THE CANADIAN SHIPPING CONFERENCES EXEMPTION ACT:

ISSUES AND ROLES FOR SHIPPERS AND SHIPPING CONFERENCES

External Affairs and International Trade Canada

Canada

THE CANADIAN SHIPPING CONFERENCES EXEMPTION ACT:

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Prepared for External Affairs and International Trade Canada

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Foreword

This publication is one in a series of transportation-oriented publications aimed at addressing the needs of Canadian exporters. Other titles in this series that are currently available include *Safe Stowage, Transportation Services Between Canada and Mexico* and *Export Competitiveness: An Assessment of the Impact of Ocean Service Contracts*. A forthcoming release in this series is *The Exporter's Guide to Transportation.*

This publication is timely in that a comprehensive review is to be conducted in 1992 of the *Shipping Conferences Exemption Act, 1987* and the *National Transportation Act.* This legislative review will provide an important opportunity to evaluate and consider recommendations on liner shipping to better respond to the needs of transportation users and suppliers.

Exporters are invited to submit to the address below their comments regarding this publication or any inquiries on international transportation in order to enhance their export performance.

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L. Grant Manery of Transport Canada's Shipping Policy Branch acted as Chairman of the Interdepartmental Steering Committee. Douglas W. Pelkola represented External Affairs and International Trade Canada which sponsored the report. Both provided outstanding support and cooperation for the duration of our work.

Any errors and omissions which may remain are the sole responsibility of the authors.

Gunnar K. Sletmo
Susanne Holste
Montreal, 30 August 1991

(1) Executive Summary

1. The following report has been prepared as a background paper for industry discussion groups and others interested in liner shipping, conferences and shippers' councils. It is intended as part of the preparations for the 1992 Comprehensive Review of transportation legislation, which includes the *Shipping Conferences Exemption Act, 1987 (SCEA 1987).*

2. The reader who is already familiar with liner shipping and the role conferences play in Canada's foreign trade may wish to go directly to Section 12 on **SCEA 1987** (see page 11 on).

3. While the United States has an overwhelming significance in our total foreign trade, Canada's oceanborne trade is primarily with Europe and the Far East. The shift in emphasis towards the Pacific Rim countries has become particularly evident during the last decade. The future of these trades is of particular interest to exporters. Sections 4, 5 and 6 provide a brief review of recent trends in Canada's foreign trade.

4. Sections 7 and 8 provide an overview of conferences and liner shipping in Canadian trades.

5. Shippers' Councils and their role are presented in Sections 9 and 10 with a short summary of the challenges to be met.

6. Legislation which provides exemption from the *Competition Act* (Canada's antitrust legislation) for certain types of shipping agreements concerning rates and other terms of carriage, has been deemed necessary for conferences to operate in Canada's foreign trade. Sections 11 and 12 provide a background of the history of Canadian conference legislation and of the present legislation under *SCEA 1987.*

7. The experience to date with *SCEA 1987* is reviewed in Section 13. Graphs 4-8 provide a condensed summary of the views of shippers, freight forwarders and shipping conferences. The most remarkable observations are that the legislation is little known by most shippers and that all parties involved believe the legislation has had little effect on the industry.

8. Sections 14 and 15 present issues identified for further consideration in connection with the 1992 Comprehensive Review of transportation legislation, including *SCEA 1987.* The issues are summarized in Tables 1-3.

(2) Introduction

In a time of growing globalization the economic prosperity and future development of Canada depends on the ability of its manufacturing and service industries to compete at home and abroad. Overseas markets play an important role in our economy. Hence, the access to effective and competitive maritime transport is of vital importance.

It was in the spirit of encouraging competition and a dynamic business environment that the *National Transportation Act, Motor Vehicle Transport Act* and *Shipping Conferences Exemption Act* were enacted in 1987.[1] The aim of the new legislation was to respond to shippers' and carriers' needs by means of increased competition and to thus provide the best possible transportation framework.

The *National Transportation Act* established the National Transportation Agency. As part of its mandate, the Agency is responsible for

annual reviews of the transportation legislation for the years 1988 through 1991. These reviews are intended to provide a means for buyers and sellers of shipping services to express views on the legislation. A Comprehensive Review of the transportation legislation is scheduled for 1992 which will provide an opportunity to consider adjustments to the current legislation.

(3) Purpose of the report

This report is intended as a background paper for industry discussion groups and others interested in liner shipping and liner conferences in the Canadian context. It provides an overview of the *Shipping Conferences Exemption Act, 1987* and outlines the respective roles of liner conferences and the Canadian Shippers' Council (CSC), which is the designated shippers' group under section 21 of *SCEA 1987.*

Liner services refer to regular or scheduled operations of general cargo and container vessels. Many such services are operated under conditions established by liner conferences which are agreements between shipping lines serving a particular route or region. *SCEA 1987* exempts certain practices of liner conferences from the *Competition Act* while protecting the public interest and increasing competition. In a global environment of intense commercial competition between nations, it is of the utmost importance to Canada's foreign trade that its shippers have access to liner services that are competitive both in quality and in price with those available to other trading nations.

Maritime liner transport has experienced an increasing interdependence with other modes of transport through the development of intermodal systems and therefore can no longer be seen in isolation. As a result, the Comprehensive Review of transportation legislation in 1992 provides an opportunity to consider the importance of global transport and logistics networks. The growing importance of such systems will almost certainly have important ramifications for carriers and shippers and may change their relationships in the market place.

(4) Canada's Foreign Trade

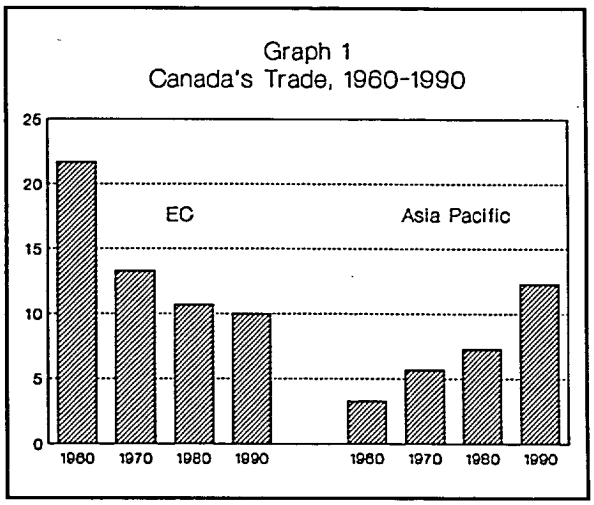
Canada relies increasingly on the export of goods and services as a source of employment and economic growth. Between 1950 and 1985 the share of exports has increased from 16.9 percent to close to 30 percent of the Gross National Product (GNP).[2] As the eighth largest trading nation in 1990, Canada has a vital interest in all matters relating to world trade. In 1990, Canada's exports accounted for 3.8 percent of world exports while imports were 3.3 percent of world imports.[3]

The major thrust of Canadian trade is directed towards the United States. The US accounts for approximately two thirds of imports and three quarters of exports. However, Canada cannot afford to ignore other trade areas which represent major trade opportunities in the years ahead. It is for these overseas markets that liner services and *SCEA 1987* are of particular relevance.

(5) Canada's Overseas Markets

The dominant role of the United States in Canadian trade may have created a predominantly "continental" attitude which may have prevented a more global approach to trade and transport. However, to ensure Canada's future prosperity and growth, overseas markets, notably in Europe and Asia Pacific, must be given greater priority in the years ahead.

Graph 1 shows the development of Canada's trade with two important trading blocks: the



Source: Asia Pacific Foundation and Statistics Canada.

