Shipping Cartels: What Can We Do about Them?*

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INTRODUCTION

The recovery of the Thai economy since the 1997 Asian financial crisis has relied heavily on the country's ability to boost exports. Shipments by sea accounted for a hefty 94 percent of the transnational shipment of goods, or over 130 million tonnes, in the year 2000. Only 10.4 percent of this amount was transported by Thai ships. The heavy reliance on foreign shipping lines leaves Thailand vulnerable to collusive practices – price fixing – on the part of major foreign lines that are beyond the reach of domestic legal jurisdiction. Sudden price hikes and arbitrary ancillary charges are the most common examples of the abuse of a superior bargaining power by international liner conferences. Many empirical studies have shown that the presence of shipping cartels contributes to higher freight rates. In particular, Fink et al. (2001) showed that private anti-competitive practices were responsible for high rates, more so than government policy restrictions that are the subject of WTO negotiations. Since transport costs were estimated to be equivalent to 8.3 percent of the value of developing countries' goods transported[1] in 1997,[2] elevated rates have a marked impact on the competitiveness of developing countries' exports.

These practices have been denounced by shippers worldwide, as well as by international organizations such as the World Bank, the United Nations Conference on Trade and Development (UNCTAD) and the Organisation for Economic Co-operation and Development (OECD). Yet, liner conferences seem to have the blessing of the major industrial countries and areas such as the United States, Japan and the European Union by providing antitrust exemptions for the industry. This "exportation" of shipping cartels has been sustained at the cost of shippers worldwide.

The Thai government recognizes the exposure of Thai exporters to foreign liner conferences and has been promoting a national shipping company and the registration of Thai vessels. However, these efforts have been mostly in vain. This paper seeks to examine and assess the various options facing the government as well as shippers in countering the formidable market power of liner conferences. It will consider the possibility of cooperation between government and private associations at the regional level. At the same time, the possibility of addressing the issue in WTO – either in the sector-specific negotiations in the General Agreement on Trade in Services (GATS) or in the competition policy agenda – will also be examined.

1. LINER SHIPPING: A 130-YEAR HISTORY OF INTERNATIONAL CARTELS

Liner shipping refers to containerized shipping services that are provided on a regularly scheduled basis to pre-determined ports. It is distinct from *bulk shipping* services that carry non-containerized raw materials in bulk form such as crude and refined oil, grain, coal, cement or liquefied gas, and that are provided only on demand by individual shippers on non-scheduled routes. While bulk shipping is generally believed to be a fairly competitive market (WTO 1998), liner shipping has been involved in cartel-like price-fixing and capacity-allocating arrangements since the 1870s. At that time, the invention of fast steamships led to cut-throat competition in the market that threatened the survival of both the less efficient traditional sailing ship operators and the new entrants that faced large fixed costs. In order to stop the destructive price competition, shipping operators entered into formal agreements – known as the conference system – that entailed common pricing and capacity allocation.

Based on this particular historical experience, the operation of liner conferences has been exempted from anti-trust provisions and scrutiny in most parts of the world. In the United States and Canada, the exemption was specified in the 1916 Shipping Act, while in other societies such as Japan, Australia and the European Union, the shipping industry is included in the list of "block exemptions" (an exemption that applies to an

* *Paper presented at the PAFTAD Seminar on Competition Policy, Manila, September 16-18, 2002.*

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The author would like to thank Mr. Paiboon Ponsuwanna, President of the Frozen Foods Association and the Secretary General of the Thai National Shippers Council, for providing very useful and insightful information on the industry and practices of shipping lines.

entire industry) in the respective national anti-trust laws. In the case of the United States, freight rates charged by conference members need to be filed with and approved by the Federal Maritime Commission (FMC), the sector-specific regulatory body. These rates are open to the public. Any discounts that were not specified in the submitted schedules used to be subject to fines by the FMC. Oddly, the regulatory body helped to monitor the cartel to ensure that members did not "chisel." This particular price-monitoring scheme was supposedly devised in order to prevent conference members from offering more preferential rates for larger shippers with greater bargaining power, placing smaller shippers at a competitive disadvantage. However, it is not clear whether the genuine underlying intention of the government cartel support was to protect the interest of shippers or that of the shipping lines and the industry.

The anti-trust exemption granted to shipping conferences has been controversial and constantly criticized. The rationale for maintaining the cartels, as forwarded by international shipping lines, is as follows:

- Uncoordinated capacity allocation among different routes can lead to low capacity utilization and thus, high-costs, or a reduction of scheduled services. Conferences will thus ensure optimal capacity allocation and therefore, low cost, and the availability of regular and predictable services.
- Unbalanced trade flows on certain routes may lead to excess capacity on the returning leg[3] that can be very costly. Conferences can ensure the availability of capacity and less exaggerated price fluctuations in the face of demand/supply imbalances.
- Destructive competition will in the end lead to a highly concentrated market. Conferences, by allowing carriers to earn a compensatory rate of return on their investment, can ensure the sustainability of a less concentrated market.

