Before The

Antitrust Modernization Commission

STATEMENT

OF

STANLEY O. SHER

ON BEHALF OF

THE WORLD SHIPPING COUNCIL

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ANTITRUST MODERNIZATION COMMISSION

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My name is Stanley Sher. I am a partner in the law firm of Sher & Blackwell in Washington, D.C. I am filing this statement on behalf of our client, the World Shipping Council. The World Shipping Council ("WSC" or the "Council") is a non-profit trade association of over twenty-five international liner shipping ocean carriers, established to address public policy issues of interest to the international liner shipping industry. The Council's members include the leading liner companies from around the world. The Council's member lines represent the full spectrum of carriers from large global lines to niche carriers, offering container, roll-on/roll-off, and car carrier service as well as a broad array of logistics services. With few exceptions, the liner shipping companies regulated under the Shipping Act are also Council members, and the Council therefore has a strong interest in ensuring that the industry operates under a U.S. legal regime that is fair, stable, predictable, and flexible enough to support the huge capital investment and innovation necessary to continue to carry the ever-increasing volume of America's foreign trade.

EXECUTIVE SUMMARY

Before turning to the issue of antitrust immunity, it is important to recognize the current dynamics of international trade. "Globalization" is not an abstract concept for container carriers. The carriers are an integral and indispensable part of it. Container cargoes moving to and from the U.S. have increased exponentially. Over 26 million international cargo containers will transit U.S. ports this year, a 73% increase in just the past 7 years. Ocean carriers have met this challenge with service innovations and capital commitments in the hundreds of billions of dollars. Today, over 1,000 ocean-going liner vessels, mostly containerships, make more than 24,000 calls at U.S. ports each year offering faster, more flexible and more efficient services. It is in this context -- of an undisputed success story -- that the legal rules regulating ocean liner shipping must be examined.

The limited antitrust immunity applicable to the liner shipping industry is the result of a comprehensive Congressional review that culminated in the 1998 passage of the Ocean Shipping Reform Act (OSRA). By authorizing individually negotiated confidential service contracts, under which approximately 95% of liner cargo presently moves, OSRA effectively eliminated the old style "conference" system that had been part of U.S. law since the enactment of the Shipping Act of 1916. Under the prior conference system, groups of carriers set and adhered to common rates. Despite the fact that the regulatory regime applicable to liner shipping today -- including the antitrust immunity portion of that regime -- is fundamentally different than the pre-OSRA regime, much commentary about the Shipping Act still focuses on the effect of conferences. Because the conference system has already effectively been dismantled, future debate about how the Shipping Act operates must focus on how the industry is structured today, not what it looked like eight, twenty, or fifty years ago.

There is virtual unanimity that there are substantial benefits in the form of expanded service offerings and increased efficiencies which flow from the many agreements filed pursuant to the Shipping Act under which ocean common carriers share vessels and other assets in order to provide the capacity necessary to support a constantly expanding volume of U.S. foreign commerce. Some have argued, however, that those benefits would remain even if the current regulatory system were scrapped. It has also been suggested that laws other than the Shipping Act already provide antitrust protection for some carrier agreements. The second suggestion is simply wrong, and the first confuses risk of ultimate antitrust liability with the regulatory certainty necessary to encourage socially beneficial actions that could face legal challenges in the absence of an exemption.

By way of illustration, both of the point that carrier agreements have evolved substantially since Congress rewrote the Shipping Act in 1998 and also of the point that beneficial agreements would be discouraged by any further limitations on the antitrust exemption in the Act, I will provide concrete examples of recent agreements that provide benefits that are important to the nation's economy, and that either would not or could not have been undertaken without the antitrust immunity in the Shipping Act. The proper public policy result begins with a factual understanding of the activity being examined. The international liner shipping activity at issue here is complex, evolving, and critical to the economic well-being of the United States and of international commerce. One must understand it, as well as the present regulatory scheme, before one entertains suggestions of changing it.