European Community (EC) and Asia Pacific. The trade with countries from Asia Pacific is growing more rapidly than with other regions of the world. Asia Pacific's share in Canadian trades has increased almost four-fold from 1960 to 1990 and more than doubled between 1970 and 1990. Given the fast expansion of the Asia Pacific economies and Canada's established links with the region, there is reason to believe that our Asian trade will continue to expand both in absolute and relative terms. In order to access overseas markets, Canadian exporters are dependent upon primarily two modes of transportation: air and ocean. In 1989 air freight, although negligible in terms of tonnage, accounted for some 14 percent of the value of Canada's foreign trade with countries other than the United States. Ocean shipping dominated all modes of transport, totalling 78 percent of value or CAD 27.9 billion.[4] The remaining 8 percent went overland to Latin America or to US ports for re-export. Thus, the importance of efficient maritime transportation to destinations other than the United States is obvious. Although only between seven and nine percent of the tonnage of Canada's oceanborne trade may go by liner vessel,[5] liner shipping carries a highly significant share in value terms. According to one estimate about two-thirds of Canada's overseas exports may be depend on liner services.[6]

(6) Commodity Structure of Canada's Overseas Trade

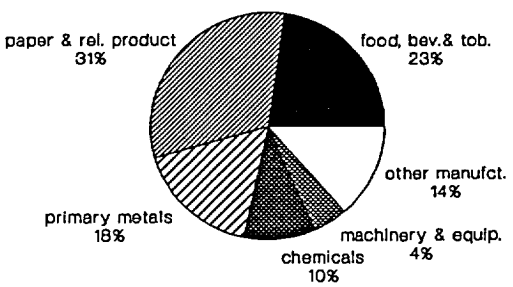
The importance of transportation costs and the nature of the service provided depends on the cargo which is being shipped. Canada's traditional export commodities to overseas markets include cereals, coal, timber, and various ores and minerals. These are typically shipped on bulk carriers in highly competitive shipping markets, based on charter contracts between shippers and shipowners. Such contracts are very different from those in liner shipping and are not subject to any specific regulatory legislation. Liner traffic, usually containerized or palletized, tends to be concentrated in a few categories. Thus, in 1989 six commodity groups dominated Canada's exports by liner services:

.paper and related products
.food, beverages and tobacco
.primary metals
.other manufacturing
.chemicals
.and machinery and equipment.

The above commodities are generally but not exclusively shipped by liner vessels and represent 70 percent of total Canadian exports by value to overseas destinations, a figure which gives a clear indication of the importance of liner type cargoes in Canada's foreign trade.[7] A few examples of important commodities moving on the North Atlantic as reported by the conferences included wines, chemicals (n.o.s.) consolidated cargo from Continental Europe to Canada Atlantic Coast and, in the opposite direction, woodpulp, asbestos and copper.[8] Overseas trade is still characterized by low unit value commodities. The share of manufactured

goods is, however, rising and it is for this high-value segment that liner shipping is of crucial importance.

Graph 2
Canada's Liner Exports, 1989



(percent of value)

Source: Conference Board of Canada. "Export Competitiveness: An Assessment of the Impact of Ocean Service Contracts." (Ottawa: Conference Board of Canada, 1991).

(7) The Conference System

Liner conferences have existed for over a century. This longevity, however, has not resolved the controversy concerning merits and disadvantages of the system.

The basic purpose of liner conferences is to establish common rates and terms of carriage in order to provide regular services in a stable transportation environment. This concerted arrangement among competitors would be subject to competition laws in Canada were it not for a special dispensation exempting conferences from such legislation. This exemption is granted because Canada, as many other governments, has recognized the international character of the liner industry and its acceptance by major trading partners.

Conference agreements come in great diversity with regards to contents and effect. A number of criteria have been identified which can serve as general characteristics of conference agreements:

(1) **Collective tariffs** to be charged by the members of the conference.

(2) **Dual-rate systems** whereby the shipper receives a discount from the basic conference rate in return for commitment of all or a portion of the shipper's cargo for a specified period. Note that Canadian conference legislation no longer allows a conference to demand that a shipper commit 100 percent of his cargo in standard loyalty contracts.

(3) **Restriction of admission** to the conference leads to closed conferences to which admission is only granted with the consent of the conference members. In the US closed conferences are illegal.

(4) **Allocated sailings** to coordinate voyages and port calls among conference members. It is also an attempt to ensure sufficient tonnage and maintain load factors.

(5) **Agreements not to compete over part of a trade** restrict conference members to assigned ports.

(6) **Pooling of trade** assigns a given share of the cargo to each member of the conference. This share can be calculated in a number of ways and may vary over time. This arrangement may be undertaken on routes which are not viable for any one operator but for which the conference has agreed to undertake service.

(7) **Joint services** can imply the complete pooling of resources and revenues and constitute the closest form of cooperation.[9] Note that joint services are not restricted to conferences.

(8) **Space chartering arrangements** in which the conference members charter space on each other's vessels and can allocate cargo depending on availability.

The existence of liner conferences and conference legislation has given rise to two issues: (1) to what extent should an industry receive protection from competition laws while their business partners are subjected to them; and (2) is the industry distorted by the existence of conferences, in particular would freight rates and the level of service be different? These questions will receive renewed attention during the Comprehensive Review of *SCEA 1987*.

Recent developments in the liner industry have brought about new organizational arrangements, such as stabilization and discussion agreements which do not rely on the basic premise of rate fixing but emphasize capacity utilization and operating efficiency of their members. Such agreements may also enable members to confer on many matters of general interest. These carrier associations represent a challenge to the exemption legislation by introducing a form of competition restriction which is not specifically covered under *SCEA 1987* (see the Issues section for a discussion).

(8) Liner Shipping and the Canadian Market

Liner shipping has undergone numerous changes which have profoundly altered the structure of the industry. The advent of containerization in the 1960s initiated a move towards increased capital requirements on both the ocean and the land side of maritime general cargo transportation. Intermodalism based on containers capable of travelling by ship, train and truck has further added to the technological revolution taking place within the intermodal transportation industry. Ocean carriers have increasingly felt pressure to provide service packages, offering transportation from door-to-door. This brought about complex intermodal logistics operations in the monitoring of cargo and the need to balance the trade so as to ensure container availability at either end of the trade route.

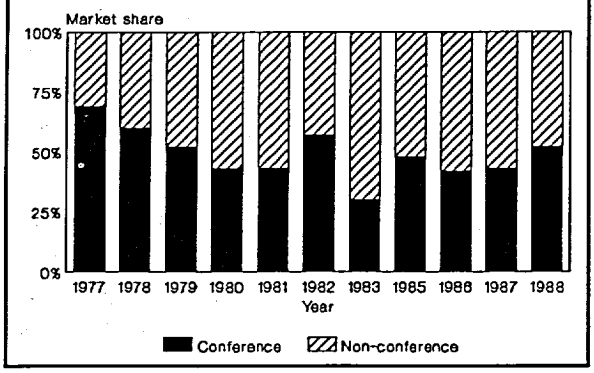
The improvement of transportation networks has increased the number of choices available to the shipper. The development of land- and mini-landbridges allows for a range of different land/sea combinations. As a result, containers being exported to Asia from eastern Canada may leave from east or west coast ports, from the Mexican Gulf or from the west coast of the United States. The shipper usually has many more options than before and is less tied to a particular ocean carrier or conference.

A good proportion of liner traffic moves under terms regulated by conference agreements. Conferences - often known as liner conferences - are associations of ocean carriers established to regulate rates and other conditions of service among its members lines with the final aim of ensuring profitability while providing reliable and scheduled services. On many routes availability of vessels and easy access to customers have resulted in relatively low barriers to entry. Conferences are therefore experiencing intensified competition from strong independent carriers, i.e., liner companies not members of a conference on that route. In the opinion of many shippers such independents have established themselves as a viable alternative. In addition, some conference members act as independents in different trade routes. It should be noted that independents are subject to the usual competition laws. In fact,

international liner shipping as such is not exempted; only conference agreements fall under *SCEA 1987*. In the absence of conference agreements, there would be no need for specific legislation providing exemption from competition legislation. However, this may well be a somewhat hypothetical argument, as conferences and independents may to a large extent be substitutes to each other.

Graph 3 shows the changes in conference and non-conference market shares of total trade from 1977 to 1988. No data are available for 1984. The use of aggregate data of this kind imposes certain restrictions concerning the generalization of conclusions.

Graph 3
Canadian International Liner Industry



Source: Ruth Ann Abbott et al. "Market Share of Conference and Non-Conference Shipping Lines in Canadian International Trade." (Ottawa: Transport Canada, Economic Research, 1990), pp. 10-11.

The period 1977-1981 shows a steady decline of conference market share which can be partly attributed to the rapid growth of CAST NORTH AMERICA (1983) INC. as an independent carrier on the North Atlantic. 1983 brought the lowest overall ranking of conferences. The rise of conference share after 1984 largely reflects CAST's entry into the conference system. During the late 1980s the relative market share in the inbound and outbound trades seemed to stabilize. The increase in conference share in 1988 was mainly due to a redefining of liner operators that excluded forest products carriers.

Because of the nature of liner traffic, the use of aggregate figures and any conclusions to be drawn from them, need to be qualified. Conference tonnage from Canada's west coast are underestimated to an unknown but significant degree because of Canadian cargo being diverted through US Pacific Coast ports. Export and import cargoes through Montreal for the UK and Continent are overestimated due to inclusion of US and other non-conference cargo. For conference member lines as much as 65 percent of cargo is non-conference cargo as it originates from or is destined to the United States. Another 5-10 percent is also non-conference as it is shipped beyond the scope of the conference to Spain, Scandinavia, Africa, etc. For non-conference carriers in 1990 about 85 percent of total cargo is Canadian and 15 percent is US cargo.

