Tentative Translation

Report on international shipping market and the Competition Policy

(2nd Draft)

June 16th, 2006

Study Group on Regulations and Competition policy

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Introduction

Shipping rate cartels have been formed based on shipping conferences in the field of international shipping ever since the 19th century. Such cartels are exempt from antitrust legislation (competition law) in areas such as the US, EU and Australia, with similar regulations in place in Japan under the Maritime Transportation Law, exempting cartels from the Antimonopoly Act. Although the suitability of retaining exemption regulations was examined in 1999 as part of a review of the exemption system, the decision was made to allow cartels to remain exempt on the grounds that (1) shipping conferences have a stabilizing effect on shipping rates and are therefore thought to be beneficial to shippers and (2) it is essential to retain international harmony with other systems such as those in the US and the EU.

However, sweeping changes in the international shipping market as a result of the spread of containerization and the rising volume of cargo shipped into and out of Asia via major routes have diminished the role of shipping conferences. On the other hand, there have been developments such as coordinated efforts between shipping conferences and non-member shipping companies to conclude stabilization agreements, restore shipping rates and set surcharges. There have also been changes in the EU and other countries, where the possibility of abolishing the system of exemption from competition law for shipping rate cartels is starting to be considered.

The Study Group on Regulations and Competition policy examined the international shipping market in 1991 when it put together its report on the system of exemption under the Antimonopoly Act. In light of changes in the current situation however, we have now decided to look into the issues affecting international shipping once again. For instance, we have examined the the feedbacks of the questionnaire to shippers and shipping companies and interview-based surveys conducted by the Fair Trade Commission of Japan. We have also consulted experts and related organizations in order to exchange opinions regarding the current state of the international shipping market and international shipping cartels, as well the future of exemption systems under the Antimonopoly Act and other related systems.

Based on the results of our studies, this report is designed to help promoting free and fair competition in the field of international shipping, focusing on the following points. An initial overview of the international shipping market is followed by a look at the history of shipping conferences and how they have changed as a result of clashes with competition laws. The next section outlines competition within the international shipping market before moving on to examine international shipping cartels. Finally, the report concludes with our views regarding competition policy within the international shipping market, concentrating mainly on approaches to exemption systems, and proposals regarding action that should be taken by the Fair Trade Commission of Japan.

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Section 1: Overview of the International Shipping Market

International shipping shoulders the majority of international trade, particularly in the case of island countries like Japan, where approximately 70%[1] of total trade in monetary terms and 99.7% of imports and exports on a weight basis rely on international shipping[2]. After providing an overview of international shipping, this section will then outline shipping services on liner and tramp services.

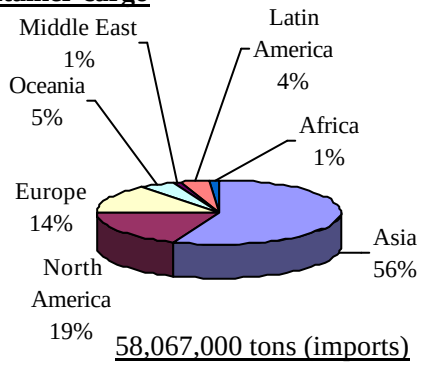
1. Shipping by liner shipping and tramp vessel services

Marine transport on routes between foreign countries, or international shipping, can be broadly divided into shipping via liner shipping and tramp services depending on the type of shipping.

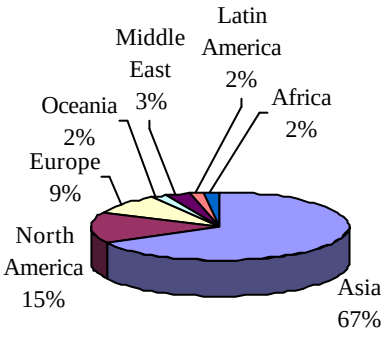
Shipping via liner shipping refers to the shipping of cargo received from any number of shippers, with shipping schedules and shipping rates made publicly available and advertisements placed far and wide for shippers to use services. Shipping via tramp services on the other hand refers to the shipping of cargo received from specific shippers using specialized vessels.

Figure 1: Breakdown of international shipping to and from Japan

? Container cargo

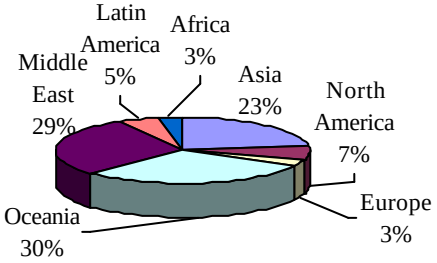


58,067,000 tons (imports)

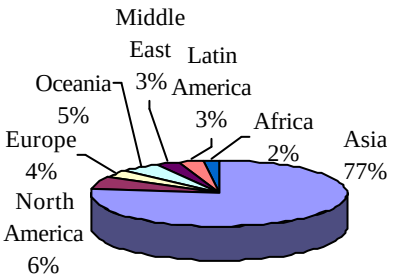


37,906,000 tons (exports)

? Tramp cargo



753,806,000 tons (imports)



91,960,000 tons (exports)

[1] Japanese total trade is about 100,100 billion yen , 69,500billion yen (70%) of which were shipping , 31,500 billion yen(30%) were airline.
[2] Figures based on Freight Distribution Statistics 2005 (Japan Federation of Freight Industries)

Source: 2005 Maritime Report (July 2005, Japan Maritime Public Relations Center, ed. Ministry of Land Infrastructure and Transport Maritime Bureau)

On a weight basis, the volume of cargo coming into and leaving Japan in 2004 came to approximately 95 million tons on liner shipping and around 850 million tons on tramp services, a ratio of roughly 1:9 in favor of the latter. On a revenue basis or in terms of market scale to put it another way, the gap comes down to 1:2[3]. Bearing in mind the fact that the majority of goods, from food to machinery, are shipped via liner shipping, it is fair to say that liner shipping is the basic means of transport within the international shipping market.

2. Overview of liner shipping services

(1) Outline of services

Today, the majority of liner shipping services consist of container shipping whereby goods are shipped in standard sized containers. As liner shipping services involve shipping cargo from any number of shippers, routes stopping off at numerous ports along the way are determined in order to provide services line with shippers' various shipping needs. Details such as ports of call, schedules, fares and the types of vessels allocated are decided based on the volume of cargo shipped, the type of cargo and other details specific to each individual route. Shippers purchase services by the container based on information provided directly by the shipping company or details of services printed in publicly available industry journals, selecting any port of call along a route as the point of origin or destination. Shippers can also purchase services for a fixed period such as one year by signing a service contract with a shipping company outlining terms and conditions of trade for the relevant period.

From the point of view of shipping companies, the key to increasing their rate of return is to increase the operating rate from each individual vessel, meaning that it is essential to determine the routes and frequency of their services so as to meet shippers' various needs as closely as possible. One of the common management issues facing all shipping companies is the fact that there tends to be an imbalance[4] between the quantity of incoming and outgoing shipping according to the volume of cargo shipped and seasonal factors.

(2) Service providers and users

As mentioned above, liner shipping services have to be provided on specific routes and on a regular basis at a specific frequency, meaning that a certain number of vessels are needed as a minimum. Providers offering liner shipping services are therefore limited to relatively large

[3] According to the 2005 Maritime Report (ed. Ministry of Land Infrastructure and Transport Maritime Bureau), revenue from shipping rates for the three leading shipping companies in Japan totaled approximately ¥650 billion from regular liner shipping rates and ¥1 trillion from irregular liners in 2004.

[4] The volume of cargo shipped on outgoing services on North American routes (from Asia to North America) in fiscal 2004 was 10.79 million TEU, roughly two and a half times more than the volume shipped on incoming services on North American routes (from North America to Asia) at 3.93 million TEU.

shipping companies over a certain scale. For example, a return trip from Japan to North America via regular liner takes around 40 days, or around 60 days to Europe. Assuming that services are provided on an ongoing basis at the frequency of one service a week (weekly services), a shipping company would have to invest in five or six vessels for North American routes and eight or nine vessels for European routes as a bare minimum. There are three Japanese companies providing regular liner shipping services; NYK Line, Mitsui OSK Lines and Kawasaki Kisen Kaisha Ltd. (K-Line). There are basically no other Japanese shipping companies providing liner shipping services apart from these three major companies. Nevertheless, there are also significant numbers of major foreign shipping companies on a larger scale, so-called mega-carriers, all of which are in competition with the three leading Japanese companies.

The major shippers using liner shipping services are industries such as trading companies, machinery, chemicals and electrical equipment.

(3) Main routes

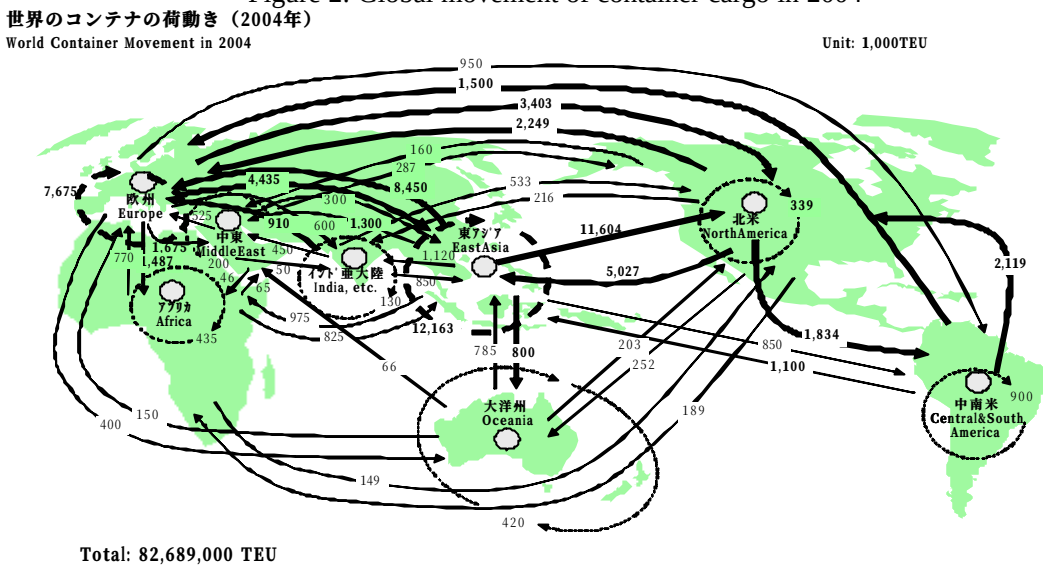
The volume of container cargo shipped around the world in 2004 (Figure 2) came to approximately 82.7 million TEU[5]. The breakdown of volume according to different routes shows that North American routes (between Asia and North America) and European routes (between Asia and Europe) are the highest volume routes, with routes within Asia accounting for roughly 50% of the global volume of container shipping.

In terms of routes to and from Japan, Asian routes[6] (routes within Asia), North America routes and European routes account for approximately 90% of the volume of shipping. Ports of call on these routes are determined via shipping routes based on the numerous ports that liners stop at on the way to their destination. For instance, North American routes go via ports in areas such as Asia and Central America, whereas European routes on the other hand go via ports areas such as Asia, the Mediterranean and the Red Sea.

[5] "TEU" (twenty-foot equivalent unit) is the equivalent unit used to count containers and refers to standard-sized commonly used twenty-foot containers (length 20ft (approx. 6m) × width 8ft (approx. 2.4m) × height 8ft). In addition to TEU, the other unit used is FEU (forty-foot equivalent unit), referring to standard-sized forty-foot containers.

[6] According to the 2005 Maritime Report (ed. Ministry of Land Infrastructure and Transport Maritime Bureau), the volume of cargo coming into and leaving Japan via Asian routes was 4.818 million TEU, approximately 50% of which was to and from China (2.252 million TEU).

Figure 2: Global movement of container cargo in 2004



(Source: based on data provided by Mitsui OSK Lines)

3. Overview of tramp vessel services

(4) Outline of services

Tramp vessel shipping services involves scheduling services as and when necessary in line with demand, with the timing and route dictated by shippers' needs. For the most part,tramp vessel services are used to ship full loads of energy resources such as LNG and crude oil or bulky items ("bulk cargo") such as iron ore and other raw materials, vehicles and wheat or other grains. A wide range of specialized vessels called bulk carriers are used, such as tankers or LNG ships for example, depending on the cargo being transported.

Cargo such as crude oil and bulk cargo accounts for the majority of cargo transported around the world by sea. This means that, on a weight basis, the majority of the world's shipping is handled by tramp vessel services, which came to 762.84 million tons, equivalent to roughly 90% of the global total, in 1999. In addition to the three large Japanese companies, tramp vessel services in Japan are provided by the likes of oil distributor and auto manufacturer subsidiaries, which provide services for their respective parent companies.

In contrast to liner shipping, whereby shipping rates and fees are charged based on the number of containers shipped and the distance, tramp vessel service is commonly provided based on charter contracts whereby entire vessels are chartered. The various different types of contract range from long term contracts spanning ten years for example and one year contracts to spot contracts whereby contracts are signed based on single vessels in line with temporary demand. A large number of shippers however opt to sign long term contracts.

(5)Main routes

Unlike liner shipping, routes for tramp vessel services are determined on a individual negotiation basis depending on the nature of the goods being shipped and the needs of the shippers or owners and therefore differ significantly according to different types of cargo. For

example, crude oil tankers frequently run routes between oil producing areas such as the Middle East and South East Asia and ports near domestic oil refineries in Japan.

Apart from simple return routes, there are also routes that circumnavigate between multiple loading and unloading points. If shipping iron ore via a dry bulk carrier for instance, the route might be as follows; Australia (loading) ? Japan (unloading) ? South America (loading) ? Europe (unloading) ? South America (loading) ? Japan (unloading).

Section 2 :History of the International Shipping Industry and Competition Policy

As part of the international shipping market, international cartels called shipping conferences[7] have continued to be formed and exempted from competition law in each country for over 130 years. The current international shipping market and the completions are affected by the historical background of international shipping and the framework of competition policies. In order to gain a clear understanding of the current international shipping market, it is therefore essential to take a look at the history of the international shipping industry.

This section will examine the origins and functions of shipping conferences, clashes between shipping conferences in the US, Japan and Europe and competition law, shipping conferences' exemption from competition law, changes to shipping conferences due to the spread of containerization and US policies promoting competition, and movements on reviewing the exemption system[8].

1 The origins and functions of shipping conferences

(1) The origins and development of shipping conferences

Shipping conferences are agreements signed between shipping companies operating liner shipping services on the same route to determine shipping rates and other terms of business in order to prevent the relevant companies competing with one another. The first shipping conference in the world was the Calcutta Conference concluded in 1875 in relation to the route between the UK and Calcutta. This was a time when the volume of trade between the UK and India was increasing rapidly, resulting in excess shipping tonnage and fierce shipping rate competition between companies. Thus it was that seven UK shipping companies decided to conclude an agreement to limit their respective number of scheduled ships and to determine minimum shipping rates. This was followed by the conclusion of the Chinese Conference, the forerunner of the current the Far East Freight Conference (hereafter referred to as the European Conference), in 1879 covering routes between Asia and Europe. Shipping conferences continued to develop after that, centered mainly around routes to and from Europe. Shipping conferences came into being a full 15 years prior to the establishment of US antitrust legislation in 1890 at a time when cartels themselves were not against the law.

(2) The function of shipping conferences

Having become firmly established, shipping conferences agreed terms and conditions covering areas other than shipping rates between shipping companies. The contents of such

[7] Shipping conferences are also referred to as "liner conferences" or "freight conferences" in some cases.

[8] Refer to Appendix 2 on chronological trends relating to shipping conferences and competition laws in Japan, the US and Europe.

terms and conditions can be broadly divided into three categories according to their purpose; (1) steps to control competition between member shipping companies, (2) steps to prevent shippers from using non-member shipping companies[9] and (3) steps to directly eliminate non-member shipping companies. The following section examines the specific details of each type of conference.

I Steps to control competition between member shipping companies

Agreements such as rate agreements and sailing agreements were concluded between shipping conference member companies as a means of preventing competition based on shipping rates. Rate agreements involve member companies agreeing shipping rates for individual items and require companies to consult one another when altering shipping rates. The conclusion of rate agreements was the most fundamental, important part of the function performed by shipping conferences. Sailing agreements are used to regulate shipping tonnage and impose restrictions on areas such as the number of trips, ports of call, service schedules and loads in tons.

