Getting down to details: I do not suggest, as Mr. Davidson would have us believe, that "we can largely forget about anti-competitive agreements". What I do believe is that the existing law that we have in Canada is adequate to deal with the problem, and in arriving at that conclusion, I do not ignore any relevant evidence.

In order to consider the practicality of agreements serious enough to reduce the rate of offer improvement, one must start on page one of Competition versus Monopoly and work towards the end. I deal with the circumstances in which the conditions are right for a conspiracy, how a market-dividing agreement (that I would oppose) creates a monopoly, etc.

As for my grip on the law, Mr. Davidson and I have been sparring partners for long enough that he knows very well that I know the role of the Attorney General and the standard of proof required.

I believe that I am not at all off the track when I comment on inferential conspiracy. "No one has ever been convicted of conscious parallelism", should read, "Convictions have never stated that the accused were guilty of conscious parallelism". But it has been a very close thing, and if the sugar companies' conviction on appeal had stood up before the Supreme Court, we would in my opinion have had just such a conviction.

From what has gone before, the reader will already see why I would insist on a test of undueness in any action as difficult to understand as competition. As for tests of undueness, we shall just have to depend, as we do now, on the good sense of the judge and hope that judge spends long enough on each case to develop a sense of what competition is all about. The defendants might also offer a little prayer that the judge assigned to the case has not studied economics under a professor with the same views on competition as those of Mr. Davidson.

NEW CANADIAN AND U.S. LEGISLATION TO GOVERN SHIPPING CONFERENCES

By S.D. Khosla and R.D. Anderson*

On March 27, 1984, Bill S-12, An Act ot Amend the Shipping Conferences Exemption Act, 1979, was introduced in the Senate of Canada, following a two-year interdepartmental review. The bill has been given second reading, and is now referred for study by the Senate Committee on Banking, Trade and Commerce. In the United States, on March 20, 1984, the Shipping

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Act of 1984 was signed by President Reagan. It will take effect on June 18, 1984. In both countries these developments entail substantial changes in the law governing liner shipping conferences, the cartels that regulate rates and conditions of service in regularly scheduled international ocean commerce.[1] These changes are of direct interest from the competition policy perspective, because of the collusive nature of conference operations and the exemptions that the Canadian and U.S. Acts provide from national competition legislation. The purpose of this note is to explain key provisions of Bill S-12 and compare them with the new U.S. legislation.

Part I provides relevant background to the amendments. Part II explains the basic changes in the scope of exemption under the SCEA amendments and the new U.S. Act. Part III compares the standards for review of agreements and the role of public authorities under the two countries' legislation. Part IV explains the significance of new provisions in Bill S-12 and the U.S. Act that are intended to encourage responsiveness to users and flexible pricing by conference members. Part V deals with the role of shippers' councils, which are increasingly relied on as a countervailing force against conferences, particularly under the new Canadian legislation. Part VI notes the significance of the UNCTAD Code of Conduct for Liner Conferences and the U.S. response to the Code.

I BACKGROUND TO THE AMENDMENTS

The existing Shipping Conferences Exemption Act, 1979 (SCEA) provides a very broad immunity for conferences from the Combines Investigation Act. In particular, under section 5 of the SCEA, conference members are permitted to (i) fix collective tariffs; (ii) use patronage contracts (a form of tying arrangement); (iii) allocate ports of call among members of a conference; (iv) regulate the timing of sailings and the type of service to be offered; (v) share cargo and/or earnings and losses from the transportation of goods; and (vi) regulate admission and expulsion of members to and from a conference. The Act permits such agreements not only among conference members, but also between members of a conference and non-conference carriers, and between the members of different conferences. These agreements may cover not only ocean cargo movements, but also inter-modal (sea plus land) transportation of goods.

The U.S. Shipping Act of 1916, replaced only very recently by the Shipping Act of 1984, provided a much more regulated environment for shipping conferences than the Canadian legislation. Antitrust immunity was contingent on prior review by the Federal Maritime Commission (FMC) under a public interest test. Once conference agreements were approved, tariff levels were actively enforced by the FMC.

Several developments in the international shipping environment have changed the nature of conferences and forced re-consideration of existing policies in both Canada and the U.S. First, linner shipping companies are increasingly providing fully integrated multimodal transport service to and from inland locations, rather than mere ocean cargo service. This development was made possible by containerization in the industry, which involves shipment of cargo in twenty or forty foot sealed metal boxes. These boxes, which are stacked in the holds of cellular containerships, facilitate easy transfer of cargo from one transport mode to another. Containerized cargo movements are now the dominant component of liner shipping. Multimodal service has the potential to undercut the power of conferences, by enhancing the availability of alternative cargo routings.