In general, it would appear that conferences continue to command a high share of liner traffic but that their share of the market may fluctuate quite significantly on certain routes as a result of competition with independent carriers. In order to assess the actual market influence it is useful to differentiate between containerized and other cargo because container traffic is generally associated with value-added goods commanding higher freight rates. A study of North American liner services compares total market shares of conference and non-conference lines to their respective share of container cargo.[10] The study points to a certain segmentation of liner markets with conferences emphasizing containers and non-conferences concentrating on so-called neo-bulk commodities. Thus, even when conferences experienced a decline in terms of share of total

tonnage, their position appeared particularly secure in the high value-added containerized end of the market.

The study indicates that conferences appear to have retained an important share of high value commodities, something which could be interpreted as a sign of market power. Finally, it is clear that while conferences and independents may specialize in different market segments, they do compete for all types of traffic.

(9) Operation of Shippers' Councils and their Problems/Challenges

Arguments in favor of the creation of shippers' councils are that they may enable the shippers to coordinate and consolidate their positions, thereby improving their bargaining position vis-à-vis the conference and, secondly, if an adequate degree of cooperation between shippers and conferences can be obtained, the degree of industry self-regulation increases and government intervention may decrease, presumably resulting in more efficient and equitable market conditions.

There is no unanimity concerning the role of shippers' councils. In fact, some see them primarily as cooperative bodies of interest which will participate with conferences in the task of improving the efficiency of liner markets. In short, the view is of the non-zero game variety, allowing all parties to gain from improved understanding and cooperation. An alternative view is that of the zero sum game where one partner's gain is the other's loss. This leads to adversarial relationships, characterized by confrontation and even distrust.

The European Shippers' Council with its various national councils was built basically on a model of cooperation. The original intent was to create a forum for the dissemination of information and for the establishment of a negotiating structure facilitating "collective consultation."[11] The councils were not backed by legislative powers but were rather intended to work in close cooperation with the conferences.

A more adversarial nature has characterized shippers' councils from countries which have historically viewed conferences with considerable scepticism, such as Australia, India and South Africa.[12] In these countries the shippers' councils have been granted significant legal support and enter collectively into negotiations with conferences on freight rates and conditions of service.

Although every shippers' council struggles with its particular set of problems and challenges a number of obstacles have been identified which seem to apply universally. First, shippers' councils are typically national bodies whereas conferences tend to be transnational in nature. Differences in national transportation legislation and the absence of international legislation clearly limit the ability of national governments attempting to intervene in shipping markets on behalf of their shippers. Cooperation and concerted efforts among shippers' councils across national borders are made more difficult by the absence of a universally recognized international organizational structure for shippers' groups. Second, most shippers' councils have a mandate of providing a broad representation for all shippers. As a result, they have to mediate among conflicting needs and goals of their members. For instance, while smaller shippers may wish for direct government intervention and financial support to shippers' councils, many large shippers can rely on their own bargaining power and will often prefer government to stand aside. Third, transportation costs constitute a relatively small portion of most companies' overall costs, and reductions which may be obtained are at an even smaller scale.

The effort and time expended on transportation matters will therefore be limited,[13] and most shippers may be doubtful about committing significant resources to council activities.

These general difficulties were recognized in the famous *Rochdale Report* on international shipping more than twenty years ago.[14] While expressing support for the shippers' council concept, the Commission insisted on the importance of a realistic view of what their task should be, observing that the public interest must be considered as being more important than either shipper or conference concerns. The Commission recognized that there are inherent conflicts of interest between the two parties but suggested that both prefer to strive for better cooperation rather than rely on government intervention to solve problems.

(10) The Canadian Shippers' Council

In 1979 the Canadian Shippers' Council (CSC) was the group designated to represent shippers under the *Shipping Conferences Exemption Act, 1979* by the Minister of Transport. The designation was renewed under *SCEA 1987* and the Council's activities, role and influence are thus directly relevant to the review of the *Act*, which will be formally undertaken in 1992.

The CSC was originally formed in 1966 by industry in anticipation of government action requiring it to perform certain tasks. Its mandate then as now is to represent a broad cross-section of exporters and to act as a liaison group with conferences and the government, on behalf of Canadian shippers. The CSC is structured as an association of associations - consisting of various industry and exporting groups - with a small number of corporate members. Trade organizations which are represented by the CSC include the Canadian Industrial Transportation League, the Canadian Manufacturers' Association and the Canadian Exporters' Association. The associations and corporate members appoint delegates to the CSC.

In its 25 years of existence the CSC has had successes as well as challenges and problems. Some of these have been of a general nature, common to all shippers' councils, while others reflect specific Canadian circumstances. Some have suggested that the key problem for the CSC has been chronic underfunding, which has plagued the council since its beginnings. However, calls for permanent government funding, with no conditions attached, have been refused with the following set of arguments: (1) the CSC was formed by industry to prevent too much direct government intervention, (2) if the CSC exists for the benefit of the industry then its participants should be willing to provide human resources and assume financial responsibility for it, and (3) if the government is supposed to finance the CSC, then it would be more logical to take the interventionist route and directly intervene in the conference liner market.

CSC officials have complained that the Council's activities are severely limited by a lack of funding. While they believe that the Council adequately fulfills its role of monitoring trends under *SCEA 1987*, it is handicapped in analyzing long-term industry developments, verifying conference information and conferring with other shippers' councils to exchange views on an international level. These financially imposed limits of activities render the CSC less valuable to its members, which in turn have raised concerns about its effectiveness. As a result, a vicious circle is created where the scepticism of some members and the current economic situation combine to curtail much needed contributions by the members.

The organizational structure of an association of associations with a small number

of corporate members poses its own set of difficulties. The individual members are often contributing directly to several organizations and may be less willing or able to provide funding for a council removed by one layer of hierarchy.

The grass-roots opinions of a large number of shippers are filtered through representatives. In negotiations with conferences these representatives have only a limited mandate to speak on behalf of individual shippers. This difficulty is further complicated by the presence at such negotiations of representatives of associations and corporate members who are there in their own right. As a result, there is some concern that small shippers, who rely on organizations such as the CSC to look after their interests, may not be adequately represented.

It has been suggested that the interests of small shippers are closer to those of the freight forwarders, and the possibility of admitting the Canadian International Freight Forwarders Association (CIFFA) to the CSC has been discussed. However, because of the dual nature of freight forwarders as both shippers and carriers this suggestion has been rejected by the CSC membership.

In conclusion, the CSC suffers from two interrelated problems, underfunding and difficulties inherent in representing diverse groups of shippers.

(11) Conference Legislation in Canada

When the government passed the *Shipping Conferences Exemption Act, 1987* it confirmed its long-standing recognition of shipping conferences and their important role in liner trades. At the same time, however, there was concern that legislation should accord more importance to the position of shippers and should increase competition.

The proximity of Canada to US ports and the interdependence of the transportation systems of the two countries make it necessary that transportation legislation be comparable and compatible. It has been stated that if the Canadian *Act* was to curtail the exemption of conferences, conference operators would then prefer the American legal environment and shift to US ports. The consequences of such a shift would apply not only to shippers and carriers but to the entire maritime infrastructure, including ports and related services. In addition to its need to carefully consider US legislation, Canada finds itself closely linked to an international shipping framework which to this day confers a special status to liner conferences. It is therefore unrealistic for Canada to develop maritime legislation based only on narrowly defined national considerations.

The first conference legislation in Canada was passed in 1970. Prior to that, conferences were not exempted from the *Combines Investigation Act* and, in fact, were challenged by the Canadian Competition authorities in the Helga Dan case.[15] The first *Shipping Conferences Exemption Act* defined the rules under which conferences were allowed to operate in Canada. It stipulated that conferences had the right to:

- .use collective tariffs
- .implement loyalty contracts
- .allocate ports of call
- .regulate the timing of sailings and other conditions of service
- .share cargo and/or earnings and losses from the transportation of goods
- .regulate admission and expulsion of members to and from a conference.[16]

Moreover, conference lines had the right to negotiate through rates ("door-to-door") of

goods with inland carriers. There were no specific provisions for complaint mechanisms or for meetings between shippers and carriers.