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

Rate agreements were concluded as part of shipping conferences in order prevent price competition, as mentioned in the above paragraph I. Due to the fact that there were no particular restrictions on entry into the international shipping market however, member shipping companies were always up against competition from non-member companies and new companies entering the market once their rate agreements were made public. This led to shipping conferences taking steps such as those outlined below in order to prevent shippers from using non-member shipping companies offering lower rates and tariffs than member companies and to ensure that rate agreements were effective.

(i) Dual rate system

Under the dual rate system[10], exclusive patronage contracts (also known as "loyalty agreements") are concluded between shipping conferences and shippers stating that member shipping companies will provide shippers with shipping services at a contract rate lower than their standard non-contract rate on the condition that they only use member companies for the duration of a specified contract period. If a shippers using the dual rate system breaches their contract by using a non-member shipping company, they are then liable for penalty charges.

[9] i.e. shipping companies not affiliated with the relevant shipping conference.
[10] Dual rate systems are also referred to as exclusive patronage contracts, loyalty agreements or contract rate systems in some cases.

(ii) Fidelity rebate system

Under the fidelity rebate system, shippers are given partial rebates on their shipping rates during a specified period (four to six months) if they only use shipping conference member companies during the relevant period. If a shipper uses any non-member shipping company during the relevant period, they are no longer eligible to receive a rebate.

(iii) Deferred rebate system

Under the deferred rebate system, shippers are entitled to claim for a fixed rebate (usually around 10%) if they do not use any non-member shipping company during a specified period (the rebate period) and then continue to not use non-member companies during a further specified period (deferred period). If a shippers uses any non-member shipping company during the relevant period, they lose the right to claim their rebate for the previous period. This system acted as an incentive to encourage shippers to continue using member shipping companies due to the fact that it increased the level of lost earnings if shippers use non-member companies. The deferred rebate system was first adopted by the European Conference, the forerunner to the Chinese Conference, in 1879.

III Steps to directly eliminate non-member shipping companies

(i) Refusing membership of shipping conferences

Shipping conferences, which were mainly concluded through UK companies, either refused membership to non-member companies or placed strict restrictions on membership depending on demand for shipping tonnage on the relevant route. In general, shipping conferences with membership restrictions attached are known as closed conferences.

(ii) Excluding non-member shipping companies through the use of fighting ships

The practice of "fighting ships" refers to shipping companies temporarily providing shipping services to coincide with the service schedules of non-member companies at rates lower than those of non-member companies in an attempt to force non-member companies to withdraw from the relevant route. Losses resulting from this practice are then borne by the shipping conference as a whole. The last time that fighting ships were used by a shipping conference in relation to routes to and from Japan was in the mid 1950s when the European Conference did so in opposition to Mitsui OSK Lines, which was a non-member company at that time. As a result of changes in the international environment, "fighting ships" have not been used again since then.

2 Clashes with competition law and exemption systems

Whereas shipping conferences had previously engaged in the aforementioned activities, 1890 saw the enactment of US antitrust legislation outlawing cartels. This created problems in terms

of the relationship between shipping conferences and regulations prohibiting cartels, prompting adjustments to be made to the application of competition laws. The following section provides an overview of shipping conferences in the US, Japan and Europe and the process of adjusting competition laws.

(1) USA

I Enactment of the US Shipping Act (1916)

Following on from the establishment of the Antitrust Act in 1890, an investigation into the economic advantages and drawbacks of shipping conferences covering routes to and from the US was launched in 1912 based on a proposal by Congressman Alexander, the then Chairman of the House Committee on the Merchant Marine and Fisheries. The results were compiled into recommendations submitted to the House of Representatives in 1914. These recommendations included (1) that prohibiting shipping conferences could potentially plunge the US economy into confusion and trigger fierce competition based on shipping rates, (2) that shipping conference agreements offered a significant number of advantages if operated fairly, including regularity of service, stability of shipping rates, equality for shippers, improved levels of service and cost efficiency and (3) that effective government supervision would be required in order to prevent shipping conferences from having any negative effects. As a result of the Alexander Report, as it was called, the Shipping Act was then enacted in 1916.

The Shipping Act of 1916 stipulated that shipping conferences were exempt from the Antitrust Act. Nevertheless, it also stated that all agreements and understandings would have to be reported to the Shipping Board[11] for approval, with exemption from the Antitrust Act only granted to approved agreements and understandings. In addition to outlawing agreements involving the practice of fighting ships, the discriminatory treatment of shippers and agreements with unfairly discriminatory contents (including the deferred rebate system on the grounds that it imposed unfair long term constraints on shippers), the Shipping Act also gave the Shipping Board the right to revoke its approval in the event that any shipping conference engaged in activities harmful to trade with the US.

Thus it was that the Shipping Act of 1916 exempted shipping conferences from the Antitrust Act, whilst also introducing a system of regulations and supervision to prevent any negative effects. This effectively transformed shipping conferences covering routes to and from the US into “open conferences” that any shipping company was free to join or leave and put an end to practices such as fighting ships and the deferred rebate system on routes to and from the US.

[11] The Shipping Board later became the Federal Maritime Commission (FMC).

II The Bonner Act (Shipping Act of 1961)

As there were no specific regulations set out under the Shipping Act of 1916, more than half of the shipping conferences covering routes to and from the US started to introduce the practice of dual rate systems. A Supreme Court ruling in 1958[12] however judged that dual rate systems with a significant difference between the two rates[13] were illegal on the grounds that they constituted discriminatory treatment of shippers, which was prohibited under the Shipping Act. The Shipping Act was revised in light of this ruling, prohibiting dual rate systems with a difference in rates of more than 15%. In addition to adding the provision that activities must be in be in the public's interests as a requirement for shipping conference approval, the revised act also stepped up regulations regarding government intervention and supervision in relation to shipping conferences, including the compulsory reporting and release of conference tariffs.

(2) Japan

I Prewar Japan

From the Meiji era onwards, Japanese shipping companies such as NYK Line and Osaka Shosen Kaisha (OSK Line) received active support to enable them to break into international shipping. Rather than actively introducing regulations governing shipping conferences as in the US however, the Japanese approach was to take fiscal measures such as the provision of shipping subsidies in order to help Japanese shipping companies compete with shipping conferences. This support enabled Japanese shipping companies to withstand competition until they too were allowed to become members of shipping conferences.

II The Far East Freight Conference case and the Marine Transportation Law (1949)

The Japanese international shipping industry was left in ruins after World War II as Japan became a nation of international shipping service users rather than providers. The enactment of the Antimonopoly Act in 1947 created problems in relation to the Far East Freight Conference between Japan and Europe on the grounds that rate agreements and the dual rate system under the conference constituted unreasonable restriction of trade and unfair business practices respectively.

In 1949, the Fair Trade Commission of Japan launched legal proceedings against member shipping companies and shippers belonging to the Far East Freight Conference. The Fair Trade Commission's tough stance against shipping conferences in accordance with Japan's Antimonopoly Act was met with criticism from all quarters as the British government amongst others claimed that (1) shipping conferences were an established business practice

[12] FMC vs. Isbrandtsen Co.
[13] The difference between lower rates and ordinary conference rates under dual rate systems at the time was between 30% and 40%.

that had been in place as part of the international shipping industry for many years and that (2) shipping conferences were exempt from antitrust legislation in the US. This made Japan come to the conclusion that shipping conferences should be given legal approval under the Marine Transportation Law, which was enacted in 1949 under GHQ occupation.

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

III "The five principles of fair trade" (1950)

As a result of the enactment of the Marine Transportation Law, the parts of the Far East Freight Conference relating to rate agreements were granted exemption from legal proceedings. The parts of the conference relating to the dual rate system however were not exempt from the Antimonopoly Act as they involved unfair business practices, resulting in legal proceedings going ahead regardless. As proceedings in the Far East Freight Conference case looked set to drag on, the Fair Trade Commission stepped in and suspended legal proceedings in November 1950, revising the dual rate system at the time in accordance with five principles designed to prevent shipping conferences from placing excessive constraints on shippers.

The Fair Trade Commission went on to request similar revisions to the relevant terms and conditions of other shipping conferences covering services stopping off in Japan, which duly complied, resulting in the five terms and conditions becoming known as the five principles of fair trade[14].

IV The Special Shipping Designation (1953)

Although activities such as discriminatory treatments by shipping conferences were initially restricted under the Marine Transportation Law, as mentioned above, the number of

[14] Refer to Appendix 3 for further details of the five principles of fair trade.

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

V Reviews of the Marine Transportation Law and the Special Shipping Designation (1959)

With Japanese shipping experiencing a rapid recovery, Japan had to start thinking about its interests as a shipping provider as well as a user. This, combined with a prolonged recession and slump in shipping rates in the international shipping industry, led to revisions being made to the Marine Transportation Law in 1959. The result was that dual rate systems, the use of fighting ships and the discriminatory treatment of shippers using non-member shipping companies were removed from the list of prohibited activities under the Marine Transportation Law[15].

In view of revisions to the Marine Transportation Law, the Special Shipping Designation was also reviewed accordingly. At the time, the aforementioned five principles of fair trade (III) were used to outline operational policies and the interpretation of how the Antimonopoly Act should be applied to unfair business practices at the hands of shipping conferences. Regulations were therefore reviewed in line with the thinking behind the five principles of fair trade, with the Special Shipping Designation being completely revised in November 1959. The revised Special Shipping Designation included regulations governing the unfair discriminatory treatment of shippers, the unfair refusal of membership for shipping companies, the dual rate system, the fidelity rebate system and the deferred rebate system.

(3)Europe

I The EC Treaty comes into effect (1958)

The treaty establishing the European Community (the EC Treaty), which came into effect in 1958, prohibits agreements and contracts that restrict competition under Article 81[16]. The basic position adopted by the British and other European governments at that time however was that shipping conferences were voluntarily concluded between shipping companies with scheduled liners on regular routes out of necessity and that there was no reason for direct

[15] The explanation provided for proposed revisions to the Marine Transportation Law during the 30th session of the Diet in 1958 was as follows. "Self-defense measures such as these (fighting ships, etc.) are internationally accepted and are indispensable in order to maintain the stability of shipping conferences. One revision shall therefore be made to the Marine Transportation Law; namely that Article 28 will be removed in order to permit shipping conferences to engage in such activities."

[16] Article 85 at that time (1958)
As of May 1999, the former Article 85 became Article 81 and the former Article 86 became Article 82. For the purposes of this report, the former articles 85 and 86 are hereafter referred to in line with the current treaty.

government intervention in their running. Furthermore, ambiguities in regulations regarding the field of international shipping in the EC Treaty led most people to believe that international shipping was exempt from the EC Treaty[17].

II The adoption of Council Regulation 4056/86 and the block exemption system (1986)

In the so-called French seamen's case of 1974[18], the European Court of Justice ruled that the general regulations under the EC Treaty should also be applied to marine transportation. Although this created problems with respect to the relationship between shipping conferences and Article 81 of the EC Treaty, at that time international shipping was subject to Council Regulation 141/62 exempting transport from the application of Council Regulation 17/62 (procedure for the enforcement of competition regulations), meaning that even if there were suspected violations of regulations such as Article 81 of the EC Treaty in the field of international shipping, the European Commission did not have the authority to conduct direct investigations, clamp down on violations or impose fines.

Although the European Commission submitted a draft council regulation to the Council of the European Community stating that international shipping should be subject to Article 81 of the EC Treaty, 1986 saw the adoption of Council Regulation 4056/86 on the application of Articles 81 and 82 of the EC Treaty to maritime transport, which set out the extent of the applicability of competition law. Council Regulation 4056/86 determined the extent to which violations are exempt from investigations and fines and relevant procedure.

Council Regulation 4056/86 also granted shipping conferences block exemption from Article 81 of the EC Treaty providing that agreements (1) contribute to improvements in the production or distribution of products or the promotion of technical or economic progress, (2) fairly distribute any resulting benefits to consumers, (3) do not impose any unnecessary restrictions that are not essential to operators' objectives and (4) do not involve products or services that could significantly impede competition between the relevant operators.

3 Changes to shipping conferences due to the spread of containerization and US policies promoting competition

Rapid and far-reaching shifts in the surrounding environment from the 1960s onwards brought about major changes in the nature of shipping conferences. Technical innovations such as containerization and revisions to the US Shipping Act in order to promote competition in particular had a huge impact on the function of shipping conferences and the

[17] Isamu Matsumoto, "EU Common Shipping Policy and Competition Law" (February 1999, Taga Publishing)

[18] Commission of European Communities vs. the French Republic, case 167/73
The fact that the French Maritime Labor Law stipulated that a certain percentage of the crew of all French vessels must be of French nationality and set out the relevant percentage was judged to be in violation of Article 48, Clause 2 of the EC Treaty on the freedom of movement for workers.

state of competition in the international shipping market.

I Changes of the competitive environment of containerization

(i) The spread of containerization

After the start of the 1960s, the volume of cargo shipped via international liners started to increase, driving up port handling costs and putting shipping companies under increasing pressure. The launch of shipping services in the US involving loading cargo into standardized containers however both rendered on-board cargo handling equipment unnecessary and made it possible to load and unload cargo regardless of weather conditions. This dramatically reduced the time taken to load and unload vessels and resulted in container shipping sweeping international regular liners.

Although some of the vessels used on international regular routes between Japan and developing countries are still not equipped for container shipping, all of the liners used by Japanese shipping companies on regular routes between Japan and North America and between Japan and Europe are container vessels.

(ii) The effects of containerization

The spread of container shipping had a massive effect for emerging shipping companies in that it dramatically lowered barriers to market entry. Previously, the need to unload large and small items of cargo individually meant that shipping companies needed a high level of loading technology and expertise in order to prevent piles of cargo collapsing in transit, which in addition to requiring large amounts of time and manpower for loading and unloading also required additional personnel to manage cargo. The development of containerization however standardized the size of cargo and rendered loading technology and expertise unnecessary, significantly reducing the amount of time and labor required for cargo handling. With governments and local authorities in each country also competing with one another the establish container ports, the leading shipping operators effectively lost some of their advantages over the competition in terms of technology and facilities. This all meant that the barriers preventing emerging shipping companies without their own technology or unloading bases from entering the market were brought tumbling down.

As containerization made it possible to transfer cargo in containers directly to freight trains and trailers, it also resulted in the rapid spread of international intermodal transport[19]. Previously, shipping companies had only undertaken international shipping between ports, with no involvement whatsoever in the transportation of goods on land. The spread of containerization however led to an increase in the number of shipping companies in Europe offering overland transportation services to inland depots or even direct to goods' final

[19] "Intermodal transport" refers to the transportation of cargo based on a single contract via two or more different forms of transport.

destination on top of their liner shipping services.

(iii) The emergence of shipping companies from developing countries and the shift to open conferences

The spread of containerization triggered the development of international shipping as a key industry in developing and socialist countries, resulting in outsiders such as state-run shipping companies from such countries entering the market. The presence of closed conferences soon came to be recognized as a clear barrier preventing shipping companies from developing countries from entering the world trade market, not least by the UN Conference on Trade and Development (UNCTAD). In light of trends such as these, the UN Convention on a Code of Conduct for Liner Conferences[20] was signed in 1974. Amongst other things, this gave shipping companies from trading countries the right to join shipping conferences and set out loading shares for shipping companies from the country of origin, companies from the destination country and companies from other countries at 40-40-20 respectively, providing that shipping conferences determined the loading share for member companies. Since the signing of this convention, even the European Conference, the archetypal closed conference, has started to accept shipping companies from developing countries as part of its transition to an open conference. In the 1980s, shipping conferences actually started to actively approach non-member shipping companies to ask them to become members in order to prevent their share of the market from slipping.

(iv) The formation of consortiums

The spread of containerization meant that massive investment was needed to construct vessels and acquire container terminals for container routes. Consequently, companies started to form consortiums with one another in order to reduce the scale of the necessary investment whilst also maintaining a certain level of service. Specifically, companies formed partnerships relating to activities such as lending or exchanging space onboard container vessels (via space charters), sharing container terminals and regulating shipping schedules. In contrast to shipping conferences, which were designed to guarantee regular liner services on a joint basis, the key characteristic of consortiums was that shipping rates, the frequency of services and business activities were still determined by each individual shipping company irrespective of any partnerships with other companies.