STATEMENT

The World Shipping Council filed comments in July of 2005 in response to a number of specific questions that the Commission asked about how it should go about analyzing the issue of exceptions to the antitrust laws. In those comments, which I will not repeat in detail here, we noted several key points about the Shipping Act, the liner shipping industry, and the level of antitrust and non-antitrust regulation applied to the industry. We noted, for example, that the limited antitrust immunity conferred on the liner shipping industry and the accompanying international shipping regulatory regime was codified in 1916, and was thoroughly reviewed and modified by Congress in 1961, 1984 and, most recently, in 1998, only eight years ago. As part of the 1998 amendments made by the Ocean Shipping Reform Act, the rate discussion immunity was substantially narrowed, while at the same time the powers of the Federal Maritime Commission to detect and punish behavior that is harmful to competition or that violates any one of more than 30 prohibited acts were expanded. I recommend those comments to you for an overview of the history of the Shipping Act and its amendments, the unique structure of the liner shipping industry, and the changes in the industry that have both triggered and resulted from the amendments that Congress has seen fit to make over the years.

Today I would like to shift the emphasis from the past to the present and the future, and from the theoretical to the concrete. Congress created this Commission for the purpose of studying the nation's antitrust laws and making suggestions for statutory and regulatory changes that the Commission might find appropriate. I do not presume to know what approach the Commission will take in fulfilling that charge. I would make the suggestion, however, which is no less true for being obvious, that it is critical for the Commission to keep firmly in mind what is at stake when one contemplates changes to the legal regime that applies to liner shipping. This is not a theoretical or academic exercise. Theory and academic debate do not change industries or economic outcomes or, in the case of liner shipping, impact the efficient transportation of the 500 billion dollars worth of international cargoes that liner shipping companies carry to and from the United States each year. Changes to the nations' laws, on the other hand -- in this case the antitrust laws and by necessary implication the comprehensive regulatory structure that the Federal Maritime Commission administers -- can have a direct effect on whether American importers, exporters, and manufacturers will continue to receive the efficient, frequent, predictable, and inexpensive international shipping services to which they have become accustomed and upon which their businesses depend. There is general agreement that the 1998 amendments have resulted in a more flexible, competitive industry. In fact, a number of our international trading partners have adopted this model. No change in the existing legal regime should be recommended unless the Commission is reasonably certain that it will improve, not detract from, the performance of the industry. That judgment could only be made after a detailed analysis of the facts and economics of the industry as it has substantially evolved following enactment of the 1998 regulatory reform legislation.

Over the years, as the Shipping Act's antitrust exemption has been debated and modified, perhaps a dozen or more individual issues have arisen with respect to the rationale for and the impacts of that exemption. Today I would like to focus primarily on two of those issues. The first issue is the current state of the law. The second issue is whether the economic benefits of the current system would remain if the antitrust immunity were further narrowed. I choose these issues for several reasons. First, I believe that they are absolutely necessary to any informed discussion of the Shipping Act. Second, these issues illustrate the changes in the industry since the passage of OSRA in 1998 and the changes that can be expected in coming years. As such, I think they provide an appropriate foundation for beginning the economic policy analysis that must precede any discussion about how the Shipping Act is functioning today.

Before I discuss the current legal regime and the benefits that U.S. importers and exporters enjoy under this regime, I would like to put that discussion in context by giving you a snapshot of the economic environment in which the industry operates.

The liner carrier industry has made extraordinary investments to keep pace with exponential growth in U.S. international trade. To give you a feel for the size of that growth, nearly 26 million international cargo containers -- half a million containers every week -- transited U.S. ports in 2005. In 1998, when the Ocean Shipping Reform Act was passed, that number was just over 15 million, an increase of 73% in only seven years. This country's international trade has grown worldwide, but nowhere more than with Asia. The large majority of those containers flow through ports on the West Coast. In the largest U.S. port complex, Los Angeles/Long Beach, container traffic has almost doubled since 1998 – from 7,475,907 twenty-foot container equivalents (or "TEUs") in 1998 to 14,194,442 in 2005. Other U.S. ports on both coasts have also experienced significant growth.