These conferences, and various other types of agreements among shipping lines, are still in operation (see Box 1). Currently, there are approximately 150 liner conferences operating throughout the world, with membership ranging anywhere from two to 40 separate lines (OECD 2002). Many more other types of agreements and arrangements are also in place. Available data indicate that liner conferences' share of the market is approximately 60 percent of the TEU (20-foot equivalent units) capacity in the major trades. However, their shares may be much higher on specific routes, in particular, those between the United States and Asian countries.

These arrangements are continuously under review in OECD member countries. Although no countries have moved to eliminate these exemptions, various measures have been taken to weaken the collusive power of these liner conferences, in particular in the United States. For example, in 1984 the United States passed the Shipping Act, which allowed members of the conferences to offer legally discounted rates as long as these rates were made public and other carriers were notified.[4]

Box 1 Other Forms of Liner Shipping Organizations

Capacity stabilization and discussion agreements

Stabilization agreements attempt to control freight rates and regulate capacity through a binding agreement covering all or most operators of the trade in the region. Such arrangements can be made among conference members or between conference members and non-conference members. Discussion agreements, on the contrary, are similar arrangements but agreements are non-binding. It should be noted that treatment of agreements between conference and non-conference lines are treated differently across countries. In Australia, Japan, New Zealand, Norway and the United States, such agreements are also exempted from anti-trust laws. In the case of the European Union, however, such agreements do not benefit from the block exemption and are closely scrutinized by competition authorities.

Consortium

Consortia are agreements/arrangements between shipping companies aimed primarily at rationalizing container shipping services in order to benefit jointly from economies of scale. Unlike conferences, consortia do not involve the setting of uniform or common freight rates. Again, the treatment of such consortia under competition policy is diverse across countries. In Australia, Canada, Japan, New Zealand, and the United States, such agreements are also exempted from anti-trust laws. In the case of the European Union, a consortium with market share below a threshold level may benefit from the group exemption.

Strategic global alliances

These agreements are aimed at operational integration in order to benefit from economies of scale. These cover the employment and utilization of vessels, joint vessel route assignments, itineraries, sailing schedules, the type of vessels to be employed, additions and withdrawal of capacity, port rotations, use of joint terminals, pooling of containers and establishment of container stations, vessel feeder routes and coordination of inland services where permitted. An agreement may also entail restrictions on the use of third-party carriers without prior consent of members and may include penalties in case of breach of contract.

Examples of conferences/agreements

- Transpacific Stabilization Agreement
- Philippines/Europe Conference
- Far Eastern Freight Conference
- Far East/South Asia/Middle East Conference
- Europe/Indonesian Freight Conference
- Japan/Philippines Freight Conference
- Mediterranean Far East Conference

While such measures did lead to a general reduction in prices, according to the FMC (1989), the public filing and advanced notice requirement remain as obstacles to an independent and flexible pricing policy. As a result, the United States passed the Ocean Shipping Reform Act (OSRA) in 1998 with the aim of weakening the conferences' power. The law did away with the filing and notice requirements and allowed individual carriers to enter into confidential contracts with individual shippers. As a result, most agreements are privately negotiated. According to OECD (2002), only 10 percent of the United States-Europe traffic is negotiated strictly under conference terms.

This same Act also stipulates that all conferences must be open, in that carriers are able to enter or exit at any point in time without penalty as long as a notice is provided in advance (normally 10 days before the intended action).

Despite the weakening strength of the conferences as a result of regulatory reform combined with the entry of lower-cost newer shipping lines, in particularly those from China, South Korea, Singapore and Taiwan, the shipping industry is still far from being competitive. Pricing determined by bilateral negotiations between the lines and the particular shipper remains opaque and potentially discriminatory. Moreover, various ancillary charges are often applied, such as terminal handling charges (THC), bunker fuel adjustment factor, and currency adjustment factor; these are designed to transfer all risks to shippers without any clear formula and without supervision of a regulatory body.

These rationales are currently being questioned, however. For example, a study on *Competition Policy in Liner Shipping* by OECD (2002) found that better quality service and lower prices were associated with a decline in conference power rather than price-fixing and capacity-allocating arrangements. That paper recommended to members that the anti-trust exemptions for price-fixing and rate discussions be removed. Similarly, a World Bank study (Fink 2001) found private anti-competitive practices to be the major obstacle impeding international trade. The study proposes that the current round of service negotiations at WTO should seek to discipline such undesirable restrictive practices.