Although consortiums were initially limited to space charters between North American shipping companies operating on specific routes, the increasing globalization of the world economy and the growth of market areas and partnerships in the 1990s led to the emergence of agreements spanning multiple areas (such as routes between Asia and North America,

[20] The Convention on a Code of Conduct for Liner Conferences was signed in 1974 and came into effect in 1983. It is yet to be ratified by countries such as Japan, the US, Canada and Australia.

between Asia and Europe and between Europe and North America for example) in order to provide frequent global services in response to the increasingly sophisticated needs of shippers. Partnerships on a global scale such as these came to be known as alliances.

II The development of US policies promoting competition

(i) The Shipping Act of 1984 undermines shipping conferences

The Regan Administration in the US enacted a new Shipping Act in June 1984 as part of its program of deregulation policies. The aim of the new act was primarily to enable member shipping companies to decide shipping rates and services between themselves and shippers individually (increased freedom from tariffs), but also to free shippers from constraints imposed on them by shipping conferences in order to enable them to select the most suitable shipping company for themselves. Specifically, the new act included regulations such as (1) the prohibition of dual rate systems, (2) the guaranteed right of independent action for member shipping companies, effectively enabling them to independently determine rates and services different to those set out by the relevant shipping conference, based on the principle of openness and (3) the obligation of shipping conferences to give approval to the conclusion of service contracts on behalf of shipping companies. The fact that the Shipping Act of 1984 forced shipping conferences to recognize member companies' right to independent action undermined the main purpose of shipping conferences themselves, namely that of setting standardized shipping rates. Similarly, the prohibition of dual rate systems also deprived shipping conferences of their hold over shippers. Companies started to exercise their right of independent action on a frequent basis, fuelling competition between shipping companies and significantly driving down shipping rates on North American routes.

(ii) The advent of stabilization agreements

The spread of containerization and the undermining of shipping conferences by the US Shipping Act of 1984 boosted the share of the market held by non-member shipping companies, making it increasingly difficult for shipping conferences to impede the activities of non-member vessels. This prompted shipping conferences to establish stabilization agreements[21] incorporating the majority of shipping companies operating on each route, including non-member companies. The purpose of stabilization agreements is to stabilize shipping routes through initiatives such as sharing information regarding matters such as shifts in supply and demand on certain routes and agreeing guidelines in relation to rate restoration and surcharges. One of the main examples is the Transpacific Stabilization Agreement (TSA), which was signed by a total of 14 companies (nine shipping conference member companies and four non-member companies) in 1989 to cover routes between Asia and North America. Although stabilization agreements involve sharing information regarding

[21] Also known as "discussion agreements"

shifts in supply and demand and agreeing guidelines on matters such as the extent of increases in shipping rates with an eye to stabilizing shipping routes, as mentioned above, they do not have any direct authority over shipping rates[22].

(iii) The Ocean Shipping Reform Act of 1998 (partial revisions to the Shipping Act of 1984)

In 1998, the Clinton Administration carried out partial revisions to the US Shipping Act in an effort to streamline administrative agencies through the improvement and abolition of regulatory authorities. Despite retaining provisions exempting shipping conferences from antitrust legislation, the 1998 revisions made it possible for service contracts, which had previously been made publicly available, to be concluded behind closed doors, confidential base. This effectively deprived shipping conferences of any control over shipping rates. The end result was that the practice of service contracts being concluded individually between shipping companies and shippers behind closed doors became commonplace. This rendered the very existence of shipping conferences meaningless and heralded an end to shipping conferences covering routes to and from the US[23]. This trend was reflected on a global scale, with the number of shipping conferences falling from more than 360 in the early 1970s to roughly 250 by the year 2000[24].

4 Recent developments involving the exemption system

(1) Movements to review the exemption system in Japan

I Reviewing exemptions of Antimonopoly Act (1999)

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

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

Revisions to legislation in 1999 stipulated that international shipping operators have to report any agreements, which then have to satisfy four requirements, including that they do

[22] Unlike shipping conferences, stabilization agreements do not entail setting blanket tariffs for all members.
[23] The Transpacific Westbound Rate Agreement (TWRA) for example, signed in 1985, was discontinued in June 1999.
[24] Hiroshi Yamagishi, “Freight Container Distribution” (May 2004, Seizando Publishing)

not unfairly harm users' interests. If the contents of the agreement do not satisfy these requirements, the Minister of Land, Infrastructure and Transport then has to issue an order to either change or restrict the contents of the relevant agreement. Regulations were also established stating that details of any cartel reported to the Ministry of Land, Infrastructure and Transport should be relayed to the Fair Trade Commission immediately. If the Fair Trade Commission then deems that any cartel fails to satisfy the aforementioned four requirements, the Fair Trade Commission may require that action should be taken by the Minister of Land, Infrastructure and Transport (regulations regarding the involvement of the Fair Trade Commission)[25].

III The abolition of the Special Shipping Designation (2006)

As mentioned above in section 2 (2), the Special Shipping Designation which was issued on 1959 was formulated in line with "the five principles of fair trade", which allow certain practices such as dual rate systems.

In view of changes in the business climate in the international shipping industry, not least the fact that the underlying practices of conference tariffs and dual rate systems are no longer effective in today's international shipping market, a public comment abolishing the Special Shipping Designation of 1959 was issued on April 13, 2006.

Its abolition means that that the definition of unfair business practices under the Antimonopoly Act in the international shipping industry has now reverted back to the original General Designation.

(2) Activities to review the exemption system in the EU

Based on the facts that (1) the Lisbon Strategy (March 2000 European Union summit meeting) advocates accelerating deregulation in the fields of gas, electricity, postal services and transportation, (2) an April 2002 OECD report[26] recommended the abolition of exemption from competition law for shipping conferences and (3) there have been changes in the international regular liner shipping market in the 15 years since the enactment of Council Regulation 4056/86, the European Commission published a consultation paper on international shipping in March 2003 as the first step towards reviewing the exemption

[25] Regulations regarding the involvement of the Fair Trade Commission are part of the Japanese system of exemption for international shipping. Refer to Appendix 4 for further details. Refer to Appendix 5 for comparative data on systems in different countries.

[26] The OECD report recommends the abolition of exemption from competition law in relation to shipping rates and agreements between shipping companies. It states that, if exemption from competition law is to remain in effect, governments should consider taking steps to ensure the following; (1) freedom to negotiate shipping rates, surcharges and other terms of business on a individual basis behind closed doors, (2) freedom to protect specific information agreed between shipping companies and shippers as part of service contracts, including shipping rates, and (3) freedom for shipping companies to determine operational details and capacity with other shipping companies, on the condition that they do not have an unfair hold over the market.

system. Having studied the benefits and drawbacks of presence of exempt cartels, the European Commission went on to release a final report in December 2005 proposing to repeal the block exemption regulations (Council Regulation 4056/86). The report stated that, whereas existing exemption regulations allowed international shipping operators to fix shipping rates amongst themselves and determine the volume of cargo shipped, the repeal of the regulations would give shippers access to international shipping services at lower rates, thereby enhancing the competitiveness of industries within the EU and helping to achieve the Lisbon Strategy. The report also leveled criticism at shipping conferences, including the facts that (1) shipping conferences have the power to influence shipping rates, preventing them from being calculated proportional to the relevant distance, (2) shipping conferences use unclear methods to calculate and determine surcharges and (3) there are no evidence that shipping conferences contribute to the stability of shipping routes.

If the Council of the European Union goes ahead and abolishes block exemption for international shipping cartels, a two-year moratorium will come into effect. A set of guidelines will also be published by December 2007 to clarify which activities would be regarded as illegal under competition law. The European Commission is set to release an Issue Paper in September 2006 touching on contentious issues relating to matters such as the exchange of information between shipping companies, as proposed by the ELAA[27].

(3) Reviewing the exemption system in the US

Although a bill on the abolition of exemption from the Antitrust Act in the shipping industry was submitted to the US House of Representatives in 2002, it was later abandoned. Other developments have included the release of a public comment covering eight different fields, including the exemption of international shipping from antitrust legislation, by the Antitrust Modernization Commission[28] which is an independent committee set up in 2004, calling for the provision of the necessary information to evaluate the relevance of the exemption system in May 2005.

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[27] The ELAA (European Liner Affairs Association) has proposed that, if Council Regulation 4056/86 were to be abolished, it would then be possible for shipping companies to legally discuss information relating to supply and demand on shipping routes. The ELAA proposal does not however recommend adjusting shipping rates or tonnage.

[28] The Antitrust Modernization Commission investigates issues relating to the modernization of antitrust legislation and related areas before submitting bills that it deems necessary and advisory reports on administrative measures to the President and Congress.

Section 3: Competition in the International Shipping Market

As discussed previously, the international shipping market is currently undergoing some major changes as a result of factors such as regulations and competition policies in other countries, containerization and other technical innovations and the rapid market growth as a result of increased trade. The following section will provide an overview of competition between regular liner services in the international shipping market.

1. Changes in shares and the concentration of the main shipping routes

As discussed in Section 1, European, North American and Asian shipping routes account for approximately 90% of all cargo shipping to and from Japan. As roughly half of all Asian shipping routes are between Japan and China, this section will look at competition on the three main shipping routes between Japan and Europe, North America and China. In terms of international cartels, which will be discussed in detail in Section 4, container liner cartels have had less of a hold over member companies in recent years, as mentioned previously in Section 2. Therefore, rather than treating container liner cartels as one single operator, this section will calculate indicators of concentration based on the shares of individual member companies.

(1) European routes

Competition on European routes has decreased slightly during the period from 2001 to 2004, from 709 to 662 based on the Herfindahl-Hirschman Index (HHI) and from 48.5% to 44.7% based on the concentration ratio for the top five firms (CR5). The reason for this is thought to be a fall in the share of the market held by major shipping companies over the last few years as a result of a slump in the shipping market. The main non-member shipping firms operating on European routes are Taiwanese firm Evergreen (7%), Swiss firm MSC (5%) and Chinese firm COSOC (5%). In 2004, a Singapore shipping company PIL and a Taiwanese shipping company Wang Hai entered by code sharing.

The number one share of the market has increased due to Maersk Sealand's takeover of P&O Nedlloyd in February 2006. The total share held by European Conference member companies on the other hand has fallen slightly from 69% in 2001 to 65% in 2004.

Figure 3: Shares of European routes (outgoing)

	2001	2002	2003	2004
Hanjin (South Korea)	12.3%	12.2%	12.5%	12.5%
Maersk Sealand (Denmark)	11.8%	12.3%	11.0%	10.5%
P&O Nedlloyd (Holland)	9.7%	8.4%	8.4%	8.0%
Evergreen (Taiwan)	7.8%	8.3%	7.5%	7.5%
CMA CGM (France)	4.2%	5.2%	5.8%	6.2%
APL (Singapore)	6.9%	5.8%	5.8%	5.8%
MSC (Switzerland)	2.2%	4.9%	5.1%	5.1%
Hapag-Lloyd (Germany)	5.5%	4.5%	4.5%	4.9%
NYK (MYK Line, Japan)	5.5%	4.5%	4.5%	4.8%
COSCO (China)	3.9%	5.1%	4.6%	4.6%
OOCL (Hong Kong)	4.2%	3.9%	3.9%	4.5%
MOL (Mitsui OSK Lines, Japan)	5.5%	5.2%	4.5%	4.4%
K Line (Kawasaki Kisen, Japan)	3.5%	4.5%	4.5%	4.3%
China Shipping (China)	2.5%	2.7%	4.1%	4.1%
HMM (South Korea)	5.5%	4.5%	3.9%	3.8%
Yangming (China)	3.5%	3.2%	3.2%	3.2%
Norasia	1.4%	1.0%	1.9%	2.3%
MISC (Malaysia)	2.1%	1.3%	1.3%	1.5%
ANL	0.0%	0.3%	1.3%	0.8%
Others	2.1%	1.8%	1.6%	1.6%
Total share	100%	100%	100%	100%
HHI	709	696	665	662
CR5 (top five concentration ratio)	48.5%	47%	45.2%	44.7%
Total share for European Conference member companies	69.2%	64.9%	64.6%	65.0%

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

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

(2) North American routes

Competition on North American routes has also decreased during the period from 2001 to 2004, from an HII of 641 to 563 and from 45.5% to 39.8% on a CR5 basis. The reason for this is thought to be an increase in the share of the market held by new operators like ANL Container Line (Australia)[29], as reflected in the increase under "Others" in Figure 4 (from 11.8% to 13.9%). As with European routes, the number one share of the market on North American routes has also increased due to Maersk Sealand's takeover of P&O Nedlloyd.

The share held by member companies belonging to the Transpacific Stabilization Agreement (TSA) has also fallen significantly from approximately 80% to around 60% due in part to the withdrawal of Maersk Sealand. French firm CMA CGM also withdrew from the TSA at the end of 2005, as did Mitsui OSK Lines from an incoming transpacific stabilization agreement[30] in June 2005.

[29] ANL entered North American routes in May 2003.
[30] Westbound Transpacific Stabilization Agreement (WTSA)

Figure 4: Shares of North American routes (outgoing)

	2001	2002	2003	2004
Maersk Sealand (Denmark)**	12.5%	11.1%	10.9%	10.6%
APL (Singapore)	8.6%	8.2%	8.1%	8.3%
Hanjin (South Korea)	8.2%	7.8%	8.7%	7.7%
Evergreen (Taiwan)	9.4%	9.6%	9.0%	7.3%
COSCO (China)	6.8%	6.6%	5.3%	5.9%
HMM (South Korea)	6.2%	5.7%	5.8%	5.7%
NYK (MYK Line, Japan)	5.4%	5.5%	5.7%	5.4%
OOCL (Hong Kong)	5.2%	5.8%	5.6%	5.3%
China Shipping (China)	3.3%	4.1%	4.0%	4.8%
K Line (Kawasaki Kisen, Japan)	5.1%	5.2%	5.3%	4.6%
Yangming (China)	4.8%	4.5%	4.3%	4.5%
MOL (Mitsui OSK Lines, Japan)	3.9%	3.7%	4.0%	3.9%
P&O Nedlloyd (Holland)	2.8%	3.0%	3.3%	3.5%
CMA CGM (France)	1.7%	2.0%	2.4%	3.3%
MSC (Switzerland)	2.0%	2.0%	2.7%	3.2%
Hapag-Lloyd (Germany))	2.3%	2.5%	2.4%	2.1%
Others	11.8%	12.7%	12.5%	13.9%
Total share	100%	100%	100%	100%
HHI	641	608	603	563
CR5 (top five concentration ratio)	45.5%	43.3%	42.5%	39.8%
Total share for TSA member companies	80.1%	78.2%	77.5%	64.0%

* Shaded rows indicate member shipping companies belonging to the TSA

** Maersk Sealand withdrew from the TSA in 2004

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

(3)Chinese routes

There are around 40 shipping companies operating on routes between Japan and China, with Chinese companies accounting from 90% of cargo loaded on such routes. Indeed, the results of a shipping company survey show that the cumulative concentration for the top three shipping companies on outgoing[31]Chinese routes, all of which are Chinese companies, was 48.9% in 2002 and 48.4% in 2003. The cumulative concentration ratio for the top three shipping companies on incoming[32] Chinese routes was 42.2% in 2002 and 37.8% in 2003, with all three companies once again Chinese as with incoming services. In 2004, Winland Shipping (China) entered. Despite the size of the combined share of Chinese routes held by the top three companies, they are thought to be highly competitive routes that are likely to change a great deal.

