

**Review of Part X of the Trade Practices Act 1974 on International Liner Cargo Shipping  
The Productivity Commission Draft Report**

**Comments by the MLIT-Japan**

Preface

1. The Ministry of Land, Infrastructure and Transport of Japan (MLIT-Japan), the government authority that has the jurisdiction over the Marine Transportation Law which regulates the antitrust immunity to agreement or concerted practice among international shipping operators, has the honour to submit herewith its comments on the Draft Report on the review of Part X of the Trade Practices Act 1974 on International Liner Cargo Shipping published on 22 October 2004.

Legal framework in Japan

2. The Article 28 of the Japanese Marine Transportation Law stipulates that any agreement, contract or concerted practice concluded between or among shipping operators concerning freight rates; fares or fees; other terms or conditions of transport; routes; sailing or calls; or carrying shall not be subject to the provisions of the Antitrust Law, but be subject to the Article 29-2 of the Marine Transportation Law, provided that the agreement, contact or concerted practice is filed with the Minister of Land, Infrastructure and Transport.

3. The Article 29-2 of the Marine Transportation Law requests international shipping operators who are parties of agreement or contract (i.e. liner conference, consortium, discussion agreement)(hereinafter referred to as the “agreement”) to file the agreement with the Minister before its entering into force. In addition the Article stipulates that international shipping operators shall file every individual concerted practice (i.e. general rate increase, surcharges, setting up of a formula to calculate surcharges) that stem from the agreements with the Minister prior to the enforcement.

4. According to the Articles, the Minister is authorized to issue orders to modify or cancel the agreement or concerted practice that is filed with the Minister, if the Minister finds that such agreement or concerted practice may hamper the consumer’s interests improperly. The Minister can execute such mandatory measures whenever he finds

any adverse effects of the agreement or concerted practice.

5. Thus, the legal framework in Japan does not authorize so-called block exemption from the anti-trust law for the agreement or concerted practice that stem from the agreement between and among shipping operators, but subject the agreement or concerted practice to the administration of the MLIT.

6. The above-mentioned framework was the result of the total review of the anti-trust immunity to the agreements among domestic or international shipping operators in 1999. The MLIT is of the opinion that this legal framework has been functioning well to ensure the interests of shippers in Japan using liner shipping services while properly taking the changes and development of the international shipping industry into consideration.

### Comments

[Principle]

7. The MLIT does not stand for an assumption that the agreement or concerted practice among shipping operators always brings users of liner shipping services profits. At the same time, the MLIT does not stand for an assumption that the agreement or concerted practice among shipping operators always bring users harm or less profits compared with the situation where the competition among shipping companies prevails strongly.

The MLIT supervises the implementation of agreement or concerted practice respectively by assessing and monitoring its implications or intervening if rectification is necessary.

[The function of shippers' association]

8. The MLIT, in executing this individual supervising or rectifying power pays attention to whether practical and mutually beneficial dialogues or consultations between the agreement (i.e. conference) and the shippers' association in Japan are properly conducted under a certain established rule.

9. In Japan, the practical dialogues or consultations with the shippers' association, which represents major manufacturing and trading companies in Japan, play important role in restraining possible unilateral power of liner conferences like a countervailing

power that is expected to be executed by the outsiders or non-conference members to the conference.

10. In addition, in Japan, both the members of the agreement and shippers' association have cordial will to develop their relations in a collaborative and constructive way, respecting each other while maintaining a strained relationship between shipping operators and shippers.

A news clipping concerning a recently-held forum to that members of the government, the liner conferences and discussion agreements, and the shippers' association attended is herewith attached for reference.

The liner conferences and discussion agreements collected, analyzed and presented macro-economic information relating to the scale and structural change of liner shipping market as well as current and foreseeable situation of supply-demand, that may require enormous costs and time for individual shippers to do so. They also explained the background of rate increase or the reasoning of the formula to implement surcharges to shippers. It could contribute to establishing a common recognition of the shipping market and providing a sound basis to conduct a candid exchange of views and ideas.