2. THE GLOBAL SHIPPING LINE SECTOR

The shipping line sector is one that has seen increasing concentration over the years. Several mergers have taken place in recent years including Maersk (Denmark) and Sealand (United States), P&O (United Kingdom) and NedLloyd (Netherlands), while Neptune Orient Lines (Singapore) has taken over the American President Line (United States) and Hanjin (South Korea) has taken over DSR-Senator Line (Germany), which earlier took over the United States shipping line, Senator. In the year 2001, the top 20 liner operators accounted for 72 percent of world container capacity in terms of TEU; the five largest operators account for 34 percent of the fully containerized fleet capacity as can be seen in OECD (2002). The top five lines are from Denmark (Maersk Sealand), the United Kingdom (P&O NedLloyd), Switzerland (Mediterranean Shipping Co.), Singapore (American President Line) and Taiwan (Evergreen) as shown in Graph 1. Japan, South Korea and China also have several top-20 shipping lines. It is interesting to note that since the 1980s, United States owners have gradually divested their interest in the shipping industry by selling off lines to foreign players in the market. Today, none of the top-20 lines is controlled by individuals or legal entities in the United States.

The increase in concentration in the shipping industry can be attributed to the substantial increase in the average size of vessels in order to exploit economies of scale and the average scale of operation. With increasingly larger capacity, greater network organization is required to sustain high-capacity utilization. This implies that a hub-and-spoke structure (such as that found in the airline industry) will become increasingly prominent. This, in turn, will lead to more mergers, consortia or alliances.