[31] Outgoing Chinese routes: routes from Japan to China
[32] Incoming Chinese routes: routes from China to Japan

Figure 5: Chinese routes

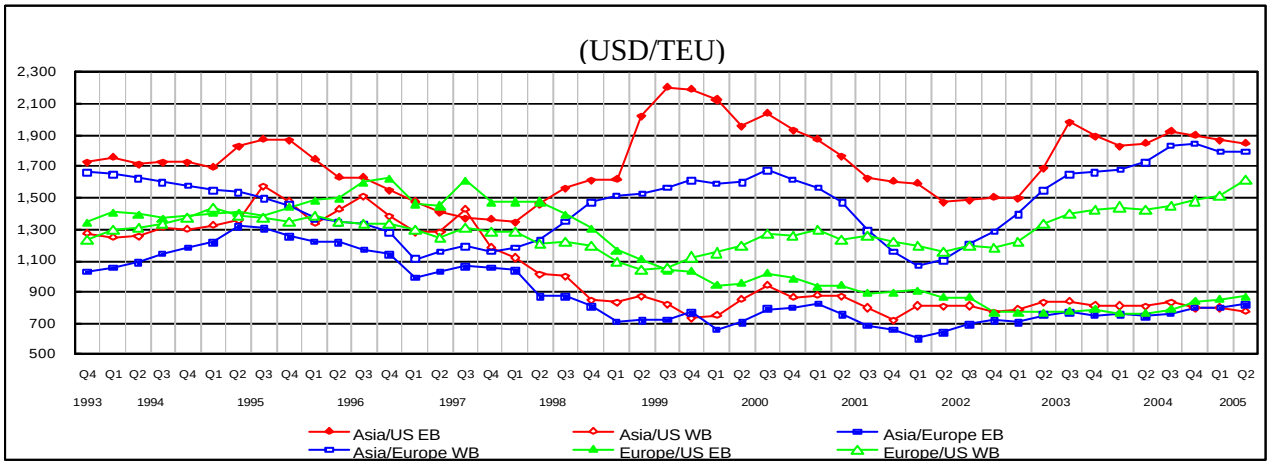
	2002	2003
Volume of cargo shipped on incoming Chinese routes (TEU)	1,322,946	1,582,999
Company A (China)	10.5%	13.8%
Company B (China)	16.5%	13.4%
Company C (China)	6.4%	9.4%
CR3 (top three companies)	42.2%	37.8%

(Source: compiled by the Fair Trade Commission of Japan based on the 2005 International Shipment Handbook (December 2004, Ocean Commerce Ltd.) and survey results)

2. Trends in shipping rates

Recent shipping rates (Figure 6) show an upward trend in rates on European and North America routes from 2002 onwards. Equally however, shippers have criticized both Japanese and foreign shipping companies for continually raising their rates whilst continuing to make high profits[33]. On the other hand, according to Japanese Shipowners' Association, the three major Japanese shipping companies suffered from deficits for years, and they have recovered the balance to black figures just recently.[34]

Figure 6: Trends in shipping rate indicators[35]



(Source: data provided by Mitsui OSK Lines, "Freight Rate Indicators" C1)

[33] According to "The Current State of Japanese Shipping" (January 2006), published by the Japanese Shipowners' Association, ordinary income for the three leading Japanese shipping companies in fiscal 2003 came to ¥189 billion, rising to ¥339.1 billion in fiscal 2004 (a year on year increase of 74.4%). The rate of ordinary profit from sales was 8.9% for fiscal 2003 and 13.9% for fiscal 2004. Annual corporate statistics released by the Ministry of Finance put the rate of ordinary profit from sales for the transportation industry, including shipping, at 4.7% for fiscal 2003 and 4.0% for fiscal 2004.

[34] The three major Japanese shipping companies do not disclose their balance regarding liner shipping services.

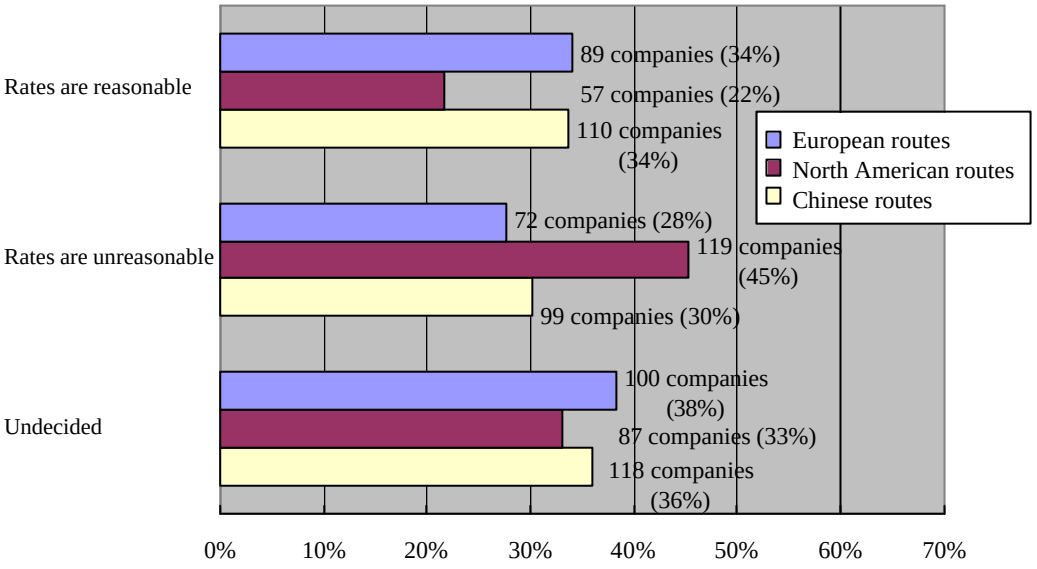
[35] The shipping rates shown in Figure 6 do not include surcharges.

As Figure 6 shows, indicators showing outgoing shipping rates are at least twice as high as those showing incoming rates, even on North America routes, meaning that rates are not necessarily determined in line with distance.

According to the Survey of shippers, evaluations on behalf of shippers asked about the reasonability of shipping rates show that a slightly higher percentage of shippers feel that rates on European and Chinese routes are unreasonable than those who feel that rates are reasonable.

On North American routes, a far higher percentage of shippers feel that rates are unreasonable (45%) than those who feel that rates are reasonable (22%). Similarly, a significant number of shippers feel that massive price hikes in recent years and the extreme difference in shipping rates between outgoing and incoming routes[36] based on the imbalance in the volume of trade are also unreasonable.

Figure 7: Evaluation of shipping rates on European, North American and Chinese routes



(Survey of shippers, Fair Trade Commission of Japan)

3. Surcharges

Surcharges are basically charged on a one-off basis to cover either increases in incidental or unforeseen costs or loss of revenue[37]. Different words are sometimes used instead of "surcharge" depending on the shipping company in question, with examples including CAF[38] (currency adjustment factor), BAF[39] (bunker adjustment factor), THC[40] (terminal handling

[36] Outgoing routes: from Japan to North America
Incoming routes: from North America to Japan
[37] Based on the definition set out in the 1974 Convention on a Code of Conduct for Liner Conferences
[38] CAF (currency adjustment factor): additional rates used to cover losses stemming from significant changes in shipping rates as a result of fluctuations in the rate of exchange for the relevant currency
[39] BAF (bunker adjustment factor): additional rates used to make shipping rates reflect changes in shipping fuel costs, introduced in the wake of the first oil shock

charge) and PSS[41] (peak season surcharge). As it will be discussed in Section 4, surcharges set by international liner conferences are effective.

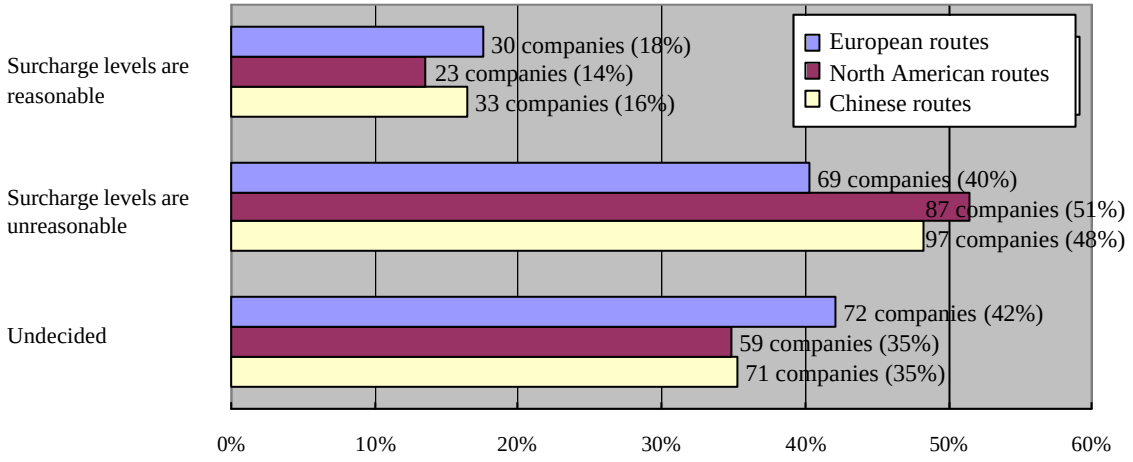
(1) Surcharges as a percentage of shipping rates

According to the Fair Trade Commission's survey of shippers, surcharges account for approximately 25% of shipping rates (freight) on European and North American routes and around 50% on Chinese routes. The reason why the percentage of shipping rates accounted for by surcharges is so high on Chinese routes is that, whereas surcharges include fixed rate charges irrespective of distance, routes between China and Japan cover a shorter distance than European or North American routes, meaning that shipping rates are lower than those for other routes.

(2) Evaluation of surcharge levels

Between 40% and 50% of shippers feel that surcharge levels are unreasonable, a significantly higher percentage than those who feel that they are reasonable (14-18%). Reasons given for surcharge levels being unreasonable include the following; (1) surcharges and dates when they come into effect are regulated and determined by container liner cartels, meaning that outsiders have to follow suit, thereby preventing any element of competition, (2) shippers have no opportunity to negotiate when surcharges are calculated, with charges being revised on a regular basis and (3) there is a lack of transparency stemming from the fact that the calculation methods used and the reasons for imposing surcharges are often unclear[42].

Figure 8: Evaluation of surcharge levels on European, North American and Chinese routes



(Survey of shippers, Fair Trade Commission of Japan)

[40] THC (terminal handling charge): container terminal overhead costs
[41] PSS (peak season surcharge): additional charges in line with times of restricted demand
[42] Examples of criticism include the inability to comprehend why THC (terminal handling charges) vary according to different routes despite using the same port and a lack of transparency in surcharges, particularly documentation fees that should really be paid by shipping companies and inland surcharges, such as diesel fuel costs for US railroad services or trucks, charged by agents for foreign shipping companies.

Section 4: International shipping cartels

Section 3 provided an overview of competition in the international shipping market. This section will follow on an overview of the specific cartels within the international shipping market and their activities.

1. Reports regarding shipping agreements

As discussed in Section 2, review of the exemption system in 1999 resulted in the establishment of regulations regarding the involvement of the Fair Trade Commission and made it mandatory for the Minister of Land, Infrastructure and Transport to notify the Fair Trade Commission[43] upon receipt of reports regarding shipping agreements[44]. In fiscal year 2005, the Fair Trade Commission received notification of 557 reports relating to international shipping agreements. Taking into account the fact that some reports contained details of multiple amendments of agreements, the total number effectively came to 685, as shown in Figure 9 below.

International shipping agreements can be broadly divided into three categories; (1) container liner cartels[45], (2) consortiums and alliances and (3) tramp vessel service agreements. Container liner cartels, the first category, engage in activities in accordance with basic agreements. As indicated in Figure 9, there were no new basic agreements signed or basic agreements discontinued in fiscal year 2005. 484 notifications are changes of BAF and CAF (72% of the overall total) and 54 are rate restorations[46], the majority of notifications were accounted for by surcharges and rate restorations. In the second category, there were ten new consortiums and alliances formed, with a further three being discontinued. Both of the reports filed regarding tramp vessel service agreements of the South Sea Lumber Transportation Agreement, The contents of the notified agreements were rate restoration and the extension of the agreement period.

The following section will examine the current situation with regard to container liner cartels, consortiums and alliances and tramp vessel service agreements.

[43] Marine Transportation Law, Article 29, Clause 4
[44] Marine Transportation Law, Article 29, Clause 2
[45] "Container liner cartels" is used as a generic term referring to agreements relating to shipping rates and surcharges, including shipping conferences and stabilization agreements.
[46] Notifications regarding changes to BAF and CAF accounted for 72% of the overall total and notifications regarding rate restoration 8%. Refer to Appendix 6.

Figure 9: Contents and breakdown of reports regarding shipping agreements (FY2005)

	Rate restoration	Surcharges					Withdrawing, joining, changing companies name				Basic agreements			Other	Total
		BAF	CAF	THC	Other surcharges	Subtotal	Members withdrawing	Members joining	Companies changing their name or withdrawing due to mergers	Subtotal	Basic agreements signed	Agreements discontinued	Subtotal		
Container liner cartels	54	323	161	5	43	532	9	5	51	65	0	0	0	10	661
Consortiums and alliances	0	0	0	0	0	0	0	1	4	5	10	3	13	4	22
Tramp vessel agreements	1	0	0	0	0	0	0	0	0	0	0	0	0	1	2
Total	**55**	323	161	5	43	**532**	9	6	55	**70**	10	3	**13**	**15**	**685**

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

2. Container liner cartels

There are currently 30 container liner cartels covering routes to and from Japan[47], including African routes, European routes, North American routes, Australian routes and South American routes, as shown in Figure 10. Of the main shipping routes to and from Japan, Chinese routes are the only ones where there are no container liner cartels present.

Figure 10: List of container liner cartels on routes to and from Japan

Route	Direction	Title	Full title of conference or agreement
North America	Outgoing	TSA	Transpacific Stabilization Agreement
	Outgoing	CTSA	Canada Transpacific Stabilization Agreement
	Incoming	WTSA	Westbound Transpacific Stabilization Agreement
	Incoming	CWTSA	Canada Westbound Transpacific Stabilization Agreement
Europe	Outgoing	JEFC	Japan Europe Freight Conference – North Europe & Mediterranean Committee
	Incoming	FEFC	Far East Freight Conference – Eastbound & Mediterranean Committee
	Outgoing	JGARSPC	Japan/Gulf of Aden & Red Sea Ports Conference
Middle East	Outgoing	BOBCON	Bay of Bengal/Japan/Bay of Bengal Conference
	Outgoing	FESAMEC	Far East/South Asia-Middle East Conference
	Both	JCFC	Japan/Ceylon Freight Conference
	Both	JHSFA	Japan/Hong Kong & Japan/Straits Freight Agreement
	Both	JPFC	Japan/Philippines Freight Conference
	Both	JTFC	Japan/Thailand Freight Conference
	Both	JTJCFC	Japan/Taiwan/Japan Container Freight Conference
Asia	Both	IADA	Intra Asia Discussion Agreement
Africa	Outgoing	FEEA	Far East/East Africa Freight Conference
	Outgoing	JAHOSAS	Japan & Hong Kong/South Africa Shipping Conference
	Outgoing	JWAAC	Japan/West Africa (Angola/Cameroon Range) Freight Conference
	Outgoing	JWANS	Japan/West Africa (Nigeria/Senegal Range) Freight Conference
	Outgoing	FECI	Far East/Canary Islands & Western Sahara Freight Conference
	Incoming	WAFEAC	West Africa (Angola/Cameroun Range)/Far East Freight Conference
	Incoming	WAFENS	West Africa (Nigeria/Senegal Range)/Far East Freight Conference
Oceania	Outgoing	ANZESC	Australian and New Zealand/Eastern Shipping Conference
	Outgoing	JSPFC	Japan/South Pacific Freight Conference
South	Outgoing	JLA	Japan-Latin America Eastbound Freight Conference

[47] Not including consortiums and alliances

Route	Direction	Title	Full title of conference or agreement
America	Outgoing	JWCSA	Japan-West Coast South America Freight Conference
	Outgoing	JMEX	Japan-Mexico Freight Conference
	Incoming	BRAZIL	Brazil/Far East/Brazil Freight Conference
	Outgoing	RIVERPLATE	Far East/River Plate/Far East Freight Conference
	Incoming	WCSAFC	West Coast of South America/Far East Freight Conference

(Source: compiled by the Fair Trade Commission of Japan based on data provided by Shipping Conference and General Administration (SCAGA))

Although precise details of container liner cartels vary according to each individual agreement, for the most part they entail regulating shipping rates and surcharges and sharing information regarding shifts in supply and demand. Based on the traditional functions performed by shipping conferences, this section will examine and evaluate the current situation with regard to the following functions; (1) regulating shipping rates, (2) regulating surcharges, (3) sharing information regarding shifts in supply and demand, (4) constraining shippers and (5) eliminating competition from non-member shipping companies.

(1) The functions of container liner cartels: regulating shipping rates

The basic functions performed by shipping conferences have been to fix conference tariffs and to restrict all member shipping companies to follow the tariffs. These days, however, shipping rates are determined based on a process of individual inquiries by shippers and negotiations regarding service contracts[48]. This is reflected by the fact that the last time conference tariffs were effectively revised was in 1998[49]. With the exception of a small minority of shippers that ship particularly small volumes of cargo or use shipping services on an infrequent basis, applying conference tariffs has become more or less meaningless. Similarly, as stabilization agreements' power to regulate shipping rates is limited to agreeing guidelines relating to the extent of rate increases rather than determining tariffs like shipping conferences, they have become mere formalities that are not legally binding.