The *Shipping Conferences Exemption Act, 1979* continued the basic exemption for conferences from competition legislation while implementing several changes from the previous *SCEA* legislation. It extended the provisions of the *Act* to agreements between conference and non-conference lines. For the first time, a special group was designated to represent the interests of the Canadian shippers and the Canadian Shippers' Council (CSC) was given that mandate by the Minister of Transport. Outbound shipping conferences were obliged to meet upon request with the Council and to provide information "sufficient for the satisfactory conduct of the meeting." The clause concerning the making available of information has led to extended discussions and at times confrontation between the two groups.

During the 1980s a number of developments suggested a need for reform of the legislative framework for shipping conferences.[17] A survey among shippers brought to light a growing dissatisfaction with *SCEA 1979*. In addition, the CSC voiced the concern that conferences were not responding to shippers' needs. Many shippers felt that conferences were too strong under existing legislation and that amendments to *SCEA* would improve efficiency and performance of the industry, through increased competition which would bring lower prices and service benefits to customers.

The number of complaints made under *SCEA* has been rather limited and generally restricted to specific difficulties experienced by one shipper. Based on the few cases that exist it is not possible to draw conclusions concerning conference practices nor about the results of such complaints. One is left to argue that the main value of *SCEA* is that it provides a set of rules for conference regulated markets and that available recent case history does not suggest that major violations of these rules are common nor even that they occur. The interested reader may find it useful to peruse the *Annual Reports* of the Director of Investigation and Research, Competition Act, to whom complaints can be made concerning presumed violations of *SCEA's* conditions for exemptions from the *Competition Act*. Complaints can also be made to the National Transportation Agency under section 13 of *SCEA 1987* or section 59 of the *National Transportation Act 1987*. It is interesting to note that in 1990, the NTA did not receive a single complaint under either of these sections.[18]

A factor of great importance to Canadian maritime legislation was the passage of the *US Shipping Act of 1984*, which created a significantly changed environment for conferences and shippers through independent action and service contracts. Although there was considerable uncertainty as to the final impact of these measures, it was generally believed that they would significantly increase competition within the liner industry. The review of the US legislation presently taking place in Washington, D.C. is being closely followed by various Canadian agencies.

(12) The Shipping Conferences Exemption Act, 1987

SCEA 1987 continues to recognize the special character of shipping conferences and grants them exemption from the *Competition Act*. At the same time the government wanted to respond to concerns frequently expressed by shippers and the general call for a more competitive liner environment. From the outset it was clear that *SCEA 1987* would be a compromise and as such did not fully meet the demands of the CSC to effectively enhance the

position of its constituents.

Three pillars constitute the general framework of the 1987 *Act*: (A) definition of conferences and the practices which are granted exemptions, (B) two new provisions which are intended to enhance the bargaining position of the shippers: the mandatory right of independent action (I/A) by conference lines and confidential service contracts between conferences and/or their members and shippers, but subject to conference approval for conditions and (C) a provision for consultation and a mechanism allowing shippers to complain to the NTA regarding measures believed to have a potentially negative impact upon the public interest.

(A) Shipping Conferences and Exemptions Granted

The 1987 *Act* defines a conference as "an association of ocean carriers that has the purpose or effect of regulating rates and conditions for the transportation by those ocean carriers of goods by water."[19] In other words, members of a conference offer their services under agreed upon rates and conditions. As will be seen later, recent developments in the liner trades, for example the establishment of bridging and discussion agreements, have led to questions regarding the usefulness of this definition.

While the basic exemption for conferences from competition legislation remained in place, a number of restrictions were introduced in *SCEA 1987* to check the influence of the conferences:

- .agreements between conference carriers and independent operators are no longer specifically exempted
- .no collective negotiations between conference members and inland carriers are allowed
- .strengthened protection against collusive pricing in that no exemptions are granted to a conference which engages, or conspires to engage, in predatory pricing
- .prior filing of conference agreements in order that exemption may be granted.

Among the important changes introduced by *SCEA 1987* are the provisions of I/A and service contracts, which are designed to provide for flexibility in pricing and contractual agreements between shippers and conferences. It was believed that this might result in more competitive rates, at least for some shippers.

(B1) Independent Action

Independent Action (I/A) is the mandatory right of conference members to establish rates and/or service conditions that differ from the general rate structure of the conference. A carrier has to give no more than 15 days notice to the conference of his intention to take I/A but the legislation stipulates that the right to do so has to be granted. The I/A rates are filed with the conference tariffs and are available for consultation.

The availability of I/A is seen as a key provision to provide flexibility and stimulate competition within the conference system. Under this arrangement the individual carrier is in a position to respond to shippers' requests if its economic and competitive situation warrants it to do so. The carrier can thus differentiate itself vis-à-vis other conference members. For the shipper I/A means the possibility to negotiate more favourable rates and/or conditions of service.

The extent to which I/A is used depends on market conditions, i.e., in competitive markets

carriers might be more inclined to take I/A in order to secure business, and on the bargaining position of the shipper. Generally speaking large shippers generating a substantial amount of business on a given trade route will have more clout than smaller or sporadic shippers. Consequently, I/A rates may be obtained more frequently by the large shipper. For the smaller shipper the most convenient access to I/A would be through the freight forwarder.

(B2) Service Contracts

A second provision to encourage competition among conference members are confidential service contracts. This comes closest to private business contracts between two individual parties because the terms of the agreement filed with the NTA are confidential. A service contract is a negotiated agreement between a conference or a conference member and a shipper on the movement of a specific volume of cargo over a certain period of time under a set rate.

It is one of the dissatisfactions of certain exporters that there is no right for I/A on service contracts. This was seen as an important opportunity to introduce true competition into the conference system. Conference representatives, however, argued during the Senate hearings prior to the passing of the legislation that I/As on service contracts would severely undermine the conference system and may render it obsolete. For these reasons and to retain parity with US legislation, the right to I/A on service contracts was not made part of *SCEA 1987.*

It should be noted, however, that there are important differences between the treatment of service contracts in the Canadian and US shipping statutes. Unlike Canada, the US legislation requires that essential terms be made publically available to similarly situated users.[20]

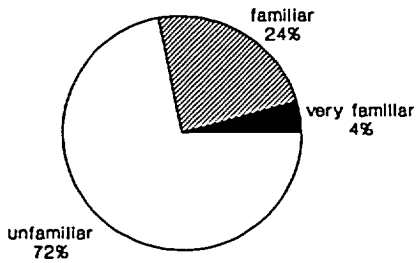
(C1) Consultation

SCEA 1987 stipulates that outbound conferences have to agree to meetings with "any designated shippers' group" and provide sufficient information for the satisfactory conduct of such meetings. In 1987, the Minister of Transport designated the Canadian Shippers' Council as the representative of Canadian shippers. The legislation includes the possibility that other groups may also be appointed to serve in such capacity, if they can demonstrate that they represent a particular segment of Canadian shippers in need of more adequate representation.

(C2) Conflict Resolution

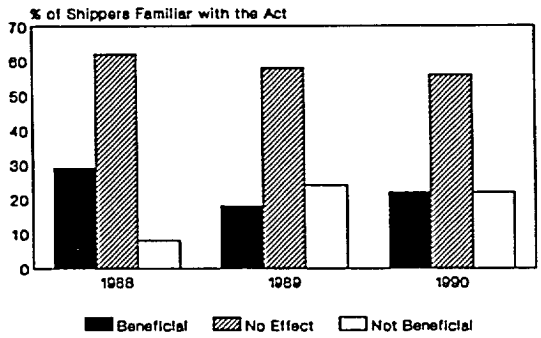
Present Canadian transportation legislation and notably the *National Transportation Act, 1987* were introduced to make the transportation industry more responsive to the needs of its customers. For that purpose section 59 of the *National Transportation Act, 1987* and section 13 of *SCEA 1987* were designed to deal with complaints and to provide expeditious conflict resolution. Section 59 deals with rates or actions which may have a negative effect on the public interest. Under section 13 of *SCEA 1987* any person can file a complaint with the NTA alleging that a conference or interconference agreement or practice "...has, or is likely to have, by a reduction in competition, the effect of producing an unreasonable reduction in transportation services or an unreasonable increase in transportation costs..."[21] An inquiry will then be conducted the by NTA, which is under the obligation to reach its conclusions within 120 days, unless both parties agree to an extension. It is important to recognize that a complaint must be deemed to be in the public interest.