Ocean carriers could easily have been overwhelmed by this growth in trade or prevented or slowed it down by not expanding capacity. Instead, they met the challenge and made the huge investments necessary to provide the service their customers demanded. The liner shipping industry has invested over $150 billion in new vessels, accompanying terminal facilities, containers, chassis, and other equipment. As a result, service options for U.S. importers and exporters have grown significantly. Today, over 1,000 ocean-going liner vessels, mostly containerships, make more than 24,000 calls at U.S. ports each year -- more than 65 vessel calls a day.

Vessel space for 24,000,000 containers was added during 2001 to 2005 alone, a 29% increase. Total vessel capacity of the worldwide active fleet is expected to increase by another 14% in 2006. Not only is overall vessel capacity increasing, the average size of vessels has also grown. The largest vessels in the world fleet in 1990 were 4,409 TEUs, which increased to 7,200 TEUs by 2000. Ships larger than 10,000 TEUs are on order today. In short, cargo demand is booming along with the global economy, and ocean carriers have successfully met that demand.

The 1998 OSRA Amendments Ended the Conference System.

The first issue that I will address is the scope of the antitrust exemption following the 1998 OSRA overhaul of the Shipping Act and the nature of the agreements that are operating today under the Shipping Act's regulatory regime. Recent changes in the law and in industry practice have rendered essentially irrelevant a great number of the historical arguments that various parties have made -- pro and con -- about the antitrust exception in the Shipping Act. From a review of the comments filed to date with the

Commission, it strikes me that the discourse has not kept up with changes in the law and in the way the industry now operates. It does no good to debate the wisdom of a regime or of activities that no longer exist. Congress concluded a multi-year examination and debate in 1998 and resolved issues about the regulatory system, quite successfully as it turned out. The discussion going forward must begin with an understanding that the antitrust immunity provisions of the Shipping Act cannot be separated from the rest of the Act, which includes a comprehensive regulatory scheme. That discussion must also reflect the fact that the current system is materially different than the system that existed prior to the Ocean Shipping Reform Act.

The Federal Maritime Commission is in the best position to provide the details of the changes made to the law in 1998 through the Ocean Shipping Reform Act. To summarize those changes: the advent in 1998 of individual confidential service contracts, under which approximately 95% of U.S. liner cargo moves today, effectively ended the conference system. Under the old conference system, upon which the ABA Antitrust Section's March 17, 2006, comments focus almost exclusively, groups of ocean carriers adopted common tariff rates and also negotiated joint service contracts that generally contained common rates for participating carriers. Those practices have been almost entirely eliminated as a direct result of the changes that Congress adopted eight years ago. [1] Indeed, there is only one active agreement presently listed by the Federal

[1] In addition to focusing its comments largely on a system that no longer exists in the United States, the ABA Section cites repeatedly to an April 16, 2002 "OECD Report," *Directorate for Science, Technology and Industry, Division of Transport, "Competition Policy in Liner Shipping Final Report."* That report was largely "based on information collected through a survey completed in the spring of 2001," which was too early to identify the full effects of OSRA (which became effective in May 1999). *Report* p. 5. In any event, the survey produced data of a quality that was admittedly "rather poorly suited to the detailed analysis necessary for the study." *Report* p. 13. The report was strongly contested within the OECD and was published as a report of the OECD Secretariat only. It cannot be considered a source of the "empirical

Maritime Commission as being a "conference" that actually operates as a tariff common-rate group. That is the Trans Atlantic Conference Agreement, and it ironically operates as a traditional conference with respect to tariff cargo because European law requires it to operate that way. The European law that both allows and requires the setting of common rates will sunset in two years, and that last remaining conference will then disappear.[2] The now-defunct conference system, therefore, is not the regime that should be the subject of this Commission's analysis. Congress has already reviewed and replaced that system.