This is supported by the findings of the Fair Trade Commission's survey of shippers, which revealed that (1) approximately 75% of shippers feel that shipping rates are determined on a individual negotiation basis with individual companies irrespective of the presence of shipping conferences or agreements[50] and that (2) a mere 5% of shippers pay shipping rates in accordance with those set out in tariffs. The Japanese Shipowners' Association also explains that shipping conferences are losing their ability and power to determine shipping rates, with rates actually being determined by individual negotiation basis through negotiation between shippers and shipping companies, regardless guidelines on shipping rates set out by conferences.

[48] Based on interviews with shippers and member companies belonging to shipping conferences

[49] Although the European Conference revised its tariffs in January 2001, this was merely to change shipping rates to a single rate system due to the abolition of the dual rate system.

[50] Figures refer to findings from European and North American routes and exclude Chinese routes, where there are no container liner cartels. Refer to Appendix 7.

This all means that container liner cartels' power in terms of determining the level of shipping rates is on the decline.

Nevertheless, the Fair Trade Commission survey revealed that between 40% and 50% of shippers recognize the fact that determining shipping rates is one of the functions performed by shipping conferences and stabilization agreements[51]. Despite the fact that shipping rate levels are determined with individual companies on a individual basis, as mentioned above guidelines set out by container liner cartels are effective[52], even the shipping rates are decided by individual negotiations basis between shipping companies and shippers, in terms of the extent of shipping rate increases, known as rate restoration. In other words, whereas container liner cartels no longer have the same power to fix tariffs that they used to have, they are still able to coordinate price increases by regulating the extent of shipping rate increases and publishing guidelines. As the name suggests, rate restoration refers to the practice of restoring shipping rates after they have fallen, with details released three months prior to ordinary price increases coming into effect. For example, the European Conference (routes between Asia and Europe) implemented a rate restoration of $200/TEU[53] in fiscal 2005. Elsewhere, in the face of increasing demand, the Transpacific Stabilization Agreement (TSA) followed on from the previous fiscal year by continuing to implement a rate restoration of $200/TEU[54]. In addition to announcing a rate restoration of $160/TEU for regular container cargo, the Westbound Transpacific Stabilization Agreement (WTSA)[55], which covers routes from North America to Asia, has also announced increases in rates and prices for individual items[56]. Neither the European Conference nor the TSA uses specific methods of calculation when determining rate restoration figures. Instead they are determined based on factors such as the state of the market and expected increases in costs.

According to interviews with the Japanese Shipowner's Association, shipping rates are determined based on negotiations between shippers and shipping companies, with the rate restoration figures set out by container liner cartels essentially just acting as guidelines. Some shippers on the other hand regard rate restoration figures determined by container liner cartels as one-sided notices. Whereas the wildly fluctuating shipping rates on routes between Japan and China due to the lack of shipping conferences makes some shippers appreciate the function of container liner cartels in terms of regulating prices to certain extent, the Japanese Shipowner's Association claims that very few shippers believe that the presence of shipping conferences

[51] 54% of shippers recognized determining shipping rates as one of the functions of shipping conferences. Similarly, 41% of shippers recognized determining shipping rates as one of the functions of stabilization agreements. Refer to Appendix 8.

[52] Effective means the actual situation that container liner cartels set the guideline and the member companies are negotiating with shippers based on the guideline.

[53] 12 month contracts only ($150/TEU for six month contracts)

[54] TSA has continued to charge peak season surcharges as part of its rate restoration program.

[55] 11 member companies as of the end of 2005

[56] For example the rate for shipping apples from the east coast of North America to Asia is set at $2,600/FEU, compared to $4,662/FEU for citrus fruits. Refer to Appendix 9.

actually helps stabilize shipping services and rates. It also points out that the increases in rate restorations implemented by container liner cartels can sometimes be substantial.

(2) The functions of container liner cartels: regulating surcharges

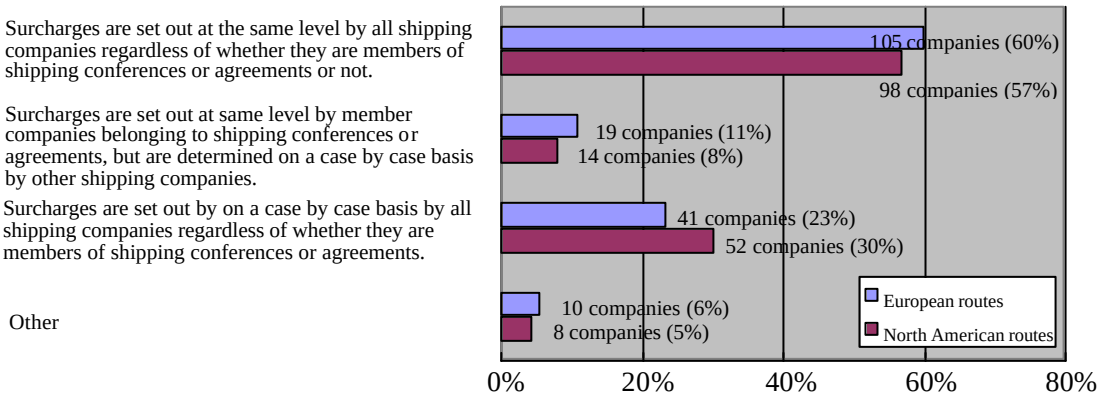
I The extent and evaluation of the binding force of surcharges

In addition to retaining the power to set surcharges for member companies, the surcharges set by container liner cartels are also followed by non-member shipping companies. One shipping company responded to the survey of shipping companies[57] responded that they determined surcharges through negotiation irrespective of those set out by container liner cartels. In fact, 95% of the shipping companies surveyed said that they use surcharges set by container liner cartels or referring surcharges set out by container liner cartels and negotiate with shippers.

A similar trend was evident in the Fair Trade Commission's survey of shippers. Figure 13 shows the responses from shippers regarding shipping companies' methods of setting out surcharges. As this shows, approximately 60% of shippers responded to the effect that surcharges are set out at the same level by both member and non-member shipping companies. Only around 10% of shippers said that surcharges are set out at the same level by member shipping companies belonging to conferences or agreements but on a individual basis by non-member companies.

Even on routes between Japan and China, where there are no container liner cartels, only 40% of shippers claim that surcharges are set out by individual companies on a individual basis. The remaining 60% claim that either surcharges are set out at the same level by all shipping companies or that they are set out at the same level by certain shipping companies.

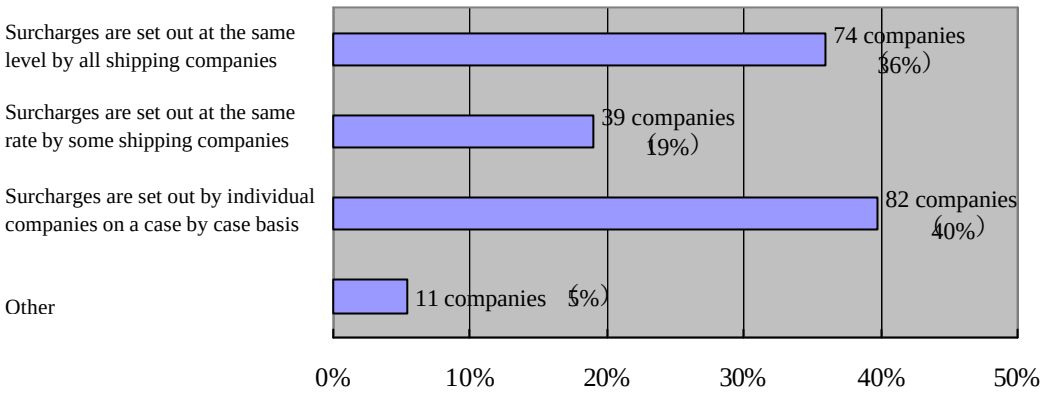
Figure 13: Methods used by shipping companies to set out revised surcharges
(European and North American routes)



(Survey of shippers, Fair Trade Commission of Japan)

[57] Refer to Appendix 10.

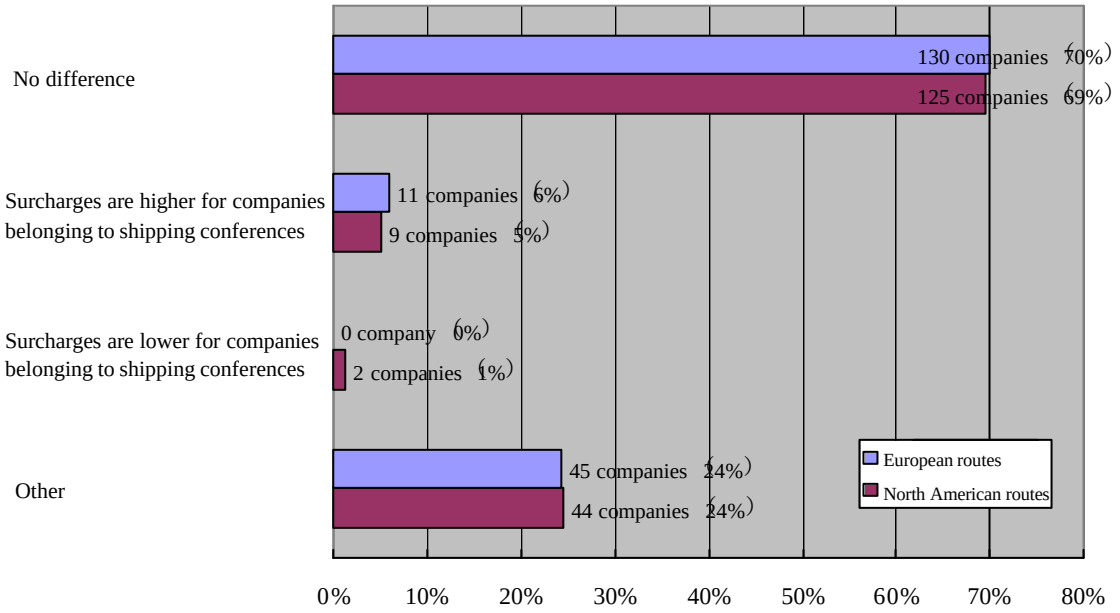
Figure 14: Methods used by shipping companies to set out revised surcharges (Chinese routes)



(Survey of shippers, Fair Trade Commission of Japan)

When asked about differences in surcharges between shipping companies that belong to container liner cartels and those that don't, approximately 70% of shippers using European and North American routes said that there was no difference, with both member and non-member companies setting out surcharges at the same level. This also indicates that non-member shipping companies are following surcharges set by container liner cartels.

Figure 15: Differences between surcharges on European and North American routes according to whether or not shipping companies belong to container liner cartels



(Survey of shippers, Fair Trade Commission of Japan)

Interviews with the Japanese Shipowners' Association also indicated that shipping

conference member companies also adhere to the rigid surcharge levels determined by container liner cartels. Interviews also reveled that, rather than being determined through negotiations between shipping companies and owners, surcharge levels are determined via one-sided notices issued by container liner cartels.

The upshot of all this is that the surcharges set out by container liner cartels can be said to be relatively effective.

II Determining surcharge rates

The following section will look at how surcharges are determined by liner container cartels. Although there are various different types of surcharges, the following section will focus on BAF, CAF and THC as common examples.

(i) BAF

BAF (bunker adjustment factors) are surcharges linked to fluctuations in fuel prices, and as such are determined based on price indices for Bunker A and Bunker C oil for ocean-going vessels[58]. For instance, the specific method used to calculate BAF under the Transpacific Standardization Agreement (TSA) is as follows[59]. First of all the weighted average price per ton of fuel (oil) is calculated from Bunker A and Bunker C oil prices for each port provided by Platts based on Bunker A and Bunker C refueling statistics at nine ports used by member shipping companies. Next a table of BAF charges like the one in Figure 16 is drawn up based on fuel costs for member shipping companies, taking into account previous weighted average prices for fuel. Although it is not possible to substantiate this table of BAF charges due to the fact that data such as fuel costs is not disclosed, it is clear from this method of calculation that BAF increase at a faster rate than actual fuel prices. This system also means that, even if the fuel price is less than $80, the benefits are not passed on to users.

Figure 16: BAF calculation method under the TSA (example)

Fuel price (weighted average price/ton)	BAF charge (per TEU)
Less than $80	-
$80-$99	$4
$100-119	$40
$120-139	$70
$140-159	$105
$160-179	$140
The same pattern continues for prices $180 and over (i.e. BAF increases by $35/TEU for every $20 increase in the weighted average fuel price).	

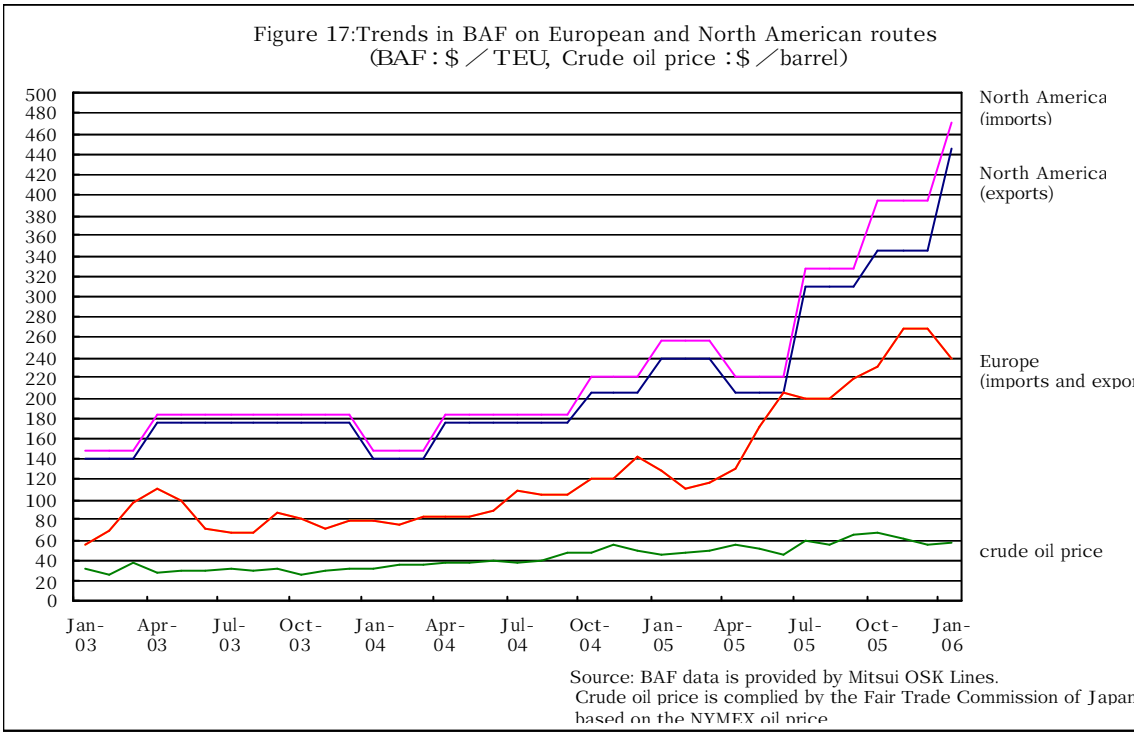
(Source: compiled by the Fair Trade Commission of Japan based on the TSA website)

[58] Bunker A and Bunker C are JIS standard classifications based on viscosity.
[59] Refer to Appendix 11.

The BAF calculation of European conference (FEFC) is as follows. Calculate the recent average weighted price by using banker price index of Cockett Marine Oil, Europe, Middle East and Asia. Compare the recent average weighted banker price to the banker price index of September 1989 (652.27) and calculate the fluctuated ratio. Then multiply the fluctuated ration to 119.12/TEU which is the basic banker price.

Figure 17 below is comparing the trend of BAF of European route and North American route and the trend of crude oil price. This table shows that the trend of BAF and crude oil doesn't match and especially in North American routes, the increase of BAF is higher than the crude oil increase.

Figure 17 : Trend of BAF and crude oil prices



(ii) CAF

Calculating CAF (currency adjustment factors) involves determining a base rate for the exchange rate for each currency in advance and then deciding whether or not to bill for CAF as a percentage of shipping rates based on exchange fluctuation figures over a fixed period. Figure 18 below shows the current method used to calculate CAF under the Transpacific Stabilization Agreement (TSA). By way of an example, CAF are not applied under the TSA if exchange rate fluctuations vary from the base rate (set at ¥126/$[60]) by less than ¥7/$. If the exchange rate fluctuates by ¥7 or more however, CAF is charged at the rates indicated in the

[60] The reasons for setting the base rate at ¥126/$ are not clear.

table below.