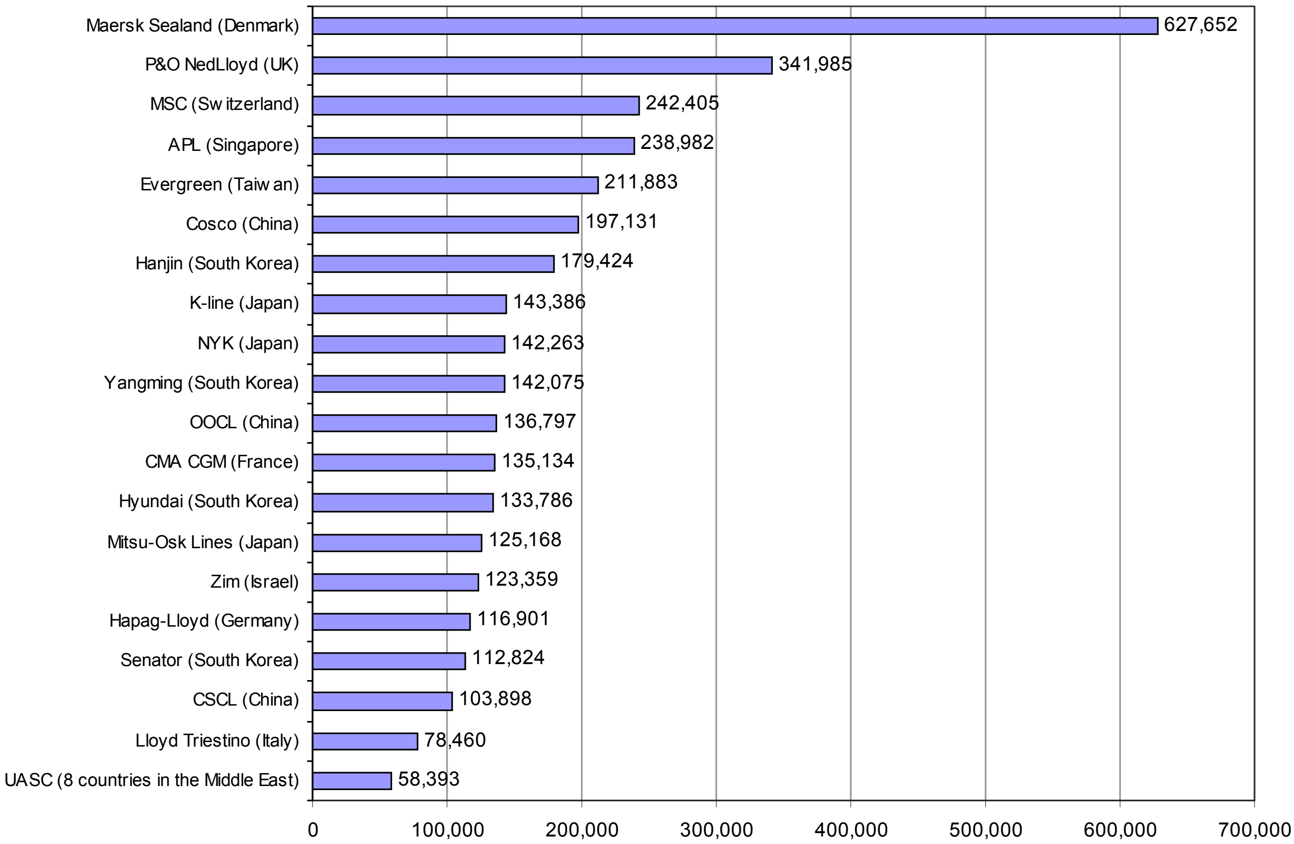
3. THE ASSOCIATION OF SOUTH EAST ASIAN NATIONS (ASEAN) SHIPPING INDUSTRY

Despite the fact that certain ASEAN countries, i.e., Indonesia and the Philippines, are island-states and that the Southeast Asian region contributed approximately 15 percent of the world container traffic during the period 1990–1997,[5] except for Singapore, no ASEAN country operates a shipping line of an international scale. Consequently, regional trade has become highly dependent on foreign shipping operators. Exporters and importers are thus fully exposed to the collusive practices of shipping lines that are beyond the reach of domestic competition law and policy. What options do ASEAN governments have to minimize such exposure?

The immediate solution that comes to mind for most governments is to promote home-grown shipping operators that will not only minimize exposure to foreign lines, but will also save the country a significant amount of foreign exchange spent each year on the international transport of goods.[6] Many countries consider the shipping industry to be a target for industrial promotion and thus provide various types of tax incentives and, sometimes, subsidies. In many cases, a state-owned shipping operator is established in the hope that state initiation will spur private interests and participation in the future.

The second alternative is for the shippers to bind together to establish bargaining power that can counter the formidable strength of shipping lines. Indeed, there are as many national and regional shippers' associations as there are shipping conferences. However, owing to the sheer number of shippers as opposed to the number of shipping lines, these associations have had a difficult time in coordinating their moves to apply counter pressure on liner conferences.

Graph 1 Top-20 Liner Operators (TEUs)



The third alternative is to have the issue addressed in WTO. There are two channels through which the concern can be addressed. The first is through the maritime sector negotiation in GATS; the second is through the competition policy agenda under the subject of international hard-core cartels that are currently being discussed in the Working Group on the Interaction between Trade and Competition Policy (WGTCP).

Indeed, these alternatives are not exclusive of one another. A government may choose to move in all three fronts in parallel. The following sections will discuss each of these alternatives in more detail.

4. GOVERNMENT POLICY TO PROMOTE LOCAL SHIPPING INDUSTRY

To promote a domestic shipping industry, most governments resort to two main options. One is to promote national shipping lines and the other is to promote the registry of foreign shipping lines in the hope that there will be certain technological “spin-offs” as a result of local equity, management and employment participation.

To encourage a domestic shipping industry, the government often resorts to tax incentives, and less commonly, subsidies, for private investment in shipping. However, government financial assistance to international shipping lines may be in vain since a shipping line can choose to register its business anywhere in the world. This is known as a “de-flagging” process. For example, a Thai shipping line may choose to register in Singapore instead of Thailand in order to enjoy the permanent corporate income tax exemption offered by the Government of Singapore.

Fierce competition for international shipping line registry is due to the fact that every country wants a share of these lines’ income as well as the employment (shipping crews) that they generate. Shipping lines often choose to register in developing countries in order to enjoy cheaper labor used in manning ships. At the same time, countries, including those in ASEAN, compete to offer tax incentives. Competition is so strong that certain countries, such as Singapore and Malaysia, offer permanent corporate tax exemption for shipping businesses in addition to an array of other tax exemptions such as those related to import duties, value-added tax, and income tax for shipping crews, among others (see Table 1). Indeed, the brutal global competition for shipping registry has been to the benefit of shipping lines at the expense of host countries.