Graph 4
Shippers' Familiarity with *SCEA*



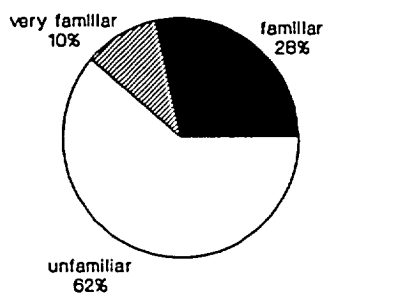
NTA, Annual Shippers' Survey 1990

Graph 5
Shippers' Assessment of *SCEA*



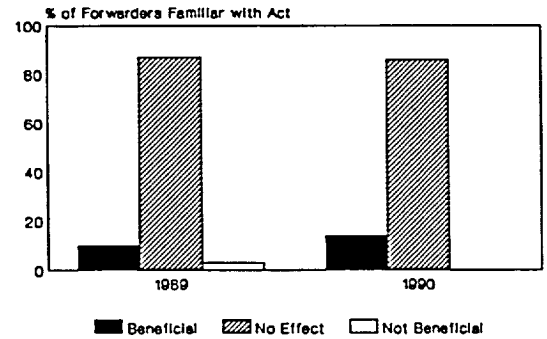
NTA, Shippers' Surveys 1988-1990

Graph 6
Freight Forwarders Familiarity with *SCEA*

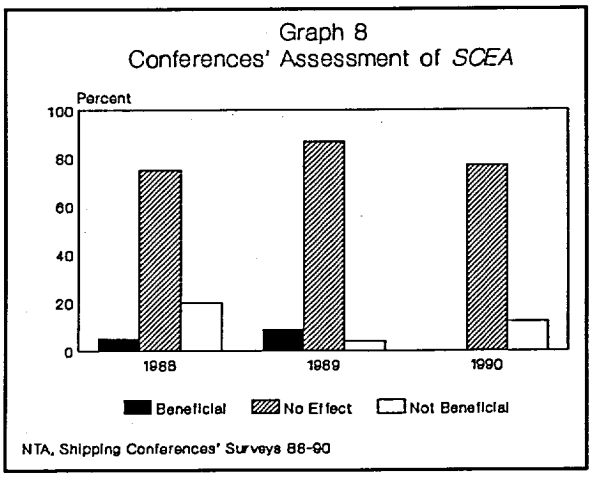


NTA, Freight Forwarders Survey 1990

Graph 7
Freight Forwarders Assessment of *SCEA*



NTA, Freight Forwarders Survey, 1989-90



(13) Experience with SCEA 1987

The *National Transportation Act 1987* provides for a four-year review period requiring monitoring of the impact of the legislation and its reception by industry. As part of the review process, the NTA is conducting annual reviews, partly based on a survey program. Graphs 4-8 illustrate important findings of the survey results: the familiarity with *SCEA 1987* and its impact on business operations. While the answers provided cannot be taken as an exhaustive representation of participants in liner markets the consistency in the answers over the last years suggests a level of reliability that justifies at least tentative conclusions about the *SCEA 1987* experience.

The evaluation of the legislation should take into account its impact on the industry as a whole and not only hear the voices of industry lobbyists or large companies, which although important players in liner markets, may have needs and concerns different from those of the small and medium sized companies, making up an important part of the Canadian economy. A company has to have knowledge of the *Act* so that it can profit from its provisions and be able to distinguish between its impact and market forces. However, the number of those who admit to a knowledge of *SCEA 1987* is remarkably low.

There was consensus among industry participants in the NTA surveys that *SCEA 1987* has had "little or no effect" on their business. However, since those stating they were unfamiliar with the *Act* have been removed from the sample, the actual number responding to the subsequent sections of the survey may be quite small. Nevertheless, they are likely to be the best informed, and their views are therefore of considerable interest. All parties involved reported varying degrees of dissatisfaction, although for a great variety of reasons. The issues raised by the participants in the surveys are reflected in the Issues' Section at the end of this report. Here just a few concerns will serve as illustrations. Shippers and freight forwarders expressed frustration that their bargaining position vis-à-vis the conferences has not improved. I/As and service contracts are seen as inadequate instruments in their present form. Another issue is the perceived lack of responsiveness of the conferences to the requests for information prior to consultation with the shippers. On the conference side there was a certain amount of irritation over I/A, which was seen as a destabilizing factor. The notice period of no more than 15 days which a conference member has to give before taking I/A is perceived as too short to allow for proper adjustments of conference operations.

Based on the NTA surveys and interviews carried out for this report with various industry groups one finds two extreme opinions emerging regarding the future of *SCEA 1987*: (1) "If it ain't broke, don't fix it" or (2) what is needed, is a complete overhaul or "outright revocation" of *SCEA*. The former view regards the legislation as generally acceptable and in accordance with the international maritime

framework. The latter statement sees *SCEA 1987* as beneficial primarily to the conferences and as useless, if not harmful, to shippers.

(14) Issues

The four-year experience with *SCEA 1987* will be subject to the 1992 Comprehensive Review, which will offer a good opportunity to consider amendments to the legislation. Although nothing prevents changes from being submitted at a later date, the *Act* provides no specific mechanisms for future reviews. In the following a number of frequently raised issues are presented.

(A) Difficulties of definition and interpretation

The NTA, in administrating *SCEA 1987*, has encountered a number of ambiguities which require clarification. Difficulties have arisen with regards to the language of the law versus its intent and relate, among other points, to the definition of a conference and the role of the NTA in administering the legislation.

SCEA 1987 defines a conference as:

> "an association of ocean carriers that has the purpose or effect of regulating rates and conditions for the transportation by those ocean carriers of goods by water."

In contrast to previous interpretation, the NTA now takes the position that the "and" is not conjunctive and that an association of carriers can obtain exemption under *SCEA 1987* as long as it adopts one or more of the practices listed in Section 4 of the *Act*. This means that the basic premise of a conference as a rate setting body is no longer valid and that any practice or agreement which may be invalid under the *Competition Act* but authorized under *SCEA 1987* may qualify an association for exemption. This interpretation permits agreements between established rate-making conferences and independent carriers to be classified as a conference under the *Act*. This would appear to go against the intent of the *Act* which specifically removed the exemption for conference/non-conference agreements.

A certain amount of uncertainty seems now to exist in the industry concerning NTA's authority and the relation between the NTA and the Bureau of Competition Policy.

The NTA currently holds the position that it has no legislated power to approve or reject a filing or to grant or deny an exemption. Pending clarification of the legislation all agreements are being accepted for filing. The current position held by the NTA is contrary to a 1988 ruling when a conference was denied exemption unless that conference's agreement was modified with regards to a clause on I/A and conference membership.

Agreements that do not fall within the exemption provided by *SCEA 1987* remain subject to the *Competition Act*.. Shipping companies sometimes have concerns regarding the status of their agreements vis-à-vis the *Competition Act*. Companies with such concerns may obtain the views of the Bureau of Competition Policy under the Bureau's program of Advisory Opinions. This program is provided as a service and is available to firms in all industries. The Bureau's views are not binding on the parties and remain subject to the ultimate adjudicatory authority of the courts.

Clarification of the definition of a conference under *SCEA 1987* will go a long way to resolve the existing uncertainty.

(B) Consortia and joint service agreements

A relatively new and increasingly important organizational development in liner shipping is the emergence of consortia and joint service agreements, often in the form of space charter agreements. Such arrangements may function as joint ventures but are not covered by present legislation on liner conferences and are therefore not subject to control or monitoring on the same terms as conferences. However, in their purpose and effect they closely resemble conferences and the point has been made that they may become a substitute. An important question in contemplating the inclusion of these agreements under conference or competition legislation is the extent to which international forms of business co-operation can be regulated under national law.

(C) Discussion, Bridging and Stabilization Agreements

Among the changes in liner shipping is the appearance of new forms of cooperation between liner conferences, conference members or independent operators. These cooperative arrangements, generally known as discussion, bridging and stabilization agreements also raise questions concerning the scope and reach of *SCEA 1987.*

Most of these agreements provide a forum to discuss general conditions of liner trades and at least implicitly, to review responses to changing market conditions. However, they do not engage in rate making. Nevertheless, in order to be protected under *SCEA 1987*, i.e., to obtain exemption from the *Competition Act*, these cooperative agreements are filed with NTA. The agreement which has received the most attention and which appears to go significantly beyond discussing matters of trade is the Transpacific Stabilization Agreement (TSA). The TSA unites three conferences, the Asia North America Eastbound Rate Agreement (ANERA), the Japan East Canada Freight Conference (JEC) and the Japan West Canada Freight Conference (JWC), with a number of important independent carriers. It is estimated that the TSA controls annual capacities of 3,375,100 TEUs compared with 478,000 for non-TSA carriers.[22] The initial purpose of the TSA was to control only capacity and therefore it does not fall under the classic definition of a conference as a rate-setting body. Nevertheless, its real or perceived market power most likely provides the basis for significant rate and service control. An illustration of this influence was the announcement in 1990 that members of the TSA had agreed to a general rate increase (GRI) to further stabilize the market. Even if this kind of measure might be difficult to implement, given the diverse business interests of the members, it provides an indication of the potential power of these agreements.