Figure 18: CAF calculation method under the TSA (example)

Yen to the dollar	115.00	116.00	117.00	118.00	119.00	-	126.00	-	133.00	134.00	135.00	136.00	137.00
CAF (% of shipping rates)	4%	4%	3%	3%	0% up to ¥7 either side of base rate					-4%	-4%	-5%	-5%

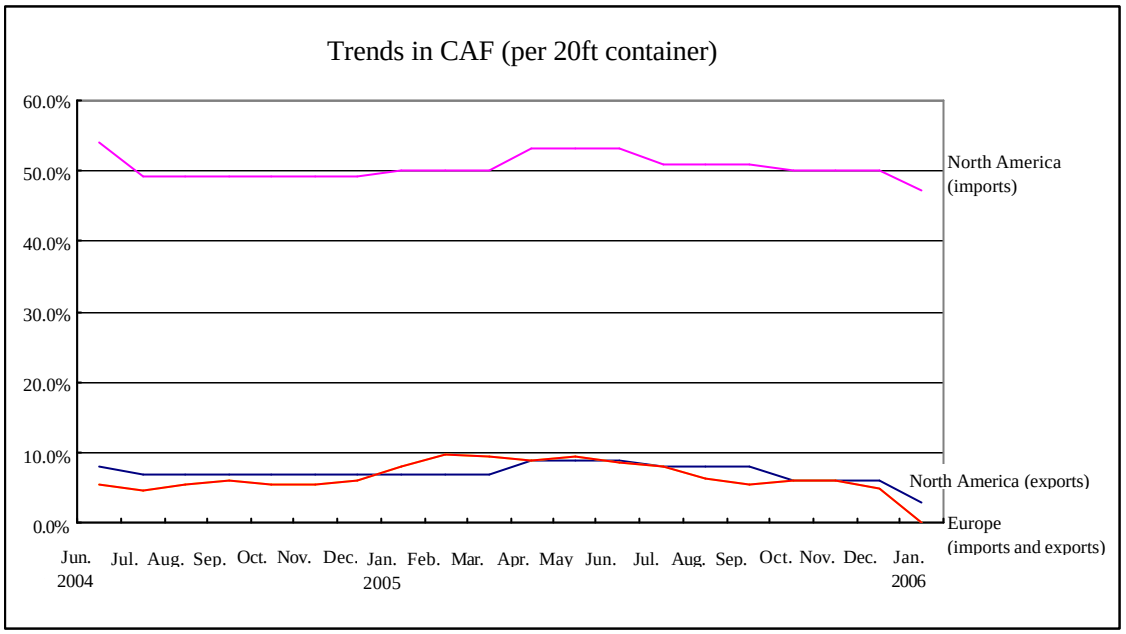
(Source: compiled by the Fair Trade Commission of Japan based on data provided by Shipping Conference and General Administration (SCAGA)

Shipping conferences on European Routes also have also set out percentages of overall costs for each currency against a base rate consisting of each currency's rate of exchange to the dollar in January 2003[61]. The specific method of calculation used is as follows. Having confirmed the monthly rate of fluctuation from the January 2003 base rate for each currency, the weighted average percentage of costs is then worked out. The weighted averages for each currency are then added together to calculate the CAF (which is only applied if there has been an increase or decrease of 5% from January 2003). According to interviews with the Japanese Shipowners' Association conducted by this study group, 80% of revenue and 70% of costs for the three Japanese shipping companies consist of US dollars. As the percentages for each currency under this method of calculation are evidently far removed from the realities of business, they therefore fail to fulfill their purpose of covering shipping companies' risks from exchange rate fluctuations.

Figure 19 below shows trends in CAF for the European Conference and the Transpacific Stabilization Agreement (TSA). There are major differences between CAF rates charged by the TSA on outgoing routes from Asia to North America and those charged by the Westbound Transpacific Stabilization Agreement (WTSA) on incoming routes form North America to Asia. WTSA explains the reason why CAF remains around the 50% is since WTSA are using ¥235/$ as a base currency exchange rate. WTSA explains as well that the CAF formula has been determined many years ago before the current secretariat administered WTSA, therefore, WTSA doesn't have the record how the formula had been determined.

[61] For example, the percentage for US dollars is 39.03%, or 7.41% for Japanese yen. Refer to Appendix 12 for further details.

Figure 19: Trends in CAF on European and North American routes



(Source: data provided by Mitsui OSK Lines (surcharges released by the European Commission and the TSA))

(iii) THC

THC (terminal handling charges) pass charges for costs incurred from the time a vessel enters the container yard until it is unloaded or from unloading until the vessel leaves the container yard to the relevant shippers or owners. The basis on which the total THC billed to shippers by shipping companies is calculated however is unclear. Although the nature of THC means that the necessary costs should vary according to each individual port, the European Conference for example has set a flat rate for THC at ports in Tokyo, Yokohama, Nagoya, Osaka, Kobe and Hakata of ¥28,491 per TEU. THC are also set at a standard rate for all ports in Japan by the Transpacific Stabilization Agreement (¥21,000/TEU[62]). In other words, THC vary according to different shipping companies, even if cargo is shipped via the same port. Since 2002, the level of THC charged for using Japanese ports has not been changed once[63].

III Evaluation of surcharges set by container liner cartels

From the point of view of shipping companies, surcharges are a means of getting shippers to cover fluctuations in costs that are beyond their control such as fuel prices or exchange rate fluctuations and a portion of actual costs incurred through the use of port facilities. Shippers on the other hand take issue with the fact that flat rate surcharges are set out by container

[62] The Transpacific Stabilization Agreement (TSA) has set out the rate of THC of ¥21,000 per TEU as a guideline, with the actual amount billed to shippers determined at the discretion of individual shipping companies.
[63] All five reports regarding agreements received by the Fair Trade Commission in fiscal 2005 were in relation to foreign ports.

liner cartels because the cost structure for each shipping company is essentially different.

For example, BAF costs differ for each shipping company depending on the methods used for fuel procurement or oil futures trading. In terms of CAF too, the percentage of costs accounted for by each currency and exchange risk measures such as exchange contracts also differ according to individual shipping companies. It is thought that the current situation is moving away from the essential purpose of CAF, namely that of getting shippers to cover a portion of the risks from exchange rate fluctuations, particularly with levels remaining around the 50% mark over the last few years as in the case of the Westbound Transpacific Stabilization Agreement.

Circumstances also differ in terms of THC too, depending on factors such as whether or not shipping companies have their own container terminals. Despite acknowledging that actual costs vary according to individual ports, shipping companies claim that the fact that shippers are charged standard flat rates, meaning that there is no change in their overall costs, is beneficial for shippers on the whole in that it enables them to avoid complicated cost calculation procedures. On the other hand, since there are shippers who only use specific ports, it is hard to say that the overall costs do not change. The decision as to whether or not flat rates are more beneficial than rates in line with actual costs should be down to the customer rather than being a one-sided decision of shipping companies. Instead of listening to what shippers actually want, the fact that shipping companies charges flat THC rate and insists that charging flat rate is for the sake of shippers, and enforcing THC in practice could be regarded as one of harmful effects of cartels. Another criticism leveled at the international shipping industry is that, in any other industry companies would naturally make every effort to absorb costs such as these themselves, even if it meant having to cover increased costs, rather than being able to pass them on to their customers as cartels do to shippers. Other fierce criticisms include the fact that CAF and BAF are revised regularly, as is the case with rate restoration, the fact that the formula used to calculate THC is unclear and the fact that PSS (peak season surcharges) and other such charges are imposed at times of restricted demand when companies are lacking in pulling power.

(3) The functions of container liner cartels: sharing information

One of the activities stipulated as part of container liner cartel agreements is the exchange of information relating to supply and demand forecasts between member companies. This shared information is then used by member companies as the basis for decisions regarding capital investment and other such matters. From the point of view of shipping companies, reasons why it is necessary to share information regarding shifts in supply and demand include (1) the high costs involved in constructing vessels, (2) the fact that it takes roughly three years from the start of construction until a vessel can be launched, (3) the need to make appropriate investment

decisions with regard to the construction and launch of vessels (4) the need to prevent disastrous price wars as a result of an oversupply of vessels and (5) the fact that exchanging information helps stabilize shipping routes and benefits shippers.

Shippers have no strong feelings directly relating to the exchange of information between container liner cartels. With regard to the stabilizing effects of sharing information however, the Fair Trade Commission survey revealed that some shippers feel that container liner cartels do little to offset the risks of rising shipping rates and surcharges and offer no obvious benefits for shippers. Numbers of shippers also feel that container liner cartels have fueled the sense of increasing costs as a result of increasing cargo volumes and high crude oil prices in recent years and take issue with the fact that member companies belonging to international shipping cartels continue to record high profits, as mentioned previously.

(4) The functions of container liner cartels: constraining shippers

Whereas shipping conferences used to employ tactics such as dual rate, fidelity rebate and deferred rebate systems to prevent shippers from using non-member shipping companies and take retaliatory measures against shippers that did so, as discussed in Section 2, they no longer perform functions such as these. Shipping conferences' power over shippers has faded away, something that can be confirmed based on the developments discussed below.

I Dual rate systems

As mentioned previously, shipping rates are determined irrespective of tariffs set out by shipping conferences based on individual contracts concluded between shippers and shipping companies. Conference tariffs, which formed the basis of the dual rate system, are no longer effective. Consequently, dual rate systems have been removed from shipping conference contracts on all routes. If any such regulations do remain in place, shipping conferences do not have the power to enforce them in reality. Dual rate regulations were removed from shipping conference contracts on European routes at the end of 2003 and on Australian routes in August 2004[64]. Similarly, they are scheduled to be removed from West Coast of South America/Far East Freight Conference contracts in June 2006. Despite the fact that they are no longer effective in practice, there are a total of 10 routes to and from Japan that still retain dual rate systems today under shipping conference regulations[65].The Japanese Shipowners' Association agrees that shipping conference dual rate systems are no longer effective.

[64] Dual rate systems were abolished by the European Conference on the grounds that (1) conference tariffs are ineffectual and offer no benefits to shippers these days due to the increasingly insignificant function performed by shipping conferences and that (2) the costs required to sustain dual rate systems place too much of a financial burden on member shipping companies.

[65] Appendix 13(1) outlines the current status of dual rate systems agreed between shipping companies. Both of the shipping companies that still retain dual rate systems stated that they are no longer workable, meaning that they merely retain the relevant regulations on paper and that they are not effective in practice. Refer to Appendix 14 for details of routes that still have dual rate systems.

The practice of imposing penalty charges on contracted shippers using non-member vessels was based on the dual rate system. As dual rate systems are no longer used, companies have also stopped imposing penalty charges. Interviews with shipping companies revealed that it has always been impossible to ascertain whether or not shippers had used non-member vessels in practice and that none of the shipping companies interviewed had ever actually imposed penalty charges. Nevertheless, the Japanese Shipowners Association stated that there are still some shippers previously under contract to shipping conferences that go through the procedure of notifying shipping conferences of their intentions to use non-member vessels on reasonable grounds and receiving dispensation whenever they use non-member vessels or deal with shippers that do so from the standpoint of compliance, even on routes where dual rate systems have been abolished. The Japanese Shipowners Association therefore argues that all dual rate system provisions should be removed from contracts between shippers and shipping conferences.

II Fidelity rebate and deferred rebate systems

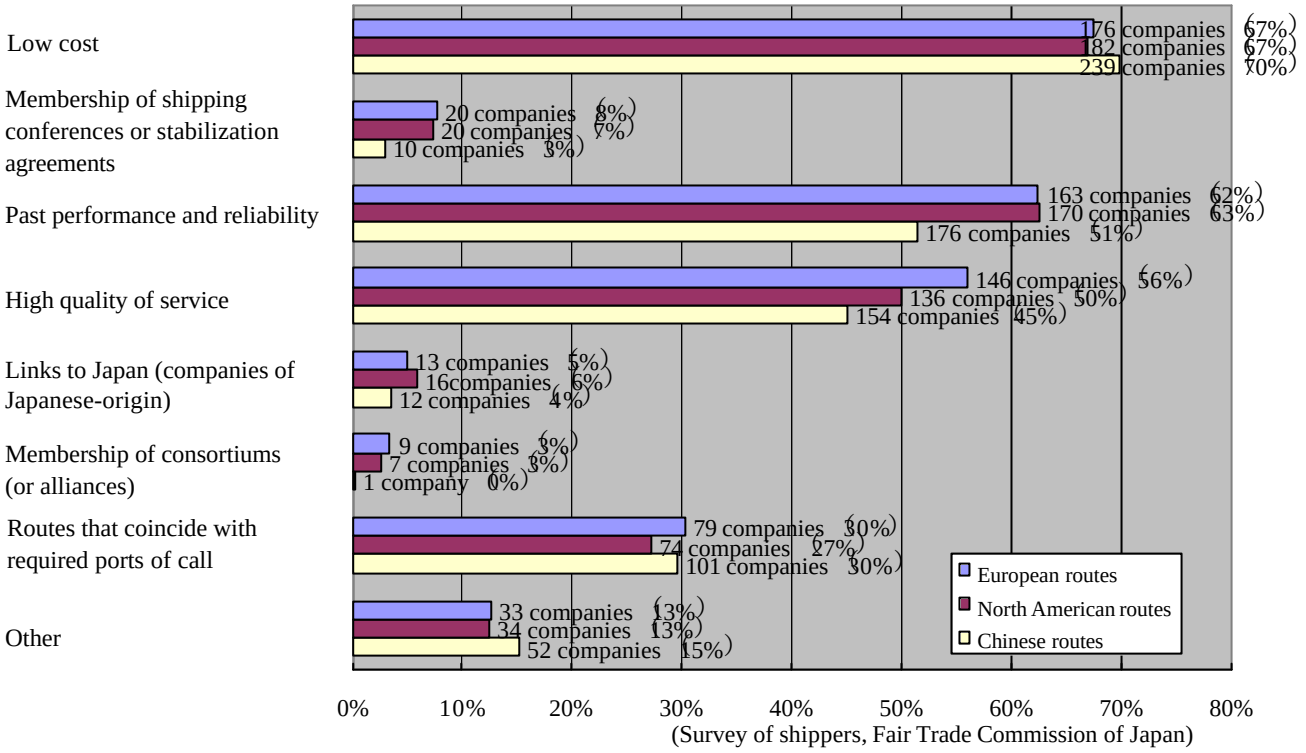
Although the European Conference used to employ a fidelity rebate system, it removed it from its contracts at the end of 2003. There are currently no fidelity rebate systems in place on any shipping routes[66]. Similarly, there are no longer any shipping conferences with deferred rebate systems in place on routes to and from Japan[67].

III Shipping conferences' power in terms of shippers' selection criteria

As discussed above, shipping conferences no longer take measures to prevent shippers from using non-member shipping companies. This is supported by Figure 20, which shows shippers' selection criteria when choosing shipping companies. Although between 6% and 7% of shippers listed membership of shipping conferences as one of their criteria, the main reasons given for choosing shipping companies were cost (approximately 70%), past performance and reliability (50-60%) and quality of service (40-50%).

[66] As indicated in Appendix 13 (2), when surveyed, no shipping companies responded to the effect that they still use fidelity rebate systems.
[67] Similarly, as indicated in Appendix 13 (3), when surveyed, no shipping companies responded to the effect that they still use deferred rebate systems.