Table 1 Exempt from Tax Offered to Registered Shipping Companies in the ASEAN5

	Import tax	Corporate income tax	Personal income tax	Other tax
Thailand	Exempt from import duty (Board of Investment (BOI) law). Exempt from import tax for ships up to 1,000 gross tons.	Exempt from tax for eight years.	Exempt from tax for crews who work on a Thai ship that operates internationally.	*(1) Exempt from tax on ship leasing; (2) Exempt from income tax on proceeds from sale of used ships or compensation from an insurance company; (3) Exempt from income tax on the portion of income put aside for the planned purchase of ships; (4) Facilitation of speedier VAT refund.*
Singapore	*Exempt.*	*Exempt.*	*Exempt from tax on dividends from shares in shipping line companies registered in Singapore. Exempt from income tax for crews who work on a Singaporean ship that operates internationally, but on the condition that most of the work is outside Singapore.*	*(1) Exempt from tax on the value-added of a ship when it is sold; (2) Exempt from tax on ship rentals if ships are leased from domestic company; a special rate applies when the ship is leased from overseas; (3) Exempt from corporate income tax; (4) Exempt from VAT on proceeds generated from asset sales; (5) Exempt from tax on freight for a company based in Singapore.*
Malaysia	*Exempt.*	Exempt.	Exempt from tax on dividend from holding shares in shipping company registered in Malaysia. Exempt from tax for crews who work on a Malaysian ship that operates shipping line internationally.	*(1) Exempt from tax on the value-added of a ship when it is sold; (2) Exempt from tax on ship rentals, if ships are leased from a domestic company; (3) Exempt from corporate income tax; (4) Exempt from tax on freight for a company based in Malaysia; (5) Accelerated depreciation of 60 percent allowed for the first year and 40 percent for the second year.*
Indonesia	*Exempt from customs tax and commercial tax for machines and tools imported from other countries.*	None.	Exempt from tax for crews who work on an Indonesian ship, with special rates of between US$47.88 and $191.52 per year depending on responsibility and number of family members.	*n.a.*
Philippines	Exempt from import duty for BOI member. Exempt from duty and import tax for machines and tools used in ship maintenance in a dock registered with the Maritime Industry Authority.	None.	Exempt from tax for crews, with special rate of 5–10 percent of revenue.	*n.a.*

Note: n.a. means not available.

Source: Thailand Development Research Institute (2000, 284-5).

Competition for shipping registry has not only eroded the potential collection of tax from these lines, but also any other gains associated with local private sector equity and management participation that could lead to a transfer of know-how. Again, fierce competition has led to the elimination of any kind of condition that a host country might place on the shipping line. These include domestic equity share, the employment of local nationals and the purchase of requirements. As can be seen in Table 2, Singapore imposes no equity or employment restrictions on shipping lines that choose to register in Singapore. Moreover, Singapore allows a line to flag its ships from anywhere in the world. By contrast, Thai regulations require registered ships to undergo local inspection. This is known as a "*closed registry"* as opposed to "*open registry*" where no requirements whatsoever are imposed.

Thailand has not competed effectively in this system. Many Thai shipping lines have chosen to register in Singapore in order to take advantage of tax and other privileges. The government, however, insists on having a national shipping line in order to retain some of the valuable foreign exchange spent annually on sea transport. The Thai Maritime Navigation Company (TMNC), a state-owned enterprise, enjoys a captive state market. According to the law, government agencies are

Table 2 Conditions Placed on Foreign Liners Registering in the ASEAN5

	Type of business	Foreign equity	Employment
Thailand	*Must be a limited company or a public limited company established under Thai law.*	*Foreign equity must be not more than 49 percent of registered equity. Number of foreign shareholders must be less than half the total shareholders. These conditions do not apply to branch offices.*	*Up to half the crew must be Thai citizens.*
Singapore	*Must be a limited company or a public limited company established under Singaporean law.*	No restrictions.	No restrictions.
Malaysia	Must be a company established under Malaysian law. Head office must be in Malaysia. Majority of management must be in Malaysia.	*The majority of directors on the board and shareholders must be Malaysians.*	*n.a.*
Indonesia	*Must be a company established under Indonesian law. Size of ship must be no less than 20 cubic metres or 7 gross tons.*	*Foreign equity must be no more than 49 percent of registered equity.*	*n.a.*
Philippines	*Must be a company or an association established under Philippine law. Size of ship must be more than 15 gross tons.*	*Foreign equity must be no more than 40 percent of registered equity.*	*n.a.*

Note: n.a. means not available.

***Source:* Thailand Development Research Institute (2000, 283).**

required to seek shipping services from TMNC unless the price quoted by the state enterprise is more than 10 percent higher than that quoted by the lowest bidder. In practice, however, bidding is rare; more often than not, TMNC gets the job. The worst part of the story is that TMNC itself does not own any vessel. Like any other freight forwarder, it simply acts as a broker and buys space on foreign lines, which defeats the purpose of having a local shipping company, i.e., to lessen dependence of foreign carriers.