<u>The Majority of Shipping Act Agreements Are Enhancing Efficiency and Solving Infrastructure and Environmental Problems</u>.

So what does the world look like in 2006, eight years after OSRA? What types of agreements are on file with the FMC, and how do those agreements relate to the operation of the international, intermodal transportation system?

The majority of the ocean carrier agreements on file with the Federal Maritime Commission (147 of 219) are vessel sharing agreements of one type or another. Under

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evidence" that the Antitrust Section agrees is necessary to evaluate the market under the post-OSRA Shipping Act regime.

[2] There has been much speculation about what effect the European Commission's repeal of its so-called "block exemption" from the competition laws with respect to liner conferences will have. Certainly it is an interesting development, but I think the jury is properly still out on what impact that action might have. First, there is by no means unanimity among the world's trading nations as to whether Europe took the proper course. Carrier agreements operate in most trading nations of the world without legal threat. Of course, the repeal in Europe does not become effective for two years, so we have not yet had an opportunity to see the practical effects of that repeal. Perhaps most important in terms of analyzing whether the European approach holds any lessons for the U.S., the system that the EC has abolished had already effectively been abolished in the United States by the OSRA amendments in 1998. The block exemption in Europe, which was unaccompanied by regulatory oversight, applied only to traditional conferences, i.e., groups that published a common tariff and that were compelled to charge uniform tariff rates by law. In other words, the European system somewhat ironically required carriers seeking any immunity to undertake the most anticompetitive actions possible in order to qualify for that immunity. The U.S. system has not required or encouraged such an approach since at least 1984, if ever. Accordingly, although the recent European action will change how that system works, that system has for a long time been different than the U.S. system. Finally the E.C. is currently considering new competition guidelines for ocean carriers, which are still evolving.

these arrangements, a group of carriers, typically between two and four, share space on one another's ships. These arrangements allow for each participating carrier to serve more ports with greater frequency at a lower capital cost. The result is that customers get better service and an increase in the number of competing carriers from which they may choose. These agreements range from very simple arrangements to charter space on other carriers' ships to substantially integrated services that share terminal facilities and engage in long-range planning for vessel deployment in addition to sharing space on vessels. These types of agreements have been consistently praised by shippers -- the companies that own the cargo carried on the ships -- for their contribution to increased service quality. As such, there is virtual unanimity on the economic policy issue presented by the most prevalent form of industry agreement to which the Shipping Act's antitrust exemption applies. That unanimous position is that such agreements should be encouraged.

In addition to the predominant class of vessel sharing agreements, there is a much smaller class – fewer than 30 – of agreements that are generally described as "discussion agreements." These agreements contain authority for their members to discuss a broad range of topics, including rate issues. They are permitted to agree on rate guidelines for contracts, but those guidelines are non-binding and are filed with the Federal Maritime Commission. The combination of the non-binding nature of any contract guidelines with the fact that virtually all cargo today moves under individually negotiated confidential service contracts means that these groups do not set rates in the manner that the conferences of old did. Group rate discussions under these agreements frequently amount to exchanges regarding market trends, including information regarding exogenous costs such as fuel prices, security costs, terminal fees, etc. that affect the industry across the board. Through detailed minute filing and trade data reporting requirements, the FMC tracks the activities of these agreements, and it also obtains important insight into how the nation's ocean transportation needs are being met. That window into the commercial world is especially important because most of the lines serving the United States are based overseas, and information is otherwise difficult for U.S. regulators to obtain.

There is a third class of agreements that has come onto the scene only in the past several years, but that is of growing importance. These agreements demonstrate both the amount of change that the industry has undergone since OSRA and also the reason why Shipping Act agreements are becoming an integral part of solutions to problems that currently threaten the ability of the entire intermodal transportation system to deal with the ever-increasing flow of goods entering and leaving the United States.