11. Ultimately the actual level of rates including surcharges would be decided between individual shipping operator and shipper respectively as the result of a business negotiation and separately from such joint action between organizations of both sides.. However, the individual business negotiation could be conducted in a efficient and constructive manner reflecting the macro-economic information of the shipping market and the background of rate increase that are shared by both sides and become available as the result of collective dialogues and consultations between the agreement and the shippers' association prior to the negotiation.

[Shipper's interests]

12. Unlike in the liner trades in Europe and the U.S., in the liner trade between Japan and China, where no liner conference or other agreement among shipping operators is filed to the authorities, shippers in Japan have been forced to negotiate with shipping operators individually with the limited information they have and their own ability of negotiation. In this situation, the Japanese shippers confront difficulties in that the shipping operators set individually the freight rates and service level, and they change them suddenly, frequently in short terms and largely without a rational

reason and explanation. In addition a surcharge is imposed which is set individually by the shipping operators and does not comply with the world import/export business practices

13. It is a real fact that the Japanese shippers experienced an unstable and unreliable liner shipping services in the liner trade between Japan and China where no liner conference or other agreement among shipping operators is filed to the authorities. Moreover, the shippers in Japan also confront difficulties in that they are not able to find a proper counterpart who is able to consult with shippers collectively to set up a transparent and fair business rule in liner markets between Japan and China, aiming at formulating constructive relations between shippers' association and the liner conference or discussion agreement.

For this reason, some shippers may ask for governmental intervention in the trade against the movement of liberalization from governmental intervention.

[Conclusion and comment of Conflict of law]

14. In Japan, the MLIT is of the opinion that it will not authorize so-called block exemption from the anti-trust law for the agreement or concerted practice that stem from the agreement between and among shipping operators, but subject the agreement or concerted practice to the administration of the MLIT to assess and monitor individually whether it could secure and develop the interest of shippers in Japan while properly taking the change and development of international shipping industry into consideration.

15. The policy of MLIT in executing the supervising power is to establish and even develop the collective and collaborative relationship between shipping operators and shippers as a whole to secure and improve stable and reliable liner services to and from Japan in the long term.

16. In this regard, if the government of one side of a trading route makes a negative decision on the legitimacy regarding the agreement or concerted practice among shipping operators who engage in the liner trade between Japan and Australia, in a sudden manner and without any rational reasoning from the view point of the other government, the legal stability of the latter government may be hampered and the interests of shippers subject to the decision of the latter government may be injured.

For this reason, the MLIT requests holding a prior consultation with the

relevant governments or establishing an objective guideline to avoid the above-mentioned risk of legal instability of the other country and adverse effect to the interest of shippers in the other country who are trading partners, if the Australian government introduces an individual authorisation system by replacing the block exemption for liner shipping services.

# Container Shipping Players Search for Understanding

A container shipping forum was held in Tokyo on November 30, at which time Japanese shipping companies and shippers held dialogues on recent developments in global liner shipping and future supply/demand fluctuations, among other topics.

The shipping companies asked their partners to understand the need for freight rate restorations next fiscal year, pointing out cost-inflating factors such as increases in charter rates, the shortage of containers, and congestion at ports and harbors.

Shippers, noting that they could also be negatively impacted by such factors, proposed that both sides should find more opportunities to discuss solutions.

Witnessing the attendance of some 150 interested parties, including representatives of shipping companies and shippers, the container shipping forum was sponsored by *The Japan Maritime Daily*, and supported by the Japan Shippers' Council (JSC) and the Japanese Ship-owners' Association (JSA).

To open the forum, Toshiki Sakurai, director of the International Shipping Division under the Ministry of Land, Infrastructure and Transport (MLIT)'s Maritime Bureau, gave a keynote speech about developments related to liner shipping anti-trust immunity in other

nations.

Measures are being undertaken in Europe and Australia toward the reconsideration of antitrust immunity.

When studying these measures, it is necessary to appreciate the different principles guiding governments, shipping companies, and shippers, Sakurai said.

It is also important to compare and contrast the discussions that these sectors have made to date and their expected future directions.