To conclude, competing for the registry of foreign shipping companies is a “no-win game” for any country. The foot-loose shipping lines will always find a better deal elsewhere, while a host country is likely to gain next-to-nothing in playing host except for a few unskilled jobs aboard the ships. The option of setting up a government-owned shipping company or subsidizing a domestic shipping line is also no panacea. The shipping business is not only capital-intensive, but also knowledge- and network-intensive. Moreover, the business has evolved over time to become even more complex.

According to a study by OECD (2002), the average size of vessels has increased significantly, which means that maintaining high-capacity utilization is becoming a major challenge. The scale and scope of operations has also expanded. We have witnessed numerous mergers among lines, and this trend is on-going. Also, owing to increasing sophistication and the rising bargaining power of large shippers, such as Wal-Mart, lines have had to become increasingly more involved in logistics and the land transport leg to ensure punctual door-to-door delivery. This means that many lines have become multimodal transport operators with their own local land transport network. These are not easy tasks. Thus, not every country can be among the top 50 in terms of shipping lines. Even the United States has chosen to leave this extremely complex industry; instead, its investors deal with the cartels. That is why we have seen a series of regulatory reform measures in the maritime sector in the United States. After all, that country has no shipping lines left to protect and, consequently, it has shifted its policy fully in favor of its own shippers.

For a small country such as Thailand that cannot compare with the United States, the possibility of a success story in this industry is nil. Thus, it is time for the Thai Government, like the United States Government, to forget about having a domestic shipping line and focus instead on protecting the interests of its own shippers that are not as well endowed with bargaining power as Wal-Mart and other large multinationals. Before we proceed to discuss the role of the government, it would be appropriate first to examine the role of shippers in trying to protect their own interests.

5. THE ROLE OF NATIONAL SHIPPERS COUNCILS AND THE ROLE OF THE FEDERATION OF ASEAN SHIPPERS COUNCIL (FASC)

We have seen examples in which shippers in Hong Kong have united in refusing to pay THC (ancillary charges at the harbor, such as craning and forklifting). In the end, lines agreed to absorb half the charge. Compared with shippers in Hong Kong and Japan, Thai shippers pay relatively high THCs in that they have to absorb all harbor charges that once had been included in freight rates. However, not all shippers pay the same THCs. Prices are always subject to negotiation in the shipping business. The more bargaining power one has, the lower are the charges.

To the author's knowledge, there is only one trade association in Thailand that has been able to unite in order to counter the market power of shipping lines; that is the Thai Frozen Food Association, which has been in operation for decades. As a block, the Association was able to obtain preferential freight rates and bargain with the lines so that THC is waived. The success story of this group should prompt similar initiatives from other trade associations. Unfortunately, other attempts have failed. This is mainly because large players in the industry are often unwilling to "sacrifice" their competitive edge over smaller players with less bargaining strength and thus they face higher freight rates. In other words, the lines' practice of offering different "rebates" for different shippers of various size enables them to play the game of "divide and rule." Larger shippers are content with the deal they have secured, and thus are unwilling to make an effort to help smaller shippers that may be their competitors in the market. Without large shippers, smaller shippers by themselves can never hope to build up sufficient bargaining power to counter the lines.

With obstacles in coordination even at the national level, there is little hope for a regional arrangement. While FASC addresses the cartels' concern and urges governments to pass regulations, there is little that members coming from such diverse backgrounds can do. Nevertheless, the Federation does represent a voice that shipping lines and governments will have to take into consideration.

6. REGULATION OF INTERNATIONAL SHIPPING LINES

Although international shipping lines are beyond the reach of domestic anti-trust regulations because they are not registered in Thailand, it is still possible to regulate certain aspects of their services, but not their freight rates since that could easily lead to market distortions. Moreover, unreasonable rates may prompt shipping lines to terminate services altogether. To better balance the negotiating power between domestic shippers and international shipping companies, the government may pass regulations that require international lines to consult the national shippers' council or association before they increase prices.

Thailand drafted a maritime bill, which stipulates that adequate notice must be given to the local regulatory agency and that shipping lines must negotiate with shippers before any rate increase. According to the bill, shipping lines would be allowed to increase freight rates, but must give the Office of Maritime Promotion Commission (OMPC) 90 days' notice along with reasons supporting the increase before it could be implemented. If the state did not seek 15 days' notice, the new rates could be enforced. If negotiations between the two parties fail to reach an agreement, an arbitration committee made up of impartial outsiders would be formed and its decisions would be final. Unfortunately, the new government that came into power in 2001 took no interest in the subject. Consequently, the draft bill did not make it to the legislative process that would have enacted it into law.