Figure 20: Shipping company selection criteria on European, North American and Chinese routes (multiple answers permitted)

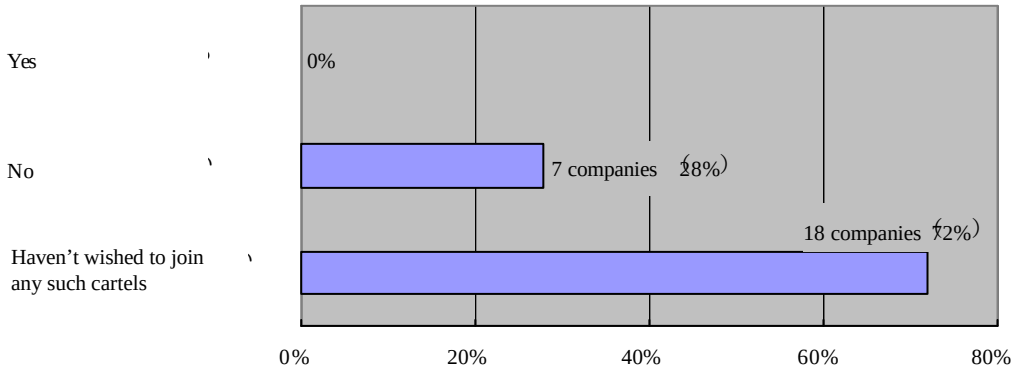


(Survey of shippers, Fair Trade Commission of Japan)

(5) The functions of container liner cartels: eliminating non-member shipping companies

As mentioned previously, shipping conferences are making the transition to open conferences. When surveyed, not a single shipping company responded that they had been refused membership to a shipping conference or stabilization agreement that they wished to join at any time over the last five years. Similarly, there were no shipping companies that responded to the effect that belonging to a container liner cartel resulted in them being treated favorably or unfavorably compared to other shipping companies. The results of interviews with the Japanese Shipowners' Association also revealed that container liner cartels on routes to and from Japan no longer take steps to restrict market entry from non-member shipping companies.

Figure 21: "Have you been refused membership to a container liner cartel that you wished to join during the last five years?"



(Survey of shipping companies, Fair Trade Commission of Japan)

3. Consortium and alliance agreements

Unlike shipping conferences and stabilization agreements, consortiums and alliances coordinate space charters for container vessels, the shared use of terminals and shipping schedules rather than determining shipping rates or surcharges. This means that, although they do not necessarily fall under the category of cartels, consortium and alliance agreements can be reported under the Marine Transportation Law, making them eligible for exemption from the Antimonopoly Act, on the condition that they do not restrict shipping rate agreements, market shares or the volume of supply.

There were 22 reports regarding consortiums or alliances on routes to and from Japan in fiscal 2005, ten of which were in relation to new agreements being concluded, eight to changes being made to agreements (membership or withdrawal of shipping companies, etc.) and three to agreements being discontinued. Alliances currently in operation on European, North American and other major shipping routes are detailed below.

Figure 22: Shipping tonnage for the main alliances on major shipping routes

Alliance/shipping company	Shipping tonnage (as of January 1, 2003)	
	Vessels	TEU
Evergreen group	78	320,629
Evergreen (Taiwan)		
Lloyd Triestino (Italy)		
Hatsu Marine (UK)		
The Grand Alliance (GA)	145	717,156
NYK Line (Japan)		
P&O Nedlloyd (Holland)		
OOCL (China)		
Hapag Lloyd (Germany)		
MISC (Malaysia)		
The New World Alliance (TNWA)	90	435,006
APL (USA)		
Mitsui OSK Lines (Japan)		
HMM (South Korea)		
CKYH group	169	729,980
COSCO (China)		
Kawasaki Kisen Kaisha (Japan)		
Yang Ming (Taiwan)		
Hanjin (South Korea)		
Senator Lines (Germany)		

(Source: 2005 Maritime Report (July 2005, Japan Maritime Public Relations Center, ed. Ministry of Land Infrastructure and Transport Maritime Bureau)

(1) The need for consortium and alliance agreements

According to the Japanese Shipowners' Association, it is essential to streamline management and improve efficiency through the use of space charters and other consortium and alliance agreements in order to provide services on a global scale in line with the needs of shippers. In addition, the fact that consortiums and alliances are designed to cut costs and streamline operations based on initiatives such as sharing cargo space rather than determining shipping rates or surcharges means that they do not restrict competition. Nevertheless, the Japanese

Shipowners' Association still claims that the system of exemption from the Japanese Antimonopoly Act should be retained on the grounds that such agreements are exempt from competition law in the European Union and the United States.

(2) Shippers' evaluation of consortium and alliance agreements

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

4. Tramp vessel service agreements

Although the numbers are few, there have also been reports regarding agreements in the field of tramp vessel services including the South Sea Lumber Transportation Agreement and the North Sea Lumber Transportation Agreement. These agreements involve activities such as determining shipping rates and market shares and regulating tonnage.

Shippers tend to appreciate tramp services such as tankers and shipping mineral resources since shippers and ship owners can negotiate shipping terms and determine shipping rates within a fair market,. However, in spite of the governmental policies to protect their national shipping companies [68] within exporting countries, the South Sea Lumber Transportation Agreement incorporates regulations that restrict entry into the market from new shipping companies looking to sign up to agreements, including the requirement to take over a share of the market from member shipping companies. Further investigation is therefore needed into the validity of cartels such as this from the standpoint of shippers' interests, based on the current situation.

[68] Countries exporting south sea timber impose regulations on the number of shipping companies permitted to ship timber in the interests of protecting shipping companies for own country.

Section 5: View points regarding international shipping issues and competition policy

Shipping conferences and other international shipping cartels have been exempt from the Antimonopoly Act, primarily due to the facts that they are common practice in international shipping and are exempt from competition law in other countries. As discussed previously in this report however, such cartels are losing their power over the market due to factors such as the emergence of shipping companies from developing countries, limiting their current function largely to that of coordinated price action, including rate restoration and surcharges, extending to outsiders as well as members. Elsewhere, with the system of exemption from competition law being reviewed in the European Union and other countries, the climate surrounding shipping conferences and other international shipping cartels is undergoing some changes.

As mentioned previously, despite shipping companies' claims that they are still a necessity, users have singled out a number of problems with shipping conferences and other international shipping cartels. It is therefore essential that the future of such cartels is examined based on the basic concept originally stated in the 1991 report published by this study group, namely that the system whereby international shipping is exempt from regulations under the Antimonopoly Act is an anomaly within a free economy and therefore needs to be kept to an absolute minimum and reviewed on an ongoing basis in line with changes in the economic climate[69].

This section will first of all examine the legislative framework in relation to shipping conferences, focusing on the system of exemption from the Antimonopoly Act, and the need to take action under existing systems. The remainder of this section will then examine issues relating to peripheral systems linked to competition in the international shipping market, such as pilot and port transport systems.

1. Exemption of international shipping from the Antimonopoly Act

International shipping agreements between shipping companies are exempt from the Antimonopoly Act under provisions set out in Article 28 of the Marine Transportation Law. When this system of exemption was first introduced, it was designed to ensure harmony with international practices. Specific reasons for this, according to a proposal statement given to the 5th session of the Diet in 1949, included the fact that the formation of shipping conferences and other cartels between shipping operators was common practice in international shipping and the fact that the prohibition of cartels under the Japanese Antimonopoly Act even though they were exempted from advanced anti-cartel legislation in the United States was preventing any hopes of healthy development for the Japanese shipping industry. In addition to ensuring international

[69] Refer to the Report of The Study Group on Regulations and Competition policy, Fair Trade Commission of Japan (July 1991).

harmony, one of the other reasons cited for retaining the system of exemption under the Antimonopoly Act as part of reviews in 1999 was the fact that preventing wild fluctuations in shipping rates and increasing business efficiency through cooperation and partnerships between shipping companies would result in a stable supply of international shipping services and would therefore be interests of shippers.

The first issue to be addressed is therefore whether international shipping cartels are actually would be the interests of shippers or not. After examining issues relating to international harmony, this section will then discuss the future of the exemption of international shipping from the Antimonopoly Act and action that should be taken by the Fair Trade Commission of Japan under the current system.

As discussed in Section 4, consortiums and alliances and activities such as sharing information regarding shifts in supply and demand[70] as part of international shipping agreements reported in accordance with the Marine Transportation Law do not necessarily constitute cartels providing that they do not restrict shipping rate agreements, shares of the market or the volume of supply. Although this will not be examined for the purposes of this report, it is thought that there is no need for agreements to be exempted from the Antimonopoly Act if they do not effectively restrict competition in any way and that they should therefore operate in accordance with the Antimonopoly Act. If they are to become subject to the Antimonopoly Act, the Fair Trade Commission of Japan needs to look into the compilation of guidelines in line with demand from operators, setting out the thinking behind the Antimonopoly Act with regard to what sort of activities are permitted (consortiums, alliances, the exchange of information on shifts in supply and demand between shipping companies, etc.) and what sort of activities would be regarded as problems.

(1) International shipping cartels and customer interests

As mentioned previously in Section 4, cartels have been strongly criticized by customers on the grounds that the methods used to calculate charges are unclear, that prices are increased too frequently and that rate restoration and surcharges imposed by container liner cartels are unfair practices that would not be permitted in any ordinary business. Despite acknowledging that there are no clear methods of calculating charges, shipping companies on the other hand claim that cartels such as these are essential to their business activities due to the special nature of the international shipping market. Specifically, the special nature of the international shipping market refers to the facts that (1) companies have to engage in capital investment in line with demand in spite of the seasonal fluctuations in the volume of cargo and the major imbalance between eastbound and westbound cargo, (2) international shipping is a process industry[71] that

[70] Refer to Section 2-9 (Intelligence activities) of Guidelines on the Antimonopoly Act in relation to Trade Association Activities (Fair Trade Commission of Japan), which outlines the thinking behind the Antimonopoly Act with regard to information-gathering activities carried out by trade associations.

[71] According to the Japanese Shipowners' Association the total investment required for the likes of

requires large scale continual investment, (3) it is not easy to withdraw from the market if there is excess tonnage because the market for used vessels will also go into decline and (4) the market is therefore prone to extreme fluctuations in prices due to shifts in supply and demand.

Examining the current status of the ongoing container shipping cartels from the perspective of the customer's benefits, the rates of typical surcharges such as CAF, BAF and THC which constitute a large portion of cartels have possibilities that demand burdens costs which exceeds the actual costs for the reason that these surcharges are decided uniformly on Regular Container Cartels although costs may differ from one firm to another .In case the shipping companies charges superfluous costs to shippers, there are possibilities that shipping firms are prejudicial to shippers's interests unreasonably.

In addition, concerning the specialty of the Maritime Transportation Market which shipping companies insists on that international shipping is not the only industry subject to major fluctuations in demand due to seasonal and other factors and a need for capital investment in line with maximum demand; the same could also be said of other transport and passenger travel industries. Similarly, barriers preventing operators from entering or withdrawing from the international shipping industry are no more substantial[72] than in other industries. If anything, it is easier sell on equipment because it is movable, meaning that sunk costs in the international shipping industry are actually lower than other industries. This is supported by the fact that shipping conferences have lost some of their power due to new operators actively entering the international shipping industry. Bearing in mind the ease of entry to and withdrawal from the international shipping industry, coping with extreme fluctuations in prices within the industry is just a case of providing the necessary capacity through the same price mechanisms used in other industries, even if there are temporary price rises due to restricted demand.

On routes between Japan and China, where there are no container liner cartels, there are still some shippers with concerns regarding wildly fluctuation shipping rates and unclear surcharges. However, when asked what measures should be introduced on routes between Japan and China, the most common response from shippers (65%) was that improvements should be made through the promotion of free competition between shipping companies.

Based on all of these points and strong criticism from customers regarding the practices of rate restoration and surcharges imposed by container liner cartels, there is no evidence to support shipping companies' claims that cartels must be permitted in the interests of stabilizing shipping rates amidst special circumstances.

Analysis carried out as part of a survey based on the proposed abolition of block exemption

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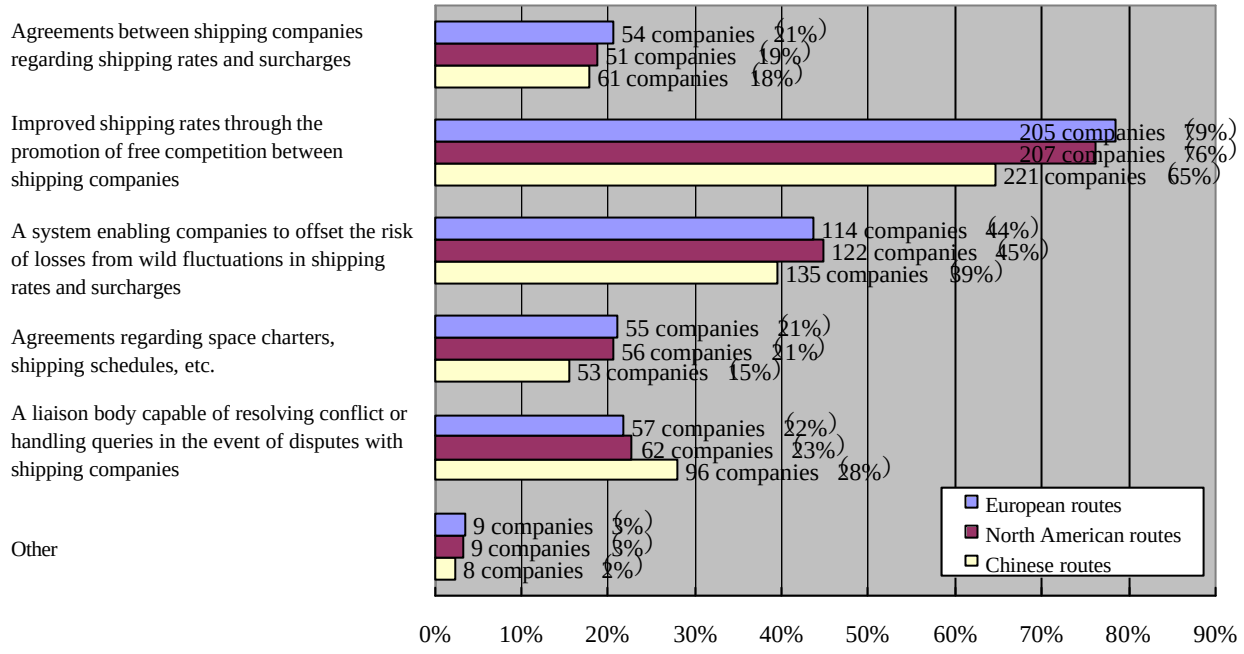
new vessels and containers on routes between Japan and North America and Europe comes to approximately ¥140 billion (8 vessels @ $120 million, containers $260 million, exchange rate: ¥115/$)

[72] In May 16. 2006, described above the contents of explanations of the Japanese Shipowner's Association at the study group., there is no entry regulations of shipping conferences and rules of the domestic law. As mentioned previously in Section 3, (there are many new entrants to the main routes)

by the European Commission[73] in December 2005 revealed that, in actual fact, international shipping cartels could potentially contribute to instability on certain routes.

Figure 23: Measures regarded as necessary by shippers according to shipping route



(Survey of shippers, Fair Trade Commission of Japan)

(2) International harmony

The next issue that needs to be examined is the need for harmony with international systems. As mentioned previously, the system of exemption from the Antimonopoly Act for international shipping was introduced in Japan in order to ensure harmony with international systems. The argument was that, as international shipping services to and from Japan are subject to the legal system in the destination country or country of origin as well as that in Japan, it is essential for the two systems to be compatible with one another. If Japan were to abolish its system of exemption, cartels would not be permitted on routes to, from or via Japan, irrespective of exemption systems in other countries along the relevant routes. As routes linking Japan to countries such as the United States and Australia are equally important to other countries, any reviews to current systems must include the active exchange of opinions between countries.

Nevertheless, there are differences between systems of exemption from competition law between Japan and some other countries even today. For example, whereas other countries

[73] Refer to "The Application of Competition Rules to Liner Shipping, Final Report" (Global Insight October 26, 2005).

permit exclusive shipping conferences, the United States alone prohibits them in accordance with the United States Shipping Act of 1916, as discussed in Section 2. Similarly, the United States outlawed dual rate systems with a difference in rates over a certain level in accordance with the Bonner Act in 1961, at a time when dual rate systems were common practice. The US Shipping Act of 1984 then went on to ban shipping conferences from controlling shipping rates, marking the end of shipping conferences on routes to and from the United States. Although these competition policies, which are exclusive to the United States and differ to systems in other countries, have altered the competitive environment on routes to and from the United States, they have had no obvious impact in terms of US routes being plunged into confusion or US shipping companies being treated unfairly.

A closer look at the differences between current exemption systems in the United States, the European Union and Japan reveals that, whereas dual rate systems and tramp vessel service agreements are prohibited in the United States, they are allowed exemption from competition law in Japan and the European Union[74] providing that they remain within certain limits. On the other hand, whereas agreements regarding inland transportation rates are not included under exemption systems in Japan and the European Union, they are in the United States providing that they remain within certain limits. This all goes to show that the extent of exemption from competition law is not necessarily the same in all countries but is determined separately by each country's government. One of the motivating factors behind reviews to the block exemption system currently being considered in the European Union was the Lisbon Strategy to improve industrial competitiveness within the European Union. Bearing all of these points in mind, Japan needs to think about the future of its competition policy from the standpoint of the best interests of Japanese shippers and furthermore, from the viewpoint of benefits of Japanese consumers.