A second key development is the emergence, in Canada and other maritime countries, such as the U.S., Australia and Japan, of shippers' councils as an important new voice of users, both in negotiating with conferences and in seeking pro-user changes in ocean shipping legislation. Like its U.K. and Japanese counterparts, the Canadian Shippers' Council (CSC) has been active in seeking changes in legislation governing shipping conferences. The position taken by the CSC is buttressed by evidence of widespread dissatisfaction among individual users with existing conference practices. In a recent survey of more than 300 Canadian exporters, importers and freight forwarders using liner services, 42% favoured outright repeal of the SCEA exemption, and only 20% favoured renewal of the legislation in its existing form.[2]

A third important development in the shipping environment is growing disenchantment with extensive regulation of conferences as practised by the Federal Maritime Commission under the U.S. Shipping Act of 1916. It is generally considered that FMC regulation has resulted in substantial inefficiencies and prevented conference rationalization and service coordination that would benefit users.[3] Finally, the implementation by numerous developing countries of the UNCTAD Code of Conduct for Liner Conferences has raised broader concerns about restriction of competition by government intervention in ocean shipping.

II SCOPE OF EXEMPTION FROM COMPETITION LEGISLATION UNDER THE SCEA AMENDMENTS AND NEW U.S. ACT

Both the SCEA amendments and the U.S. Shipping Act of 1984 entail significant changes in the scope of exemption provided for collusive shipping agreements from the respective national competition legislation. In terms of the types of agreements permitted, these changes bring U.S. policy substantially closer to Canadian policy under the SCEA 1979. In particular, the U.S. legislation is intended to enable conferences to implement a broad range of "rationalization" agreements, including agreements dealing with service

coordination, capacity rationalization, pooling of revenues and sharing of cargoes.[4] This change is based on a perception that such agreements can make conferences more efficient, and facilitate the provision of service that might not otherwise be available.[5] Such agreements are also permitted under the SCEA 1979 and will not be affected by the amendments.

The Shipping Act of 1984 also allows conference shipping agreements to cover multimodal as well as ocean freight cargo movements. This is an important development for U.S. conference interests, since under the old Shipping Act of 1916 it was not clear that they has this authority.[6] In allowing conference agreements to cover multimodal as well as ocean services, the U.S. Act is similar to the SCEA 1979,[7] which is not changed in this respect by Bill S-12.

Bill S-12 does provide two new limitations in the scope of the exemption provided under the Canadian Act. First, it will delete the exemption provided by the SCEA 1979 for agreements between conference members and non-conference carriers.[8,9] Competition from non-conference carriers, which operate in most trade routes not subject to foreign government-imposed entry barriers, is generally regarded as the most important sources of protection for users from potential abuse by conferences. Second, the Bill clarifies that predatory conduct by conference members results in removal of a conference's exemption under SCEA.[10] Predatory conduct, in particular use of "fighting ships", is also prohibited under the U.S. Shipping Act of 1984.[11]

III REVIEW OF AGREEMENTS AND ROLE OF PUBLIC AUTHORITIES

Review and Disexemption under Bill S-12

In Canada, the SCEA 1979 makes provision for investigation of conference practices by the Canadian Transport Commission or the Director of Investigation and Research, Combines Investigation Act, but the scope for remedial action under the act is limited.[12] Shippers generally consider that there should be provision for dealing with conferences that abuse their privileges.

To meet this need, Bill S-12 provides explicit authority for removal of the exemption of particular agreements by the Canadian Transport Commission, following an investigation and public hearing. The general standard for disexemption is to be whether, in the CTC's view, an agreement filed pursuant to the SCEA, or a practice of omission of a party to an agreement, "is or is likely to be prejudicial to the public interest."[13] In addition, for the purposes of possible disexemption proceedings, two specific conditions will be deemed prejudicial to the public interest. The first is where an agreement or practice:

> has or is likely to have the effect of restricting competition to a degree that exceeds the restriction required to provide a reasonable degree of price stability. (section 4(1))[14]

The second condition that can result in disexemption under the new provision is failure by members of a conference to negotiate in good faith with users, as required by the Act.[15] This key provision is intended to strengthen the ability of the Canadian Shippers' Council to represent users' interests more effectively in negotiations with conferences.