A similar law is being considered by Malaysia. This particular move, i.e., to clamp down on unilateral abrupt rate increases, has been adopted in many other countries including Japan, Australia, and South Korea. In the case of Hong Kong, the government has intervened to force a 10-month freeze on THC. It should be noted that these additional charges, such as THC, currency adjustment factor charges and bunker fuel adjustment factor charges, are not regulated by the FMC. Thus, there has been little transparency and accountability involved in setting these charges.

7. WTO

Maritime transport has always been a relatively liberalized service. Unlike in the air transport sector, in shipping services rarely is any exclusivity offered to "national flag carriers" on international routes. Also, the frequency and the capacity of ships calling at the ports are not restricted. Fierce competition for registry of international lines, as discussed previously, has dissolved many policy restrictions in terms of foreign equity, employment of foreign nationals and even technical and safety standards. The only remaining restrictions involve cabotage policy, which often applies only to domestic shipping services, and the exclusivity of national flags in the case of government cargoes. In short, the issues governing the shipping industry are concerned more with "fair trade" than "free trade."

The issue of "fair competition" in services can be found in Article IX of GATS, which has little substance. Members are required only to provide non-confidential information and consultations concerning alleged restrictive practices upon the request of the affected member country. To date, this provision has been exploited only once, i.e., by the United States against Belgium, concerning access of Ameritech, a United States telecom firm, to a license to publish commercial directories.

While provisions in the general obligations may be weak, sector-specific commitments, such as those in the telecom sector, may include competitive safeguards. The "Reference Paper" of the Agreement on Basic Telecommunications of 1997 contains a general commitment of members to prevent suppliers – unilaterally or collectively – from engaging in or sustaining anti-competitive practices. However, this provision is designed to guarantee foreign access to local markets, rather than establish international competition rules.

The competition policy agenda that is currently being discussed in the WGTCP focuses exclusively on three specific issues, one of which is international cartels. The following sections provide more detail about each of these channels through which concerns about shipping cartels can be addressed.

7.1 Maritime Transport Services

The results of the Uruguay Round, while incorporated in the schedules of commitment in maritime transport of each member, also contain an annex to GATS on negotiations in maritime transport and a ministerial decision to prolong maritime transport negotiations until June 30, 1996, well after the closing of the Round in 1994. In effect, the Negotiating Group on Maritime Transport Services was established. That Group decided to suspend the negotiations until the commencement of the next Round. The failure to reach an agreement results from the refusal of the United States to negotiate on the ground that commitments offered by the other parties were too insignificant to effect real changes in the industry. However, the 32 members (counting the European Union as one member) that participated in the negotiations agreed to abstain from imposing any additional restrictions.

Maritime sector negotiations have concentrated narrowly on "market access" issues. There is a need to deal with anti-competitive practices undertaken by various forms of maritime cartels prevalent in the industry. Large societies with significant bargaining power, such as the United States, the European Union and Japan, can probably tackle the problem on their own, despite "extra-territoriality problems," in order to stem the power of the conferences and to protect the interests of their shippers. Smaller states, such as Thailand, however, with limited enforcement capacity and weak bargaining power, can be in a more difficult position and may need to rely on international rules to enforce competition disciplines in the sector.

Therefore, it is recommended that ASEAN nations, along with developing country allies, should demand that the "block exemption" provided for shipping cartels be removed from national competition laws. In cases where the law is intentionally not enforced, the foreign consumers affected should be provided with the right to challenge the anti-competitive practices of lines in the national courts of countries whose citizens own or control these shipping lines. This type of provision is found in the WTO rules on intellectual property and government procurement (Mattoo and Subramanian 1997). Developing countries should make this issue a "prerequisite" to entering into negotiations on maritime services in GATS in the next Round.

7.2 Competition Policy Agenda

Trade and competition policy is considered to be one of the "Singapore Issues." That is, it is one of the issues born out of the Ministerial Conference in Singapore in December 1996.[7] The ministers attending that meeting decided to set up the WGTCP, the task of which is only exploratory, with a focus on considering various issues and concerns raised by members relating to the field. The WGTCP will not negotiate new rules or commitments. The ministers made it clear that no decision had been reached on whether there would be negotiations in the future, and that any discussions could not develop into negotiations without a clear consensus decision.

Developing countries are apprehensive about the competition policy agenda, however. They are suspicious, rightly, that the issue will be about market access rather than ensuring fair trade. Since most developed countries have a well-established competition law in place, market access appears to be developed countries' agenda to ensure access to developing countries' markets without such laws. Thus, developing countries must tread carefully. They believe that there are currently large gaps in the establishment of competition law, policies and institutions among member countries so that any negotiation will not be feasible. Therefore, it is necessary to narrow these gaps. That is, capacity-building will be a prerequisite to consideration for negotiation in the next round. Consequently, the Doha Ministerial Declaration specified key issues to be addressed before the Fifth WTO Ministerial Conference in November 2003 (as can be seen in the underlined text in Box 2).