In respect to Europe, the director pointed out that shippers have been distrustful of liner conferences' exclusive attitudes for quite some time.

As shippers demand the stable supply of services, shipping companies should behave in consideration of shippers' interest so that both camps can develop a relationship based on trust and proceed in the same direction, said Sakurai, adding that trust requires transparency in the market, which can be achieved by disclosing and exchanging information.

As shown by this forum, he said, shipping companies and shippers are willing to talk with each other; therefore, he continued, a system must be maintained under which they can enjoy coexistence and co-prosperity.

Following Sakurai, the JSC gave an address, indi-

cating that it has no intention of opposing the existence of conferences, although it does believe their activities should be supervised.

On the Japan/China trade, which is said to have no liner conferences, surcharges and other problems are ongoing, the council stated.

The JSC demanded that all liner conferences catering to Japan reconsider systems that exist in name only, such as the dual freight system, by the end of 2005, while penalty rules should be removed immediately.

Carriers then explained recent changes in cost factors.

Also introduced were their projections regarding supply and demand in 2005 on the trades linking Japan with Europe and North America, as well as business plans for the same year of the Japan Europe Freight Conference (JEFC) and the Transpacific Stabilization Agreement (TSA).

Changes in cost factors identified by the shipping companies included 1) sharp increases in container charter rates, 2) a chronic shortage of containers, 3) high bunker oil prices, and 4) congestion at ports/harbors.

They added that these factors are showing signs of persisting and therefore should not be considered temporary.

Freight rate restorations have so far enabled lines to improve their base-line profitability; however, cost-inflating factors are now putting pressure on operat-

ing costs, preventing carriers from maintaining quality services.

Concerning the supply/demand balance in 2005 for the Europe trade, west-bound freight movements are forecast to grow 17.5 percent over 2004, while capacity is expected to increase 15 percent. The supply/demand balance will continue to be tight resulting from high load factors.

Carriers noted that costs will continue to increase next year due to higher charter rates, an insufficient number of containers, imbalances on east/west services, and higher charges for overland and terminal services.

For the purpose of offsetting higher costs and securing space for shipments consigned in Japan, the shipping companies called upon the shippers to understand the need for freight rate restorations.

According to the JEFCA's 2005 business plan, a freight rate restoration of US\$200 per TEU will be imposed for one-year contracts, while for six-month contracts, a revision of \$150 per TEU will be made twice (\$300 per TEU on a yearly scale).

In North America, meanwhile, shipping companies are tackling the issue of congestion on the West Coast by directly serving East Coast ports/harbors and switching their destinations to Pacific Northwest (PNW) ports/harbors, among other steps.

Nevertheless, development of landside infrastructure and overland transport systems are

expected to take several years. As such, said carriers, 2005's peak season will suffer similar problems to this year.

For these reasons, the TSA has announced it will increase rates for its West Coast of North America services by \$285 per FEU, services to inland destinations on the East Coast (interior point intermodal (IPI) and mini-landbridge (MLB) cargoes) by \$350 per FEU, and all-water services to the East Coast by \$430 per FEU.

Over the period from June 15 to November 30, a peak season surcharge of \$400 per FEU will be introduced.

At the end of the forum, a panel discussion was held between shipping companies and shippers, focusing on what had been explained in the keynote speech and other presentations.

Opinions were exchanged as to bunker adjustment factors (BAFs), terminal handling charges (THCs), and other surcharges as well as efforts being made to deal with congestion on the West Coast of North America.

"Shippers are not in opposition to freight rate increases in general," said a panelist representing shippers.

"Shipping companies, however, spent all the time [today] explaining why they will implement freight rate restorations."

Factors leading to increases in costs are issues that must be shared by both sides, he continued, wondering whether or not they can meet to have constructive discussions about how these issues can be dealt with.

"If a system is realized in Japan under which shipping companies and shippers can help each other to work on their common problems, shippers' organizations in Europe, the U.S., and other countries and regions of Asia will pay attention, I hope," he said.

## Public Terminals

Offering Services