The Director of Investigation and Research, Combines Investigation Act will have an important role to play under the amended SCEA. In particular, the Director is specifically empowered to initiate disexemption proceedings before the CTC. Proceedings may also be initiated by a shipper, a shipper group, an ocean carrier or other interested person.

Review Standard and Procedure Under the U.S. Shipping Act of 1984

As noted, under the U.S. Shipping Act of 1916, exemption of conference agreements from the antitrust laws was contingent on their prior review and approval by the Federal Maritime Commission. FMC approval was provided only after the agreements were shown to fulfill a "serious transportation need" or provide an "important public benefit" -- and the burden of proof in meeting this test was on the conference members.[16] Shipping companies also considered the time and other regulatory costs of obtaining approval to be excessive. Streamlining the review process and removing their onus of proving that an agreement should be allowed has been the foremost concern of U.S. carrier interests throughout the legislative review.

The Shipping Act of 1984 substantially provides the strengthened immunity desired by U.S. conferences, in that it (i) weakens the standard under which agreements are reviewed; and (ii) substitutes a burden of proof on the FMC to show that an agreement should be disallowed. The new standard for review of agreements provides specifically that an agreement may be disallowed it it

> is likely, by a reduction in competition, to produce an unreasonable reduction in transportation service or an unreasonable increase in transportation cost.[17]

As noted, rationalization agreements are expected to be exemptible under this standard. An agreement will be "automatically" considered exempt 45 days after being filed unless the FMC considers it objectionable under this standard and obtains an injunction against it from the U.S. District Court for the District of Columbia.

Similarity of Canadian and U.S. Provisions

The new U.S. exemption standard and procedure, while more favourable to conferences than the previous law, are relevant to the Canadian policy review since, to a certain extent, they are similar to the conference-specific disexemption power in Bill S-12. Under both the U.S. and Canadian provisions, most conference agreements will be routinely exempted from the antitrust laws upon filing, but agreements that are demonstrably harmful to user interests may be disallowed. The working of the new U.S. provision is somewhat similar to the Canadian test in section 4(1), in that both rely generally on the idea that restriction of competition by liner conferences should be limited to what is "reasonable". While there are also differences in the review standards and procedures, the analysis developed by the FMC in administering the new Act may be helpful to the Director of Investigation and Research and the CTC in making effective use of the new Canadian provision.[18]

Tariff Filing and Enforcement Provisions

The Shipping Act of 1984 retains an anti-competitive feature of the old U.S. Law: enforcement of conference and non-conference tariffs by the Federal Maritime Commission. IN particular, section 10(b) of the Act expressly prohibits carriers from charging rates different from those set out in their tariff. In this way, U.S. law helps to police the conference-cartel agreements. In Canada, the SCEA 1979 requires filing of conference tariffs with the CTC, but there is no provision for government tariff enforcement. There is also no tariff-filing requirement for non-conference carriers. These aspects of the Act are not affected by Bill S-12.

IV CHANGES TO ENCOURAGE RESPONSIVENESS TO USERS AND FLEXIBLE PRICING

In addition to the above-noted limitations on the exemption for liner shipping agreements, both Bill S-12 and the new U.S. Act provide special new measures designed to encourage greater responsiveness to users. Recent work on contestable markets has shown that enhanced freedom of entry and pricing can provide improved economic performance, approximating competitive results, even in markets characterized by a lack of actual competition.[19] The new Canadian and U.S. provisions may readily be interpreted as attempts to enhance contestability in the market for liner services.

Loyalty Contract Provisions

A primary means by which conferences attempt to limit contestability of their markets is the dual rate loyalty or patronage contract. These contracts normally involve a commitment by individual users to ship all of their cargo with members of a conference serving the relevant trade route, in return for a standard 10-15% rate discount. Such contracts are not an absolute barrier to entry, since they may normally be terminated on 90 days notice by the shipper, but when used by conference members acting in concert they make potential entry by non-conference carriers more difficult. The amendments to the Shipping Conferences Exemption Act seek to limit the impact of loyalty contracts by (i) clarifying that they may cover less than 100% of a shipper's cargo; and (ii) requiring that the proportion of cargo so covered must be determined through negotiation between the conference and users.[20]

In the U.S., the Shipping Act of 1984 deals more forcefully with loyalty contracts, by prohibiting them except to the extent that they are "in conformity with the antitrust laws."[21] This provision is expected to end the use of loyalty contracts by conferences, since the concerted use of tying arrangements is prohibited under section 1 of the Sherman Act.

