999, that statute was revised to require registration of inwards as well as outward conferences (which are broadly defined in Australia to include almost any collective carrier agreement). A review of Part X by the Australia Productivity Commission in 2004-2005 produced a recommendation that Part X be eliminated or, alternatively, that it be revised to require individual authorization of more anticompetitive

[9] In any event, the introduction of a bill in the U.S. is a far cry from enactment into law. According to THOMAS, the legislative website of the U.S. Library of Congress, in the 111th Congress, covering 2009 and 2010, some 10,629 bills were introduced, of which 364 were signed into law, a passage rate of less than 4%.

agreements while retaining registration for agreements less likely to raise anticompetitive concerns.

Now, almost seven years after the issuance of that report, Australia has not changed its system of registration for inwards and outwards conference agreements, and immunity for such agreements.

Thus, while the Australia Productivity Commission made a recommendation similar to that contained in the Draft Report, the Australian Parliament has decided to retain a system that does not follow those recommendations and which is more consistent with the dominant international approach and the suggestion of the Agreements.

3. Japan

Japan is the country that most recently reviewed its competition law exemption for carrier agreements, having decided in June of 2011 to retain its broad exemption for ratemaking and non-ratemaking agreements.

As background, Japan was one of the first Asian countries to adopt a competition law exemption for carrier agreements. The Japanese Marine Transportation Law provides that "any agreement, contract, or concerted practice between or among shipping operators concerning freight rates, fares or fees, transport terms or conditions, routes, sailings or calls are exempt from the Japanese Anti-Monopoly Law." See Marine Transportation Law, Article 28. Thus, conferences, ratemaking agreements, and non-ratemaking agreements are all exempt from the Anti-Monopoly Law, and are instead subject to regulation under Article 29-2 of the Marine Transportation Law, which requires all exempt agreements to be filed with the Ministry of Land, Infrastructure and Transport ("MLITT") before becoming effective.

In 2010, the Japanese government asked the MLITT to review the issue of antitrust immunity for carrier agreements in Japan, and to consider various factors such as benefits of

immunity to shippers, overall impacts on the Japanese economy, and systems of carrier antitrust immunity that exist internationally among Japan's key trading partners. After a thorough review, the MLITT decided that the current system of antitrust immunity for carrier agreements in Japan should be maintained for the following reasons:

- After consulting a number of interested industry stakeholders, the MLITT was unable to find any valid reason for abolishing the current antitrust immunity system in Japan. Indeed, the factual findings in Japan were very similar to those set forth in the Draft Report, including the presence of numerous competitors in the trade offering robust service to importers and exporters, no evidence of abuse or anti-competitive conduct by carrier agreements, and no complaints by shippers regarding rate levels or service availability. Rather than adopt the type of radical change advocated by the Draft Report, the MLITT reasonably determined these facts supported the continuation of the status quo.

- In another conclusion similar to that of the Draft Report, the MLITT noted that antitrust immunity for all types of carrier agreements continues to be the international standard, and that such immunity is still afforded to carrier agreements by virtually all of Japan's key trading partners. In this regard, the MLITT understood that lack of immunity could put Japan at a serious competitive disadvantage with other countries around the world, and potentially undermine its status as a leading liner shipping center in Asia.

- The MLITT recognized the potential consequences to carriers, shippers, and the Japanese economy as a whole that could result if immunity for ratemaking and non-ratemaking agreements was withdrawn in Japan. According to the MLITT, such negative impacts could include prolonged freight rate volatility, newer and higher surcharges, and a number of potential service problems, including overall service reductions and a lack of available vessel capacity to meet the growing needs of importers and exporters.

See, June 17, 2011 press release issued by MLITT.

4. Singapore

Japan's decision to maintain carrier immunity followed Singapore's decision in December 2010 to extend its own broad block exemption for liner shipping agreements until December 31, 2015. Singapore has afforded both ratemaking and non-ratemaking agreements a competition law exemption since 2006, shortly after it adopted its Competition Act. The 2006 Singapore Block Exemption Order for Liner Shipping Agreements ("BEO") expressly exempts liner shipping agreements regarding "price" from the prohibitions in Section 34 of its

Competition Act, as long as those agreements comply with certain administrative requirements including filing with the Competition Commission of Singapore ("CCS"). See BEO at ¶ 5. The term "price" is defined broadly to include any rate or charge "incidental to or reasonably connected with" the provision of liner services. See BEO at ¶ 3(1). Thus, liner conferences and ratemaking agreements are both exempt from the Competition Act. The BEO also exempts agreements regarding "technical, operational, or commercial arrangements." This term is designed to exempt the various types of non-ratemaking agreements. The CCS determined that it was "desirable to have a BEO that allows liner operators participating in all forms of liner shipping to collaborate to bring about technical, operational, and commercial improvements in their services." See CCS Explanatory Note on the Competition Block Exemption for Liner Shipping Agreements Order 2006, at ¶ 43 (rel. July 12, 2006).