One example of such agreements is the West Coast MTO Agreement. This agreement is made up of marine terminal operators, or "MTOs," not carriers. MTOs, like ocean common carriers, may file certain types of agreements with the Federal Maritime Commission and thereby obtain antitrust immunity for activities within the scope of those agreements. The West Coast MTO Agreement was formed to deal with the very serious port congestion and environmental problems in the ports of Los Angeles and Long Beach, California, the nation's largest port complex. All cargo arriving at or leaving those ports does so either by truck or rail, and the volume of trucks necessary to move the cargo entering and leaving the port had grown to the point that it was causing substantial delays at the terminal gates. That meant that trucks would idle for long periods of time, reducing throughput efficiency and contributing to an already substantial air quality problem.

The MTO agreement was used to set up a program called "PierPASS." Under that program, the various marine terminal operators that provide vessel loading and unloading services at the ports agreed that they would open additional gates and provide expanded services during nighttime hours. To encourage use of the night shifts, they adopted a charge on cargoes entering and leaving the ports during normal daytime work hours, and the money collected was used to help defray the costs of extending the operating hours of the terminals into the night. As a result of this program, 30-35 percent of truck traffic (over 2,000,000 truck trips in the first year) has been moved to off-peak hours, reducing congestion on port area highways and greatly reducing the waiting times for trucks serving the ports. Trucks come and go more quickly without waiting in line. Air pollution is decreased, and truckers can make more trips during a workday, allowing them to earn more money. Moreover, the effective throughput volume of the ports has been expanded -- with no expenditures for the construction of additional physical infrastructure and no government money required. By all measures, the undertaking has been a success, and one that has succeeded where numerous attempts at local and state government solutions had failed. Because the program relies at its core on an agreed upon industry solution based on a uniform charge to cover costs and induce a shift to off-peak cargo movements, it would, in the absence of antitrust immunity, arguably be subject to *per se* invalidation.

Another agreement filed under the Shipping Act that is providing a creative and efficiency-enhancing solution to port congestion problems (at both seaports and inland rail yards) is a chassis pool program sponsored by a corporation formed under the auspices of a carrier agreement called the Ocean Carrier Equipment Management Association (OCEMA). A long-standing problem at many U.S. marine terminals and rail yards is that the truck chassis used to transport shipping containers (which can be transferred from ships to trucks to trains without being unloaded) are owned by different shipping lines. Traditional practice has been that, when a trucker arrives at a port to pick up a container transported by a particular ocean carrier, the container must be matched with a truck chassis owned or leased by that same ocean carrier. In addition to slowing the loading process, this practice requires many more chassis to be stored on a terminal than would be the case if the trucker could use any available chassis.

The system being implemented under the OCEMA agreement in many parts of the country today, which allows carriers to contribute chassis to a pool of equipment and to draw any chassis from that pool, has reduced the number of chassis that need to be maintained at any location. That has freed scarce terminal acreage. This in turn allows for expanded throughput capacity without the need to consume additional surrounding land. In addition, because containers and chassis no longer have to be matched according to the owner of the equipment, this system, like PierPASS (although by a different mechanism), reduces truck waiting times -- thus reducing air pollution, speeding cargo processing through the terminal, and allowing truckers to make more trips, save fuel, and earn more money. And again, no government funds are required. Both the Department of Transportation and the U.S. Environmental Protection Agency have publicly praised this efficiency-enhancing arrangement. Although these chassis pools would have defenses available in a rule of reason review of a Section 1 claim, it is unlikely as a practical matter that this industry arrangement would have been undertaken in the first place without the certainty provided by the antitrust immunity provisions of the Shipping Act.

I believe that these two examples, one involving marine terminal operators and one involving ocean common carriers, are typical of the kinds of agreements that we will see more of in the coming years. Although investment in ships -- the leg of the international intermodal system for which carriers are responsible -- has more than kept up with rapidly escalating demand, the same is not true of the U.S. highway, bridge, and rail assets that must move cargo to and from the nation's ports before and after the cargo is transported by ship. Because it will require billions of dollars to build out of these land-side transportation bottlenecks, and because trade volumes are expanding more rapidly than are the public funds that are necessary to relieve choke points in the system, the availability of a mechanism that allows the industry to collaborate to create additional capacity through increased efficiency is vital to economic growth. The Shipping Act antitrust exemption (and its attendant agency regulation) is not the only tool for allowing such solutions, but it has allowed solutions where no others have yet appeared.