Right of Independent Action

To provide enhanced freedom of pricing for individual carriers within the conferences, both Bill S-12 and the U.S. Shipping Act provide a form of "right of independent action". In essence this right enables individual members of the conference to offer special rates or services to shippers without the approval of other members -- and without being penalized by the conference for doing so. Even the threat of independent action by a conference member is an important check against excessive pricing by the cartel as a whole.[22]

Bill S-12 provides a statutory right of independent action only for members of conferences operating in trade routes where there is no compeition from non-conference carriers. It is not clear how many conferences will be affected by this provision, owing to the presence of small and/or seasonal carriers that may be considered as providing liner service. Also, carriers implementing independent action will be required to provide 15 days notice to other conference members. This may tend to inhibit the implementation of such action.

In the U.S., the Shipping Act of 1984 provides a statutory right of independent action of all members of all conferences serving U.S. trades.[23] This requirement has been imposed, despite resistance from most U.S. carrier interests, through the support of certain influential U.S. shippers (especially the Chemical Manufacturers' Association). The maximum notice period provided by the Act is 10 days.

Time/volume Rates and Service Contracts

IN the U.S., the Shipping Act of 1984 authorized conferences to implement both time/volume rates and service contracts. Time/volume rates involve discounts for shipment of specified volumes of cargo within certain time periods. Service contracts enable a shipper to contract out of the conference tariff, and purchase a specific service directly from a carrier (including a conference member). The initial benefits from these contracts accrue, primarily to large shippers, but the impact on rate levels may spread to the industry as a whole.[24] Such arrangements may become more common in Canada given the above-noted requirement, in the SCEA amendments, for contractual ties to be negotiated with shippers.

V ROLE OF SHIPPERS' COUNCILS UNDER THE CANADIAN AND U.S. ACTS

In Canada, an important thrust of the SCEA amendments is to strengthen the ability of the Canadian Shippers' Council (CSC) to negotiate effectively with conferences on behalf of users. In 1979 the Council was officially designated by the Minister of Transport to represent the interests of shippers in meetings with conferences, pursuant to section 15 of the Act. This section also requires members of the conferences serving Canadian export trade to meet with the designated shippers' group when "reasonably requested". Such meetings typically deal with the issues of conference rate levels and surcharges. To facilitate such negotiations, section 15 also requires conferences to supply "information sufficient for the satisfactory conduct of the meeting." The Council considers that, owing partly to the vagueness of these requirements, and to the lack of an explicit requirement for conferences to actively negotiate with shippers, it has been of limited effectiveness in iits role under the existing legislation.[25]

The amendments in Bill S-12 are intended to assist the Council in carrying out its functions in several ways. In particular, rather than merely providing information for the conduct of the meeting, conferences are to provide information "sufficient for the satisfactory carrying on of the negotiations."[26] A similar requirement is imposed on the shippers' group itself. As noted, the amendments also provide that a failure by members of a conference to negotiate in good faith is to be deemed prejudicial to the public interest and may be considered as grounds for administrative removal of a conference's exemption by the CTC. The shipper group is also specifically empowered to apply to the CTC for disexemption proceedings under this section.

The U.S. Shipping Act of 1984 also recognizes shippers' councils, and prohibits conferences from refusing to negotiate with them. Freight consolidation activities of shippers' councils -- i.e., their activities as buying groups -- are not specifically authorized by the Act, but will not necessarily be prohibited unless they involve the exercise of threatening market power.[27]

VI U.S. RESPONSE TO THE UNCTAD CODE OF CONDUCT FOR LINER CONFERENCES

The UNCTAD Code of Conduct for Liner Conferences, which is being actively implemented by most developing countries involved in maritime trade, and has been accepted by the European Economic Community in its trade with non-OECD countries, is regarded by the United States as protectionist and anti-competitive.[28] The Code embraces the conference system, attempts to legitimize government reservation of cargo to national shipping lines, and suggests a possible formula for allocation of cargo by governments: 40% to the exporting country; 40% to the importing country's carriers; and 20% to cross-trading countries. It thus substitutes government allocation of cargo to national carriers for allocation by market forces, and threatens the access of U.S. carriers to non-U.S. ("foreign to foreign") trades.