The TSA has been on file with the NTA since 1989 and its parties believe that they enjoy exemption from the *Competition Act*. However, *SCEA 1987* no longer explicitly includes the exemption of agreements between conference and non-conference lines. Indeed, it was stated that the removal of this kind of exemption was intended to increase competition in the liner industry. Therefore, the question of whether the filing of the TSA is valid and whether exemption should be granted has to be addressed.

As such cooperative agreements, and in particular the TSA, indeed have been accepted for filing, the terms and conditions applying to them need to be defined and spelled out. However, should Canada decide to deny exemption for such agreements, the possibility exists that the parties to such an agreement would delete Canadian trades and ports from their scope. While this may have no immediate bearing on business operations, it would imply

that the monitoring of activities and changes therein could no longer take place as effectively. Hence very little if anything may be gained from denying exemption to cooperative agreements. However, the status of these agreements needs to be clarified in order to remove the present uncertainties.

The changing nature of liner shipping can be expected to continue to give rise to new organizations and forms of cooperation in the future. These may include various forms of space chartering, booking arrangements and strategic alliances. Consideration may therefore be given to incorporating in *SCEA* a new definition of activity eligible for exemption. It should be noted, however, that such arrangements do not necessarily require an exemption from the *Competition Act* in order to be permissible in Canada. Joint ventures are acceptable under the *Competition Act* as long as they contribute to the efficient functioning of the market.

(D) Interface conferences/inland carriers

SCEA 1987 no longer grants conferences the right to negotiate through rates with inland carriers on behalf of their members. As in the *US Shipping Act of 1984*, under *SCEA 1987* conference members remain free to negotiate with inland carriers on an individual basis. Given the intermodal nature of most container movements this situation may not be optimal and the question has been raised as to whether this provision should be revised to allow for collective negotiations by conferences. Some shippers would like to see conferences, rather than their member lines, be allowed to negotiate rates with inland carriers as this would, in their opinion, lead to reduced transportation costs for them.

(E) Base ports/inland arbitraries

Conferences now use fewer base ports and are developing transportation systems based on container hubs. Inland arbitraries - charges from various feeder ports or cities away from the base ports - are set on a container or tonnage basis. Shippers have expressed concerns over the concentration of traffic to a few base ports and the additional costs associated with it.

(F) Open rates

A set of tariffs not explicitly envisaged under *SCEA 1987* are so-called "open rates" where each conference member is free to set his own rates for one or more commodities. This basically constitutes the ultimate I/A. Open rates emerge when conference members fail to reach agreements on tariffs, conference shares, and other terms. The NTA has determined for the present time that no action will be taken if a conference uses open rates and does not file a tariff. Tariff filing is only required if a conference establishes common rates and requires exemption from the provisions of the *Competition Act*. There needs to be clarification of the status of conferences using open rates and of the practices for which an exemption can be obtained. A particular issue is whether a conference should continue to benefit from an exemption under *SCEA 1987* if it does not fulfill the filing requirements, even by filing open rates. The ambiguity of this issue stems from the definition of a conference.

(G) General Rate Increases

General rate increases (GRI) cover all or most commodities carried under conference tariffs. Conflicts between shippers and conferences tend to intensify during periods of frequent increases in ocean freight rates. The

CSC has requested that increases be limited to an amount to be established once a year with no further increases for the next 12 months. It has been suggested by the Maritime Committee of the OECD that the resolution of such conflicts should be the responsibility of the commercial parties involved. The Committee also suggested that shippers and conferences may wish to bring their concerns forward to the OECD Business Advisory Committee (BIAC) and in collaboration with other international bodies might be able to establish some common ground to govern surcharges and additionals.[23] However, it would appear unlikely that firm rules, such as only one increase per year, could be established, given the commercial imperatives of such decisions.

(H) Surcharges

Surcharges exist primarily in the form of currency and bunker adjustment factors through which conferences attempt to allow for fluctuations in exchange rates and fuel prices. The recent example of bunker surcharges for fuel and insurance during the Gulf War has raised the question of the extent to which these surcharges represent a hidden form of GRI. Shippers have advocated the use of voluntary audits both for GRIs and surcharges to prevent increases they deem unjustified in terms of real costs.

(I) Service Contracts

One of the important new provisions under *SCEA 1987* governs service contracts. However, they have been used only infrequently in Canadian trades. In 1988, there were six such agreements; by the end of 1990 the number had increased to 24. Service contracts are confidential and unlike in the US the essential terms are not made public. This has for example limited the extent to which developments could be made public in NTA's annual reviews. If the situation prevails in the future, it will be very difficult to analyze the impact of service contracts on liner trades in a public forum. A study by the Conference Board of Canada suggests that the use of service contracts could give rise to savings in ocean transportation costs in the order of 6 percent and that as a result total exports could increase by $49 million ($ 1990) during the first year with an increase up to $142 million ($ 1990) by the fifth year.[24] Such results are necessarily somewhat hypothetical. However, it appears realistic to believe that service contracts may yield benefits to some shippers, subject to market conditions.

Shippers' low awareness of *SCEA 1987* and of conference rates structures may be contributing factors to the limited use of special rates and contracts. It must be noted, however, that service contracts bind both parties to agreed upon terms and conditions. In rapidly changing markets shippers and carriers alike may be unwilling to enter into such relatively long-term commitments. In fact, there is some indication that both groups may prefer to reach informal agreements, rather than entering into monitored and legally binding business contracts.

(J) Independent Action on Service Contracts

It was a major disappointment for many shippers that the draft legislation which included the mandatory right to independent action on service contracts to conference member lines was amended in the Parliamentary Committee Hearings, giving conferences the right to set the terms and conditions of those contracts. Conferences were concerned that the right to take I/A on service contracts might lead to the disintegration of the conference system. One reason for this concern is that on the North Atlantic seven commodities account for some 80

percent of the traffic, shipped by 20-30 companies. As a result it was believed that mandatory I/A on service contracts could lead to intense competition for these cargoes and a great concentration of buying power. While some large shippers could have benefitted from this, it is not evident that smaller shippers would have been in a more advantageous situation under a system of service contracts combined with independent action. As small shippers do not control the quantities of cargo needed to establish mutually beneficial service contracts, they might not have benefitted from such arrangements to the same extent as large shippers. However, it is conceivable that small shippers could pool their cargo and thus reach a critical mass to take advantage of I/As on service contracts.

(K) Notice period

The Governor in Council, subsequent to Section 3(a) of *SCEA 1987*, has established a notice period of no more than 15 days prior to the commencement of any rate introduced by independent action. Many shippers believe that this period should be shortened as a key argument in favor of I/A has been flexibility in responding to market conditions. In the US 10 days notice are required. The conference side, on the other hand, would prefer an extension to allow its members more time to review market conditions for the commodities affected. Under some circumstances, the conference might in fact decide to change its own rates in accordance with the proposed I/A rate. In a very limited number of cases I/As have been used for rate increases. There needs to be clarification if the 15-day notice period also applies when I/A is being taken to introduce a rate increase.

(L) Awareness of the Shipping Conferences Exemption Act, 1987

Judging from the National Transportation Agency's (NTA) annual survey programs, *SCEA 1987* remains a fairly obscure piece of legislation, even to those who may be directly affected by it. In 1989, over two-thirds of shippers and one-half of freight forwarders stated they were unfamiliar with the legislation.[25]

The limited use of the key provisions regarding I/A and service contracts, confusion about loyalty contracts, lack of understanding of US legislation and conditions are not surprising given the ignorance professed by many participants in liner markets. Therefore, the lack of knowledge of the legal framework of conferences may be seen as an issue. To make the *Act* better known, annual reports could be made available by the CSC on activities and interaction with conferences and by the NTA on the administration of *SCEA 1987*, including changes in conference regulations and new agreements. However, it is likely that those who need to know or who have a strong interest in knowing, will already possess the necessary information. In other words, the surprisingly low level of awareness may reflect the fact that relatively few respondents are direct and regular users of liner conference services.

(M) Representation of shippers' interests

The CSC is the designated shippers' group in Canada and is mandated to represent a broad cross-section of shippers vis-à-vis government and conferences. The CSC has experienced severe problems of underfunding. Given that there are some 3,000 regular conference users in Canada, the question arises why shippers have failed to support their Council at adequate levels. Even a modest membership fee (e.g.