In issuing its Block Exemption Order in 2006, the CCS recognized that "[e]xemptions from certain provisions of competition law have long been a feature of the liner industry in major jurisdictions around the world." CCS BEO Explanatory Note at ¶ 7. The CCS stated that the block exemption would maintain the stability of prices and the availability of reliable services, and would facilitate efficiency by permitting technical and operational cooperation among liner shipping companies. See id. The CCS stated that antitrust immunity for shipping agreements would provide competitive, comprehensive, and low-priced shipping services for shippers throughout the country. Id. at ¶ 6. Finally, the CCS recognized the importance of the exemption in promoting international consistency in liner shipping:

> Shipping is a global trade and the CCS is mindful of the larger regulatory environment within which different stakeholders in the shipping industry operate, as liner operators will generally organize their agreements to comply with the rules of the strictest country on a particular trade route. After due consideration of the nature of the shipping trade, international maritime developments...the CCS is of the view that the [Block Exemption Order] will put in place a

> regulatory environment broadly aligned with that currently in place for major jurisdictions, such as the EU, the United States, Australia and Japan. Such a block exemption will provide certainty to the shipping industry. Id. at ¶ 9.

As its 2006 BEO[10] was set to expire on December 31, 2010, the CCS initiated a thorough review of its exemption in 2010. As part of this review, the CCS retained independent consultants to meet with key stakeholders in the maritime industry, and issued a questionnaire to a number of parties for their input, including a number of carriers, shippers, shipper groups, liner shipping agreements, and interested governmental entities.

Following this review, the CCS decided to renew and extend its Block Exemption Order for a further five years. In making this decision, the CCS noted that "antitrust exemptions remain the regulatory norm for the liner industry globally, and for most of Singapore's trading partners," and "will provide continued certainty to the shipping industry." See CCS Response to Public Consultation of September 2010 on Proposed Recommendations to Minister With Respect to Block Exemption Order for Liner Shipping Agreements at ¶ 3 (rel. September 14, 2010). The CCS concluded that liner shipping agreements have a "net economic benefit" and that the presence of these cooperative agreements provides "a higher degree of connectivity and service choice for Singapore's importers and exporters." Id.

5. People's Republic of China

A similar regulatory exemption for carrier agreements has existed in China for a number of years. In 2002, the PRC Ministry of Transportation ("MOT") released its Regulations on International Maritime Transportation, which recognize and authorize liner shipping agreement practices in China. Article 22 of the Regulations states that "photocopies of liner conference agreements, service operation agreements, and freight rate agreements concluded between

[10] As the reference to the EU in Singapore's 2006 BEO demonstrates, the conclusion reflected in the BEO was reached prior to the EU's decision to withdraw the block exemption for conferences. However, the EU's action did not change the conclusion reached by Singapore in 2010.

international shipping operators engaged in international liner services in which Chinese ports are involved shall be submitted" to the MOT after the conclusion of such agreements. In 2003, the MOT released Implementing Rules in conjunction with the Maritime Regulations, where it made clear that the regulations applied to all types of carrier agreements, including conferences ("liner conference agreements"), ratemaking agreements ("freight rate agreements"), and non-ratemaking agreements ("operational agreements"). See Implementing Rules Article 3(14), (15), and (16) and Article 32.

In March of 2007, the MOT released a "Notice on Strengthening Supervision on Liner Conferences and Freight Discussion Agreements ("Notice"), pursuant to its authority under the Maritime Regulations, which was intended to "facilitate the healthy development of China's market for international container liner transportation, ensure fair competition in international shipping market, and protect the lawful rights and interests of carrier and shippers." The Notice establishes an agreement filing procedure and a consultation mechanism between carriers and shippers on all ratemaking agreements, which provides for transparency on all carrier agreement practices in China.

6. Summary of The Dominant International Experience

As foregoing analysis of the treatment of carrier agreements by New Zealand's major trading partners demonstrates, most countries afford carrier agreements exemptions from their competition laws. However, this does not mean that there is no government regulation or oversight of such agreements. To the contrary, virtually all countries that have exempted these agreements from their competition laws have adopted separate regulatory systems in lieu of a more generalized competition law regulatory system to ensure that the public gets the benefits of the carriers' cooperation, while avoiding possible unfair or anti-competitive practices. Thus, in

such countries where an exemption from competition law is provided, carrier cooperative activities are carried on openly and under regulatory oversight.

7. The European Union -- A Lone and Unsuccessful Exception

As the Draft Report notes, the only significant exception to the international standard of carrier immunity is the European Union ("EU"), which eliminated its exemption for liner conferences in October 2008 as a part of a broader effort to eliminate exemptions for most industries. However, as explained below, this repeal has not produced the benefits expected by the European Union and is not an appropriate model for New Zealand to adopt.