A key provision of the Shipping Act of 1984 provides a means for the U.S. to resist implementaiton of the Code. Section 13(b)(5) of the new Act responds to the Code by authorizing the Federal Maritime Commission, if it finds that any common carrier and/or foreign government has "unduly impaired" the access of a U.S. vessel to ocean trade between foreign ports, to take any action it considers appropriate, including suspending the tariffs of foreign national shipping lines, thereby excluding them from U.S. Maritime Trade. This is essentially a provision for direct retaliation against countries implementing the Code. Canada has no similar provision for resisting foreign government cargo allocation, although it may be required to consider such measures. This issue may be considered by the recently established Task Force on the Canadian merchant marine.

Notes

1. Approximately two thirds of the value of Canada's deep sea foreign trade is carried by liner service.

2. E.M. Ludwick and Associates, Shipping Conferences: Survey of Users' Views (Ottawa: Consumer and Corporate Affairs Canada, 1983).

3. See e.g., Gunnar K. Sletmo and Ernest W. Williams, Liner Conferences in the Container Age (New York: MacMillan, 1981).

4. U.S., House of Representatives, Shipping Act of 1984 (Report 98-600, February 23, 1984), p. 36.

5. See e.g., Devanney et al, "Conference Ratemaking and the West Coast of South America, "Journal of Transport Economics and Policy, vol. 9, 1975.

6. The FMC granted intermodal ratemaking authority to the U.S. North Atlantic conferences in the fall of 1983, but its authority to do this was under challenge by the Department of Justice.

7. SCEA 1979, section 2, definition of "transporation of goods" for the purposes of the Act. S.C. 1978-79, c.15.

8. Bill S-12, clause 3, amendments to section 5, SCEA.

9. Such agreements may still be permissible under the U.S. legislation.

10. Bill S-12, clause 4, amendments to section 6.

11. Shipping Act of 1984, section 10(7).

12. Section 4 of the SCEA specifies certain conditions that are to be considered as prejudicial to the public interest for purposes of section 23 of the National Transportation Act. Shippers consider that remedial action under this provision is uncertain and costly.

13. Bill S-12, clause 5.

14. This wording is contained in the SCEA 1979, section 4, but will be explicitly linked to the disexemption provsion by Bill S-12, clause 2.

15. Bill S-12, clause 2.

16. L. Jacobs and A. Weintraub, "The Shipping Act of 1916: Proposed Amendments and their Impact on the U.S. Merchant Marine, "Journal of International Law and Economics, vol. 15, 1981, p. 639.

17. Shipping Act of 1984, sections 6(g) and (h). For full text of the Act, see H.R. Rep. 98-600, 98th Congress, 2nd session, February 23, 1984.

18. The analysis to be carried out will include traditional antitrust considerations (e.g., market share of parties to the agreement), efficiency benefits (e.g., control of excess capacity), and implications for U.S. foreign policy and international comity. H.R. Rep. 98-600, February 23, 1984, ppg. 33-37.

19. W.J. Baumol, J.C. Panzar and R.D. Willig, Contestable Markets and the Theory of Industry Structure (New York: Harcourt, Brace, Janovich Inc., 1982).

20. Bill S-12, clause 1(3).

21. Shipping Act of 1984, section 10(b)(9).

22. Federal Trade Commission Chairman James C. Miller III, Prepared Statement on H.R. 1878, before the House of Representatives Committee on the Judiciary, 1983.

23. Shipping Act of 1984, section 5(b)(8).

24. The impact of service contracts under the Shipping Act of 1984 may be limited, however, since their use by individual conference members remains subject to the overall control of the conference. Shipping Act of 1984, section 4(7).

25. Canadian Shippers' Council, Submission to the Water Transport Committee of the Canadian Transport Commission (Hearings on the Shipping Conferences Exemption Act, 1979).

26. Bill S-12, clause 9, amendments to SCEA, section 15.

27. This is somewhat similar to the situation in Canada, where buying groups raise potential issues under the Combines Investigation Act, but may be acceptable to the extent that they do not "lessen competition unduly" or otherwise violate the Act. See Speech by M. Cappe, Deputy Director of Investigation and Research, Combines Investigation Act, to the National Dairy Council of Canada, September 13, 1983.

28. The U.S. was one of 7 countries to vote against the Code in the United Nations. Canada abstained and has not finalized its position on the Code. Government of Canada, Canadian Perspectives on the UNCTAD Code of Conduct for Liner Conferences: Proceedings, 1982.