(3) View point of exemption of international shipping from the Antimonopoly Act

As discussed above, whereas shippers are critical of the negative effects of container liner cartels, there is no evidence to support shipping companies' claims regarding the positive significance of cartels. The appropriate thing to do would therefore be to abolish provisions under the Marine Transportation Law exempting cartels from the Antimonopoly Act. If abolishing the relevant provisions, however, additional measures should also be taken, including (1) bringing in a fixed moratorium in order to avoid confusion in line with the abolition of exemption and (2) compiling guidelines on the application of the Antimonopoly Act after the abolition of exemption if deemed necessary. In addition, as described in (2), primary the judgment should be decided from the viewpoint of benefit of shippers and final consumers in Japan, besides, It is desirable that pay attention to countries concerned such as giving

[74] The European Commission has proposed that competition law should be applicable to irregular liners and cabotage.

opportunity to state their opinions because review of the exemption of Antitrust Law has effect on not only Japan but also countries concerned.

The European Commission believes that abolishing the block exemption system would reduce transportation costs, have a positive effect on the international shipping industry and result in improvements in service quality and technical development, as well as increasing the international competitiveness of industry within the European Union[75]. The system of exemption should be abolished as quickly as possible in Japan as well in order to ensure that Japanese shippers are not placed at a disadvantage compared to their EU counterparts in terms of competition in third-country markets.

2. Action to be taken by the Fair Trade Commission under the existing system

As mentioned in the preceding section, the Fair Trade Commission needs to work on abolishing the system of exemption for international shipping. However, in view of (1) serious complaints on behalf of shippers regarding cartel rate restorations and surcharges and (2) trends towards shipping companies charging exceptionally high BAF, particularly due to soaring crude oil prices recently, the Fair Trade Commission should take countermeasures wherever possible without waiting for the actual abolition of the exemption system. Under the existing Marine Transportation Law, the Fair Trade Commission can request that action be taken by the Minister for Land, Infrastructure and Transport if reported international shipping agreements do not meet the specified four requirements. The following section provides an overview of existing regulations and examines the criteria used to determine whether or not international shipping agreements meet the four requirements, as well as exploring thoughts on the application of the Antimonopoly Act to international shipping agreements that fail to meet other exemption requirements.

(1) Overview of the existing system

As with any regular system of exemption from the Antimonopoly Act, the current system states that the Antimonopoly Act should be applied in any cases involving unfair business practices or operators unfairly harming users' interests by effectively restricting competition. In addition to this, there are also measures in place to revise or restrict international shipping agreements if there are any problems, as detailed below.

I Cartel revision or restriction orders issued by the Minister for Land, Infrastructure and Transport

Upon receipt of a report regarding an international shipping agreement, if the agreement is deemed to (1) unfairly harm users' interests, (2) be unfairly discriminatory, (3) unfairly restrict entry to or withdrawal from the market or (4) restrict competition more than

[75] Refer to "Commission proposes repeal of exemption for liner shipping conferences" (European Commission press release, December 14, 2005).

absolutely necessary based on the aim of the agreement, the Minister for Land, Infrastructure and Transport is obliged to issue the relevant agreement with a revision or restriction order (Marine Transportation Law, Article 29-2).

II Requests for action issued by the Fair Trade Commission

As mentioned previously, there is a system in place whereby the Fair Trade Commission is immediately notified of all reports received by the Minister for Land, Infrastructure and Transport. If it deems that the contents of any international shipping agreement do not meet the aforementioned four requirements (points (1) to (4) above), the Fair Trade Commission can then request that action be taken against the relevant cartel by the Minister for Land, Infrastructure and Transport in the form of a revision or restriction order (Marine Transportation Law, Article 29-4). When the Fair Trade Commission issues a request for action such as this, notice is given regarding the relevant details through an official gazette. If the Minister for Land, Infrastructure and Transport does not issue a revision or restriction order within one month of this official notice, the cartel ceases to be eligible for exemption from the Antimonopoly Act, which comes into effect immediately (Marine Transportation Law, Article 28 (notes))

(2) Criteria to determine compliance with the four requirements

The reasons given for the establishment of regulations outlining the four requirements for shipping agreements (as detailed in the above section (1) I) in the paperwork issued at the time of revisions to the law in 1999 were as follows. (1) Although international shipping cartels remain exempt, it is essential to promote free competition within a fairer, more open market so that market functions can come fully into play. (2) In light of his or her knowledge of transport policy, the Minister for Transport should comprehensively evaluate whether agreements are necessary in order to offer users added convenience or not, taking into account the limiting effect of the relevant agreement on competition. (3) The exemption system needs to be monitored more closely in line with the fundamental thinking behind the Antimonopoly Act, namely that of promoting fair, free competition, in order to prevent it from being abused. Of the four, the requirements stating that agreements must not be unfairly discriminatory and that agreements must not unfairly restrict entry to or withdrawal from the market are both based on systems such as closed conferences and the dual rate system, which no longer exist. The following section therefore examines the two criteria used to determine compliance with requirements that could potentially pose problems in view of the current status of container liner cartels; unfairly harming users' interests and restricting competition more than absolutely necessary based on aim of the agreement.

I Unfairly harming users' interests

As discussed in details in Section 4, cartels engaging in rate restoration and surcharges do not reflect individual shipping companies' actual costs. Such cartels have been the subject of serious complaints from customers and are thought to be highly likely to harm users' interests in case shipping companies costs which exceeds actual costs without adequate explanation. Shipping companies explains that, as there is a system in place to enable discussion with shippers' associations when rate restoration or surcharge agreements are concluded, cartels do not unfairly harm users' interests. Interviews with shippers' associations conducted by this study group however revealed that there are some cases in which goods' owners views are not properly reflected when rate restorations or surcharges are determined or revised, which happens frequently over the course of each year, and other cases in which associations are merely notified rather than being consulted.

As mentioned in Section 3, interviews with shippers conducted by the Fair Trade Commission also revealed dissatisfaction amongst shippers regarding the lack of any negotiations when surcharges are calculated, indicating that the aforementioned discussion system is not functioning adequately. This is also reflected in the fact that large numbers of shippers expressed serious grievances in response to the Fair Trade Commission's survey of shippers. Even if the way of consultation was improved, there is not the guarantee that profit of all shippers is preserved. If cartel practices such as these are to be accepted, as a bare minimum they need to offer users overall benefits that outweigh any instances in which individual users' interests are harmed on a one-off basis.

II Restricting competition more than absolutely necessary based on the aim of the agreement

This requirement refers to the need to limit aspects of agreements that restrict competition to an absolute minimum compared to activities that are in the public's interest (i.e. activities that offer increased benefits to users). As mentioned in the preceding section I, the activities carried out by rate restoration and surcharge cartels must therefore not exceed the scope of what is necessary to achieve their aims, even if it is necessary in order to stabilize shipping rates over the medium to long term.

In some cases, international shipping cartels include provisions that are no longer effective. As this means that such provisions are not necessary in order to achieve the aim of the agreement, they are regarded as failing to meet this requirement. As discussed in Section 4, dual rate systems and other steps to constrain shippers are no longer regarded as being effective, neither are sailing agreements involving container liner cartels and tramp vessel service agreements regulating tonnage. Action therefore needs to be taken to correct ineffectual provisions such as these as soon as possible because they are regarded as unnecessary with regard to exemption from the Antimonopoly Act.

(1) Application of the Antimonopoly Act to international shipping agreements that fail to meet other exemption requirements

In addition to the requirements outlined in the preceding section (2), it is also essential to examine whether agreements fall within the scope of international shipping or not. The Marine Transportation Law stipulates that, in order to be eligible for exemption from the Antimonopoly Act, international shipping agreements must be based on routes between Japanese and non-Japanese ports and that shipping companies must have signed an agreement or contract with other shipping operators containing details relating to shipping rates, charges and other terms and conditions, shipping routes, shipping schedules and loading or have taken equivalent concerted action. Therefore, agreements that do not correspond to these requirements, as is the case with inland transportation for example, cannot be exempted from the Antimonopoly Act even if they are reported.

THC for instance, which have been the subject of strong criticism from shippers, include loading and unloading goods from the chassis in the container yard, transferring goods to cranes and storage costs[76] as well as costs relating to the loading and unloading of goods from the vessel itself. Unloading goods from the chassis and other such activities do not fall within the scope of international shipping but are classified under inland transportation and storage, meaning that part of the costs that make up THC are not classed as international shipping and are therefore not thought to be eligible for exemption from the Antimonopoly Act. Appropriate steps need to be taken as and when necessary in relation to issues such as these based on actual situations, including whether the cost components that make up THC are contingent upon international shipping related services or not.

(2) Action required from the Fair Trade Commission

I Actively requesting action from the Minister for Land, Infrastructure and transport

As discussed so far in this report, there are concerns that the activities carried out by the majority of currently permitted rate restoration and surcharge cartels unfairly harm the interests of users. The Fair Trade Commission should request explanations regarding reported international shipping agreements from the Ministry of Land, Infrastructure and Transport and from the applicant within a certain period of time and screen them as quickly as possible to determine whether they meet the four requirements set out in the Marine Transportation Law or not. Having done that, the Fair Trade Commission should then make every effort to actively request that action be taken by the Minister for Land, Infrastructure and Transport in response to the likes of cartels that unfairly harm users' interests, cartels whose activities grossly exceed their aim and cartels whose activities do not fall within the scope of international shipping.

[76] Breakdown of THC costs based on explanations provided by the Japanese Shipowners' Association

II Clamping down on cartels in accordance with provisory clauses

Although Article 28 of the Marine Transportation Law stipulates that international shipping cartels are exempt from the Antimonopoly Act, this is accompanied by a provisory clause stating that the Antimonopoly Act may be applied to international shipping cartels if they engage in unfair business practices. The Fair Trade Commission needs to make every effort to actively and rigorously apply the Antimonopoly Act to non-exempt practices such as these in order to eliminate the negative effects of cartels and to promote competition in the international shipping market.

3. Competition policy issues in other international shipping related fields

Surveys of shippers and shipping companies and interviews conducted by the Fair Trade Commission encountered large numbers of requests regarding pilot and port transport systems in Japan. The next section will therefore look at these issues.

(1) Pilot systems

The current Pilot Law divides the country into 39 pilotage zones, with pilots required to board all vessels over a certain scale, particularly in the ten areas of water with difficult natural conditions or heavy shipping traffic. Pilot duties are determined on a flat rate for the whole country via Ministry of Land, Infrastructure and Transport ordinances. Major sources of dissatisfaction amongst both shipping companies and shippers with regard to current system include (1) the fact that duties are higher than in other countries and are based on an unclear fee structure and (2) the fact that it is inefficient to force vessels to stop to pick up pilots twice for compulsory boarding from separate pilots from port and harbor authorities within the same port.

Proposed revisions to the Pilot Law submitted to the 164th ordinary session of the Diet included measures such as (1) changing the current system of flat rate duties based on ministerial ordinances in favor of a capped approval-based system for pilot duties, measures such that (2) relaxing the required qualifications for pilots in order to generate more opportunities to enter the field embedded. co instantaneously, with pilotage area in the same gulf are unified, it is expected to ease engaging pilot duty that ships should engage two pilots.

The proposed revisions would also be of some benefit in terms of competition policy in that they would help promote competition within the pilot market through steps such as switching from the current ministerial ordinance based flat rate system to an independent pricing system whereby individual pilots set pilot duties and relaxing the required qualifications for pilots, resulting in an expected increase in the number of new pilots entering the market. The Fair Trade Commission will need to continue to keep a close eye on the state of competition in the pilot market in the future after these revisions to legislation come into effect.

(2) Port transport

Surveys and interviews also brought to light complaints regarding high service charges for port transport[77] and excessive lead times for freight handling. As a result of the enactment of the revised Port Transport Law in 2000, shipping rates and charges for port transport were changed from an approval system to an advance notification system at nine of the leading ports in Japan[78], with regulations on capacity also abolished as part of the transition from a business licensing system to an approval system. In order to encourage new operators to enter the port transportation market[79], subsequent revisions to the Port Transport Law in 2005 brought about a similar transition to a notification system for shipping rates and charges and a business approval system at other ports in addition to the leading nine, effective as of May 15, 2006. Legislative changes such as these are designed to enable the provision of efficient, flexible services in line with demand from users based on price and service competition between operators. These recent legislative revisions can be expected to result in improvements in the areas singled out for criticism by users. The Fair Trade Commission will need to investigate the state of competition and competition policy in the port transport industry as necessary in the future in line with legislative revisions such as these.

[77] According to the Ministry of Land Infrastructure and Transport Ports and Harbors Bureau, whereas rates per container at the Port of Tokyo are cheaper than those in Hong Kong or Los Angeles, they are between 1.5 and 2 times higher than those in Kaohsiung, Pusan and Singapore. A survey carried out in 2000 with average rates at the ports of Tokyo and Kobe scored as 100 put Hong Kong at 223, Los Angeles at 191, Rotterdam at 92, Singapore at 64, Pusan at 64 and Kaohsiung at 65 (based on 40ft containers)

[78] Chiba,Keihin,Shimizu,Nagoya,Yokkaichi,Osaka,Kobe,Kanmon and Hakata

[79] According to the 2005 Maritime Report (ed. Ministry of Land Infrastructure and Transport Maritime Bureau), 19 new port transport operators have been granted approval at Japan's nine leading ports since 2000.

Conclusion

International shipping shoulders a large portion of world trade and has grown into the industry it is today against the backdrop of countries' changing fortunes. The international shipping industry predates competition law, with the principle of the freedom of shipping (whereby governments do not intervene in matters relating to cargo coming into and leaving their country by giving priority to their own merchant marine fleets or native vessels but allow free choice of foreign shipping companies or vessels) having become common practice on a global scale. Based on this principle, the international shipping industry has been able to develop without entry into and withdrawal from markets or business activities in other countries being subject to excessive laws and regulations. International cartels known as shipping conferences have also been formed between shipping companies for over 130 years and have continued to be accepted under competition law in most major countries.

The international shipping industry is also one of the essential industries propping up the basic infrastructure needed by the many different industries in Japan. In that sense, the future of the international shipping industry needs to be addressed from the aspect of that the international shipping has a great influence on not only shippers but also consumers in Japan. We should bear in mind that reviews to the system of block exemption in the European Union have also stemmed from the same perspective, with progress being made based on the Lisbon Strategy with the aim of increasing the international competitiveness of industries within the European Union. As discussed in this report, current container liner cartels harm the interests of shippers by imposing unreasonable rate restorations and surcharges. There is no evidence to support the claim that the international shipping industry is of a special nature and that such cartels must therefore be accepted. In light of the current situation, the best thing to do would be to abolish the system of exemption from the Antimonopoly Act for international shipping.

In addition to being the interests of shippers, applying the rules of fair, free competition to the international shipping industry would also be beneficial to the industry as a whole. The historical facts speak for themselves; the fiercer the level of competition within industries during Japan's economic development, the more internationally competitive the relevant industries are today. In the European Union too, the abolition of the block exemption system is expected to have a positive impact on the international shipping industry, improve the quality of service and help refine technical development.

Elsewhere, the international community needs to take action to deal with the increasingly important task of exposing international hard core cartels, which unfairly place a massive burden on user companies and, by extension, consumers. International shipping practices that control

shipping rates have already been outlawed in the United States, with the European Union also considering proposals regarding the abolition of its block exemption system for international shipping. If any international hard core cartels were to be exposed in the field of international shipping, they would be exempt from competition law in Japan, effectively allowing them to continue to exist, which could have grave consequences in terms of Japan's duty to the international community. This is another standpoint that needs to be taken into consideration as part of reviews to the current system of exemption.

The Fair Trade Commission of Japan needs to take action in response to issues such as these, whilst also exchanging opinions with other countries. Rather than waiting for revisions to be made to legislation however, the Fair Trade Commission needs to take action now under the existing system. There is a system in place under the exemption system set up in 1999 that enables the Fair Trade Commission to request action. This could be used to eliminate the negative effects of cartels for the time being. This study group will continue to closely monitor the activities of the Fair Trade Commission and trends in the international shipping market with a view to making further proposals in this field as and when necessary.