The U.S. Federal Maritime Commission recently released a study on the EU's repeal of its liner conference exemption (hereinafter "FMC EU Study").[11] The FMC noted that the EU's main expectations of the economic impact of repealing the conference exemption would be:

> --transport prices for liner shipping services will decline
>
> --service reliability on deep sea and short sea trades is expected to improve
>
> --the competitiveness of EU liner shipping firms will be positively impact, if impacted at all
>
> --small liner shipping carriers will not experience particular problems
>
> -- EU ports, employment, trade and/or developing countries will experience no negative impact and possibly a positive impact.[12]

After analyzing the actual effects of the repeal, the FMC concluded, among other things, that:

> --"the repeal does not appear to have caused a decline in freight rates or other charges." FMC EU Study, p. 218.
>
> --"there was no persuasive evidence that the repeal of the liner conference block exemption either improved or hurt service quality." FMC EU Study, p. 219.
>
> --"The impact of the repeal on rate stability appears to have been an increase in volatility-

[11] *Study of the 2008 Repeal of the Liner Conference Exemption from European Competition Law*, Federal Maritime Commission, Bureau of Trade Analysis, January, 2012.
[12] FMC EU Study, p. 218, citing September 25, 2006 press release and memo issued by the EU.

> -a result that suggests that the existence of a discussion agreement in a trade (or, at least, in the Far East trades) may have some dampening effect on rate volatility. FMC EU Study, p. 219.[13]
>
> --"The impact of the repeal on market concentration appears to be increased concentration." FMC EU Study, p. 220.

Thus, some of the major benefits the EU anticipated as a result of the repeal of the block exemption for conferences have not materialized. On the contrary, the FMC found that the repeal has produced increased rate volatility and increased market concentration. The EU's experience strongly suggests that the repeal of the block exemption in New Zealand would not produce any benefits, and may in fact produce negative consequences.

In addition to the lack of benefits from a repeal of its block exemption, there are others reasons New Zealand should not follow the EU's approach. As an initial matter, recent statements from several countries suggest that the EU decision on conference immunity will not be followed elsewhere, but instead will be monitored as a kind of experiment that departs from the long-established cooperation system in liner shipping. For example, in its recent decision to extend its block exemption, the CCS stated: "[i]n view of the economic downturn that has impacted the liner shipping industry significantly, CCS is of the view that more time is required to assess the impact of regulatory changes in the EU." Likewise, Japan expressly rejected to follow the EU approach, citing the considerable rate and service volatility that has been experienced in the EU trades since its removal of conference immunity. China is also currently studying the impacts of the EU's decision. If New Zealand were to repeal its competition law exemption for carrier ratemaking agreements, it would immediately be at odds with its key trading partners around the world, almost all of which provide exemptions under their own competition laws – e.g. the U.S., China, Japan, Singapore, Taiwan, Korea, Australia, Canada,

[13] This is confirmed by the *Alphaliner Weekly Newsletter*, Volume 2011 Issue 22, attached hereto as Appendix 5.

etc. Lack of an exemption could put New Zealand at a serious competitive disadvantage with other countries around the world, and potentially undermine its ability to maintain competitive shipping services to meet the growing needs of its importers and exporters.

Moreover, given the substantial differences between the New Zealand and EU trades, there would be considerable risk in New Zealand following the EU approach. The EU is the largest economic block in the world, which means that the cargo volumes moving to/from the EU assure it of adequate service, regardless of its regulatory regime. Moreover, four of the five largest carriers in the world are based in the EU. As the Draft Report notes, the same cannot be said of New Zealand which, as an island nation, is very dependent on international shipping services provided by companies based elsewhere.

The size of the New Zealand market means that a significant change in regulatory regime presents a far greater risk to New Zealand than to the EU. In particular, it is questionable whether the FMC's finding that the EU's repeal did not impact service quality would hold true in New Zealand, which is a much smaller market served by a much smaller number of carriers. The other negative consequences experienced in the EU trades, such as increased rate volatility and increased market concentration, are also likely to be magnified in the smaller, more concentrated New Zealand market. Thus, New Zealand must be extremely cautious in embarking on any significant changes in its regulatory regime.

D. *The Agreements' Proposed Alternative*

For the reasons set forth above, the Agreements believe that the Commission should revise its recommendation to suggest a less drastic change to existing law and recommend that both ratemaking and nonratemaking agreements (inward and outward) be subject to registration in New Zealand and be made subject to the unfair practices of the New Zealand Shipping Act.

In addition, the exemption for ratemaking agreements would be required to permit and protect confidential individual service contracts.

This revised approach has several advantage over the recommendation made in the Draft Report, which the Commission concedes is based on limited information:

- It is consistent with the approach taken by virtually all of New Zealand's major trading partners.
- It is incremental in nature, and protects New Zealand importers and exporters against potential abuses (the primary benefit of eliminating the exemption for ratemaking agreements)[14] without risking destabilization of New Zealand's ocean shipping services.
- It provides an opportunity for the New Zealand authorities to gain experience with carrier agreements, which will better inform any future policy decisions in this area.

Accordingly, the Agreements respectfully request that the Commission revise the recommendation made in the Draft Report in the manner suggested above.

Respectfully submitted,

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[14] As the finding of the FMC EU Study quoted in footnote #2 above suggests, this benefit is greatly overstated.