I discussed earlier the fact that investment in ocean-going vessels, unlike investments in U.S. highways, ports, and railroads, has kept pace with and has in fact exceeded the demand created by a rapid and sustained growth in international trade. Frequent, fixed-day sailings are available between United States ports and virtually every port in the world, and the costs of that transportation typically represent a very small fraction of the overall value of the cargo. The vast majority of all cargo arrives on time and without damage. Capacity shortages are exceedingly rare. Even in times of peak demand, there is enough vessel capacity that cargo does not get left behind. That is no small achievement in light of the fact that cargo volumes are cyclical, seasonal, and increasingly imbalanced (import versus export) in any given trade. It is also of no small importance to our nation's economy, which increasingly depends on just-in-time delivery for manufacturing inputs, retail stock, and seasonal agricultural commodities. I am not suggesting that the success of this rather remarkable system can be tied solely to the Shipping Act or the antitrust exemption that law provides, but it is clear that the ocean transportation system post-OSRA has more capacity, better service, and greater efficiency than at any other time in its history -- and this is at a time of growing demand. The nature and the predictability of the legal regime logically play a part in that success. The question is whether it is wise to scrap a system that is working better than any other U.S. transportation sector.

The Benefits of Carrier Agreements Would Not Be Available Without the Antitrust Exemption.

That question leads me to my second main point. Although most critics of the Shipping Act have no complaints about the way that the liner shipping industry performs, the rates charged, or the services provided, those critics have argued that all of those benefits can be had without antitrust immunity, and therefore that there is no reason not to repeal that immunity. I think that analysis is wrong for a couple of reasons.

Those opposed to the exemption routinely state, without much analysis, that the pro-competitive and efficiency-enhancing agreements in which carriers and marine terminal operators participate would not run afoul of the antitrust laws even in the absence of the exemption. In some cases (for example, simple vessel-sharing agreements), that conclusion may be correct if it is read to mean that a court, properly applying current guidelines and judicial precedent regarding collaborations among horizontal competitors, would most likely find that such undertakings are not prohibited by Section 1 of the Sherman Act. The problem is that that is the wrong standard.

As Congress indicated in a similar situation, to say that a company will win a lawsuit over particular behavior is far different from saying that a company is equally likely to engage in that desirable behavior when it is faced with the possibility of a treble damages suit as when it is not. In enacting amendments to the National Cooperative Research Act of 1984, the House Committee on the Judiciary made it plain that the fact that a company might well prevail in a government-initiated antitrust enforcement action or a private antitrust claim did not provide a sufficient incentive for that company to engage in cooperative research and production that might benefit consumers:

> Just as in the Committee's consideration of the NCRA during the 98th Congress, it is essential to distinguish between actual and perceived antitrust enforcement risk with respect to production joint ventures. Actual antitrust enforcement has had minimal inhibitory impact on cooperative ventures. Misapprehensions about such enforcement, however, have probably had a significant dampening effect on collaborative activity, and for this reason cannot be dismissed as irrelevant.

H.R. Rept.103-94, at 10 (May 18, 1993). The Committee went on describe the increase in beneficial collaborations that it expected to result form providing certainty regarding antitrust exposure:

> Indeed, as clearly acknowledged by the Committee in the 98th Congress, the NCRA was passed not to redress an overly stringent enforcement policy, but to clarify misperceptions about antitrust risk. But correcting misperceptions may still have tangible and important benefits in the context of collaborative activity. In the nine years since passage of the NCRA, more than 300 research joint ventures in a wide span of industries have been registered. By contrast, according to testimony the

> Committee received during the NCRA debates, in the three-year period of 1976-1979 only 21 research joint ventures were newly formed.