$100) from all shippers would result in a dramatic increase in the CSC budget and allow it to play a far more active role. Under the present circumstances, the usefulness and effectiveness of the CSC are necessarily limited by its severe lack of financial support.

Freight forwarders play an important role in Canadian trades, where shippers are often small and assign their cargo to forwarders. The question has been raised whether the Canadian International Freight Forwarders Association (CIFFA) should become a member of the CSC or whether it should apply for designation. The dual nature of freight forwarders as carrier and shipper renders this question more complex. There is also concern that two official shipper groups would split the voice of shippers and further weaken their position. It would therefore appear that freight forwarders and their clients are better served by maintaining freight forwarders as independent intermediaries in liner markets.

(N) Consultation

Section 20 of *SCEA 1987* stipulates that conferences are required to meet with the designated shippers' group and have to provide "information sufficient for the satisfactory conduct of the meeting." This phrase has been the cause of much frustration on the part of industry representatives.

The CSC requests that detailed cost data be made available to them by conferences regarding rate increases and surcharges. These requests have generally been denied because such information is deemed sensitive. Additionally, in many circumstances legislation in the country of the home office of shipping companies may prevent disclosure of data. Consultation is therefore regarded as unsatisfactory by the CSC. It does not seem that a more detailed definition of the information requirement would remedy the situation. It might be that the nomination of the CSC as designated shippers' group and the legislated requirement for consultation has led to an overly optimistic and demanding position on the part of the CSC, which is not matched in reality and resources. In this context, it may be useful to consider in greater detail the consultation mechanisms in place in other countries with longer experience in such matters.

(O) Dispute Resolution

It is the mandate of the 1987 transportation legislation to be responsive to the needs of the industry through an adherence to laissez faire principles and to market self-regulation. Recognizing the potential for anomalies and market failures, certain mechanisms were set up to respond to complaints from participants in the transportation market.

However, the dispute resolution mechanisms in place, namely Section 13 of *SCEA 1987* and Section 59 of the *National Transportation Act 1987*, are deemed virtually useless by the CSC. Under Section 13 it must be proven that an "unreasonable reduction in transportation services or unreasonable increase in transportation costs" are the result of a "reduction in competition." Although the onus is not on the complainant, the CSC believes the criteria established under the law to be too stringent. Procedures under Section 59 are seen as too long and costly. In the opinion of the CSC, there is at the present time no satisfactory mechanism to deal effectively with conflict resolution. Nor is mediation in its present form a useful alternative. In support of this conclusion, the CSC can point to a case where informal mediation failed because the conference involved was allegedly unwilling to disclose information deemed sensitive.

(P) Discontinuation of SCEA

The CSC has called for a major overhaul of *SCEA 1987* because it believes it provides no benefits to shippers. Alternatively, it suggests that *SCEA 1987* be removed from the books, subjecting conferences to the full force of the *Competition Act*. The CSC feels that the only purpose of the present *SCEA* legislation is the exemption of one particular group of firms from the *Competition Act* to which all other industries are subjected. In the opinion of the CSC, the *Act* has not fulfilled its objective to increase competition and improve the shippers' position.

Directly related to the call for radical change is the debate of the merit and timeliness of conferences and their exemption. Those who argue that the time of shipping conferences should come to an end see them as obsolete given today's technology and communication facilities. Conferences are said to delay necessary reorganization of the industry and more efficient use of resources. Those supporting conferences continue to regard them as a stabilizing factor in an inherently volatile industry, which requires large capital investment.

New organizational forms, such as the Transpacific Stabilization Agreement, may be an indication that the market is finding its own ways to adjust to change. The claim that conferences keep freight rates artificially high was not supported by an NTA study on conference ocean freight rates filed under *SCEA* which showed that although freight rates increased during 1990, over 50 percent of the rates (in current dollars) declined between 1983 and 1990.[26] In other words, evidence suggests that market conditions are the key factors in determining rate levels and that the market mechanism works.

It does not seem realistic to suggest that Canada should lead the way in discontinuing conference exemption. Although Canada is a major exporter, its liner traffic is relatively modest compared to many other industrial countries and Canada is in no position to unilaterally affect major changes in world liner markets. In a highly international, interdependent environment it is also difficult to talk about "Canadian" trades as our traffic is closely intermingled with that of the US. Significant changes in world liner markets and their organization, if deemed desirable, would have to be accomplished in an international forum and would require a consensus involving all major trade partners. It seems reasonable to state that if Canada was to abandon *SCEA 1987* certain conferences might discontinue servicing Canadian ports, while expanding their services from US ports. Land transportation makes it relatively easy for Canadian shippers to use American ports. However, there could be costs associated with the disruption of services and congestion in some US ports. The Canadian exporter might find himself further removed from foreign customers and severe financial losses might occur in Canadian ports and port cities as a result of a decrease in economic activities.

In the absence of conference legislation there would be no provision for regular monitoring of industry activity, such as freight rates, level of service and concentration within the industry. In addition, there would be no mechanisms available for conflict resolution. Even if dispute resolution has been called ineffective, its mere existence may have had a moderating effect on conference activity.

North America is considered a single market by carriers. Intermodalism has increased the number of options available to shippers but it has also opened markets to carriers, who can now reach customers efficiently via rail and truck links. Some believe that Canadian shippers

benefit significantly from this situation as the proximity of American ports results in greater choice, improved service levels and more competitive rates.

The review of the *US Shipping Act of 1984* will be concluded in April 1992 and its conclusions and recommendations will undoubtedly be of great importance to Canada's 1992 Comprehensive Review of transportation legislation.

(Q) Liner Code

The *UN Code of Conduct for Liner Conferences* came into force in October 1983. However, it applies only to a limited number of trades and none directly affecting Canada and the US. Its importance at the present time is therefore primarily as a model of one kind of approach to the regulation of liner conferences. However, it should be noted that the *Code* goes far beyond the usual framework for conference regulation and espouses cargo sharing as a general principle. The best known and most controversial element is the suggested 40/40/20 cargo sharing provision, originally intended to assist in the development of merchant fleets from developing countries. However, it may serve also to protect fleets of less than competitive industrial nations. Canadian exporters have in the past voiced strong opposition to all forms of cargo sharing and cargo reservation. For a number of reasons, including opposition from exporters, Canada is not a signatory to the *Code*. On the other hand, an internationally accepted regulatory framework for conferences might be obtained through the *Code*, and such an international agreement might constitute a useful substitute for often contradictory national legislation. An illustration of the need for an international framework in an increasingly global transportation network is the issue of foreign-to-foreign filings related to US cargo shipped through Canadian ports.

The *Code* contains a number of provisions for conference membership rules, decision-making, self-policing, rate-making, surcharges, consultation, dispute resolution and the role of governments; these issues have been identified in Canadian trades.

(15) Summary Checklist of Issues

The following three tables summarize 17 issues that have been raised in this paper. Some of these questions overlap or are closely interrelated; others may appear marginal to some, yet of real concern to other stakeholders in the *SCEA 1987* review process.

The issues have been grouped in three broad and admittedly somewhat arbitrary categories. It is hoped, however, that this classification may facilitate the structuring of group discussions among interested parties. The three categories are:

(A) SCEA: Its Scope in a Changing Environment

.liner markets are subject to constant change as a result of new logistics and vessel technology, developments in world trade and the economic environment

.as a result, liner conferences undergo changes as they seek to adapt to new market conditions; in some cases new organizational forms may arise not foreseen by existing legislation

(B) Issues Relating to Rates and Tariff Structures

.a key concern for shippers are rate levels

Table 1

SCEA: Its Scope in a Changing Environment

Issues	Main points	Questions
Difficulties of definition and interpretation	.definition of a conference .intent vs interpretation of the Act .role and responsibilities of the National Transportation Agency (NTA)	.need the definition of a conference be changed? .who has final power of interpretation of the *Act*? .what is the role of Consumer and Corporate Affairs (CCA)?
Consortia and joint service agreements	.definition .role and importance nationally and internationally .take almost form of joint venture and are not subject to conference legislation	.should definition of a conference be amended to include these new organizational forms? .are they adequately regulated under the *Competition Act*? .do they replace conferences?
Discussion, bridging and stabilization agreements	.new organizational forms not covered under *SCEA* .exemption is assumed after filing .associations may take form of superconferences	.what is their status under *SCEA*? .are these agreements covered under the *Act*? .does filing mean exemption? .what are the consequences for users of ocean transport?
Interface conferences/inland carriers	.under *SCEA* conferences are prohibited to negotiate inland rates on behalf of their members with inland carriers	.does this pose a problem? .should conferences be allowed to negotiate with inland carriers?
Base ports/inland arbitraries	.fewer base ports are set by conferences	.what has been the effect of fewer base ports and increased use of inland arbitraries? .are through rates taking the place of inland arbitraries?