Id. at 11.

As these Congressional findings make clear, the mere likelihood of prevailing in an antitrust challenge to a collaborative undertaking does not often provide sufficient certainty to encourage parties to go forward. Something more concrete is necessary, and in the case of liner shipping and marine terminal operations, the limited antitrust immunity granted by the Shipping Act, coupled with a regulatory scheme that also prohibits most of the negative behaviors prohibited by the antitrust laws, provides that certainty. Those who would abandon or substantially modify that system should consider carefully what the practical results of such action might be, and consider whether the reality or indeed even the risk of such results are warranted in light of virtually universal recognition of the benefits of the current system. Put differently, if suggested changes are premised on purely ideological grounds, is that a prudent way to make economic policy in an arena that touches virtually every sector of the national and international economy?

There is another point that warrants comment in connection with the assertion that the benefits of the current system would persist even if the legal foundation for that system were removed. That point involves the suggestion that there is existing statutory protection outside of the Shipping Act for most of the beneficial cooperative arrangements that exist today. The argument has perhaps been made most pointedly by the Antitrust Section of the American Bar Association in its March 17, 2006, comments. There, at footnote 48, the Section states that: "For what it is worth, such agreements would also likely qualify for treatment under the National Cooperative Research and

Production Act, 15 U.S.C. § 4301-05, permitting them to avoid even the possibility of treble damages liability upon the filing of a preliminary notice with the enforcement agencies."

With due respect to my friends that are members of the Antitrust Section, the suggestion is simply wrong as a matter of law. The National Cooperative Research and Production Act (NCRPA), which was the subject of the House Judiciary Committee Report quoted earlier, was enacted with the express purpose of increasing the competitiveness of American firms. In keeping with that purpose, the Act's liability limitation provisions expressly do not apply "unless . . . the principal facilities for such production are located in the United States or its territories . . . ." 15 U.S.C. § 4306. The vast majority of the vessels used to move America's containerized foreign trade are registered in countries other than the United States, and are owned and operated by companies that are organized in countries other than the United States. Accordingly, the suggestion that the NCRPA would provide the requisite certainty to encourage companies to continue their beneficial cooperative arrangements after a repeal of the Shipping Act is simply incorrect.

Because Congress has already recognized that the threat of litigation (even litigation in which the challenged companies are likely to prevail) is sufficient to chill desirable conduct, it is imperative that any serious consideration of repealing the Shipping Act's antitrust exception include a frank and impartial evaluation of whether the nation is prepared to risk the loss of the existing beneficial industry cooperation. Reasonable people can differ as to the proper course to adopt at the end of that debate, but the debate cannot be cut short on the basis of assumptions about current law and economic incentives that are demonstrably incorrect.

CONCLUSION

In 1998, Congress made major changes to the Shipping Act. In particular, it revised the antitrust exemption and strengthened the regulatory tools available to the FMC to ensure the availability of competitive liner service to American importers and exporters. One of the results of those changes was that the conference system was effectively eliminated. In its place, the Ocean Shipping Reform Act marked the advent of individually negotiated confidential service contracts and new types of agreements under which the certainty of the limited antitrust immunity has allowed the industry to fashion solutions to infrastructure and environmental constraints that were not being addressed by the government. These industry solutions either would not have been possible -- or as a practical matter would not have been undertaken -- in the absence of the limited antitrust immunity provided by the Shipping Act. Finally, all of these developments have occurred within an industry that continues to invest aggressively in the infrastructure necessary to meet the nation's growing international trade. That cannot be said of the other transportation sectors transporting goods in this country. The international ocean transportation system is an absolutely critical underpinning of many vital sectors of the American economy. The current regulatory regime under which that transportation system operates works, and works well. It is, legally and commercially, a real success story. Congress could do much harm, and little good, by changing it now.

Thank you very much for your kind invitation to testify before you today. I would be happy to answer any questions that you might have.

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