Table 2

Issues Relating to Rates and Tariffs

Issues	Main points	Questions
Open rates	.*SCEA* is not definitive regarding open rates .conference filing of open rates is not required	.definition of open rates and status under *SCEA*? .should open rates be filed? .if open rates are not filed, are exemptions still valid? .are open-rate conferences still conferences? .how to revise *SCEA* to include open rates?
General Rate Increase (GRI)	.subject of continuous confrontation .multiple GRIs in one year concern shippers	.can a formula be found to limit number of GRIs? .can an international forum be found to discuss GRIs? .proof of requirements, use of independent auditor on voluntary basis?
Surcharges	.ongoing concern for shippers .bunker surcharges during Gulf War latest example	.are surcharges yet another form of GRI? .should there be a regulation for surcharges?
Independent Action (I/A) on service contracts	.at present no mandatory I/A on service contracts .demanded by CSC to increase competition .refused by conferences: undermines system	.is there a need for I/A on service contracts? .what would be the consequences? .who would benefit in the long run?
Service contracts	.introduced as important new provision .little use in Canada .essential terms remain confidential	.what has been the effect of modest usage? .in practice, are commercial parties adopting some alternative? .should "essential terms" be disclosed?
Notice period	.notice period for I/A is 15 days .tariff increases take 30 days notice	.lengthen or shorten notice period? .does the 15-day notice period for I/A also apply to rate increases introduced under I/A?

Table 3

Issues Dealing with Shipper Representation and Intervention

Issues	Main points	Questions
Awareness of the *Shipping Conferences Exemption Act (SCEA), 1987*	.generally low awareness .knowledge has not increased	.should there be a requirement for Annual Reports from the CSC and the NTA? .ability to use provisions of legislation? .who should inform?
Representation of shippers' interest	.structure, funding, resources of CSC .designated shippers' group under *SCEA* is CSC .freight forwarders showed interest in participation	.is the CSC effective in its present form? .is there a need for more diverse representation?
Consultation	.CSC deems consultation under *SCEA* not satisfactory .clause of "sufficient information" problematic	.possible to promote better working atmosphere? .can "sufficient" information be defined?
Dispute resolution	.CSC regards dispute resolution under *SCEA* inadequate .mechanisms are regarded as long and costly	.should the dispute mechanism be modified? .provide for mandatory mediation? .can mandatory mediation be international?
Discontinuation of *SCEA*	.CSC: *Act* only benefits conferences; therefore complete overhaul or discontinuation .some shippers seek stability of *SCEA* .conferences: *Act* is acceptable .conference exemption is internationally accepted	.could Canada alone discontinue exemption? .what would be the consequences? .are there alternatives? .what is the general attitude towards conferences?
UN Liner Conference Code of Conduct	.a multinational approach to conferences introducing cargo sharing principles .may be more geared towards the needs of international shipping companies than to the needs of shippers	.does the *Code* pose a viable alternative to national legislation? .is it in the interest of Canadian shippers?

and tariff structures; they therefore have a vested interest in rate-setting rules and mechanisms

.many shippers support a provision for I/A on service contracts to provide enhanced flexibility in rate setting

.the exemption from the *Competition Act* granted conferences under *SCEA* is essential for the establishment of conference rates and shippers have an obvious interest in the exact wording and philosophy of *SCEA* in this respect

(C) Issues Dealing with Shipper Representation and Intervention

.the exchange of information and negotiations

.the difficulty of establishing efficient shipper representation

.the question of shipper group interaction with conferences and its role in liner markets in the present and in the future

.would shippers be better off without conferences, i.e., without *SCEA*?

.would shippers see any advantage to Canada joining the multilateral UN *Liner Conference Code of Conduct*?

(16) Conclusions

The review of the *Shipping Conferences Exemption Act, 1987* provides an important opportunity to evaluate and consider amending legislation in liner shipping to better respond to the needs of transportation users and suppliers.

In studying the experiences with the *Act* a number of issues have been raised which require the attention of government and industry. These issues relate to the purpose of the legislation, its provisions and the way in which the *Act* is administered and executed.

An important question which has evolved since the adoption of the present *SCEA* is industry representation and cooperation. Shippers and carriers might in the past have seen themselves as being on opposite sides of the fence, and their relationships were frequently adversarial. In today's globally competitive environment, strategic alliances and long-term relationships are seen as essential. Suppliers and customers in all types of industries are developing close relations and new forms of cooperation to strengthen their collective position. There appears to be a growing recognition that a better working relationship between shippers and carriers is not necessarily founded on more government intervention or extensive legislation.

On the contrary, cooperation cannot be imposed or legislated. Legislation may provide certain basic rules, but fundamentally, cooperation rests on recognition of common interests and mutual trust. An interesting example of a new type of initiative in liner markets can be found in the United States where the *Alliance for Competitive Transportation (ACT)* which unites shippers, and potentially carriers, strives to develop "a marketplace environment...in which a shipper can negotiate with an ocean carrier for mutually beneficial transportation services."[27] While the group lobbies for shipper interests in the review of the *US Shipping Act of 1984*, there is some indication that it would welcome a consensus with carriers rather than government regulation.[28]

Since *SCEA 1987* was adopted, the concepts

of globalization and strategic alliances increasingly reflect a new reality in world markets. In such an environment, national legislation must be compatible with the needs of interlinking transportation and production networks. As a result, the scope for national unilateral legislation becomes even more limited than before, and increasingly, international fora have to be developed in order to promote dialogue between all parties involved in ocean transportation.

Abbreviations

ACL	Atlantic Container Lines
ANERA	Asia North America Eastbound Rate Agreement
BIAC	Business Advisory Committee (OECD)
CCA	Consumer and Corporate Affairs
CIFFA	Canadian International Freight Forwarders Association
CSC	Canadian Shippers' Council
FMC	Federal Maritime Commission
GDP	Gross Domestic Product
GNP	Gross National Product
GRI	General Rate Increase
I/A	Independent Action
JEC	Japan East Canada Freight Conference
JWC	Japan West Canada Freight Conference
NTA	National Transportation Agency
OECD	Organization for Economic Co-Operation and Development
SCEA	Shipping Conferences Exemption Act
TEU	Twenty-Foot Equivalent Unit
TSA	Transpacific Stabilization Agreement
TWRA	Transpacific Westbound Rate Agreement

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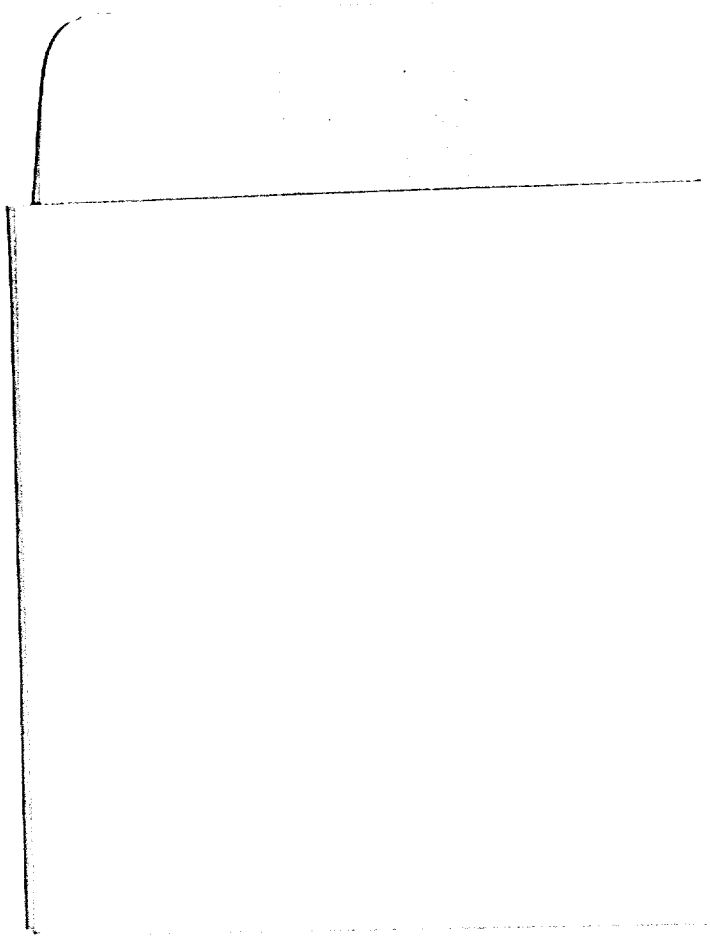

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