Following the Declaration, the WGTCP identified three issues to be discussed in three separate meetings in 2002: (1) technical assistance and capacity-building, (2) international hard-core[8] cartels and multilateral cooperation, and (3) core principles in the enforcement of competition law. The discussions on cartels directly concern shipping cartels, as well as other manufacturing cartels. The main issues of concern in the discussion on this topic include the definition of a hard-core cartel, the implications for domestic competition laws and policy, and the scope of cooperation in fighting such cartels.

It is interesting to note that paragraph 25 of the Doha Ministerial Conference states that cooperation is to be voluntary rather than mandatory. This appears to be quite odd in that WTO, unlike other forums such as APEC (Asian-Pacific Economic Cooperation), is known for its "binding" commitments.[9]

It is recommended that ASEAN countries, and hopefully other developing countries, join together in proposing an international trade rule that would prohibit hard-core cartels, much like other fair-trade rules including those on dumping, subsidies, and the violation of intellectual property rights. This option, however, is complicated and is likely to meet strong resistance from major industrialized countries that have an interest in protecting their own transnational corporations. However, such an approach would be the most effective means in stamping out cartels that have not yet been considered in the WTO discussions.

Box 2 Doha Declaration
Interaction between Trade and Competition Policy

23. Recognizing the case for a multilateral framework to enhance the contribution of competition policy to international trade and development, and the need for enhanced technical assistance and capacity-building in this area as referred to in paragraph 24, we agree that negotiations will take place after the Fifth Session of the Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at that Session on modalities of negotiations.

24. We recognize the needs of developing and least-developed countries for enhanced support for technical assistance and capacity building in this area, including policy analysis and development so that they may better evaluate the implications of closer multilateral cooperation for their development policies and objectives, and human and institutional development. To this end, we shall work in cooperation with other relevant intergovernmental organisations, including UNCTAD, and through appropriate regional and bilateral channels, to provide strengthened and adequately resourced assistance to respond to these needs.

25. In the period until the Fifth Session, further work in the Working Group on the Interaction between Trade and Competition Policy will focus on the clarification of: core principles, including transparency, non-discrimination and procedural fairness, and provisions on hardcore cartels; modalities for *voluntary* cooperation; and support for progressive reinforcement of competition institutions in developing countries through capacity building. Full account shall be taken of the needs of developing and least-developed country participants and appropriate flexibility provided to address them.

Note: Underlining and italic emphasis added by author.

Source: http://www.wto.org/english/thewto_e/

An interim strategy would be to stick to the existing framework and demand "mandatory" obligations to provide assistance in law enforcement. That is, competition authorities of countries whose citizens own or control the multinationals involved in a cartel must supply non-confidential information available upon request. Failure to do so would subject the cartel to a dispute resolution mechanism. Indeed, this proposal was forwarded by Thailand in the second Working Group Meeting in June 2002, but was strongly opposed by both the United States and the European Union. Other developing countries, in particular those without a competition authority and law, were not supportive for fear of being bogged down by requests advanced by developed countries. In this regard, many implementing details still have to be worked out.

8. CONCLUSION

The shipping line business is complex, requiring massive investment in a fleet of sufficient size, the establishment of a land transport network, and expertise in logistics. Big lines are getting bigger, while smaller ones seem to be disappearing from the picture altogether. There is little or no justification for countries with no capabilities or qualifications to attempt to establish a domestic line. Since such a line would have very little chance of becoming competitive at the international level and would only be a burden for the government to improvise costly measures, such as subsidies and privileges, to keep it alive.

Instead, the government should focus on protecting its own shippers from potential abuse of market power by international shipping cartels. It may consider passing regulations that require lines to notify and consult shippers before any rate increase. At the same time, it should put effort into having the issue addressed by WTO, either in the maritime service negotiations or in competition policy. After all, the WTO's Doha *Development* Agenda is about developing countries. The blatant anti-competitive practices on the part of liner conferences have been sustained at the expense of shippers from developing countries with little bargaining strength. It is time that we put serious effort into establishing "fair" competition as opposed to "free" competition (market access) at that multilateral forum.

ENDNOTES

1 The figure for developed countries is significantly lower at 4.2 percent. This can be explained by larger volumes, more efficient transportation, and the higher value goods shipped.

2 WTO (1998, 3).

3 For example, after the 1997 Asian financial crisis (starting in July), Thailand's imports dropped significantly, while exports benefited from a weaker baht. As a result, there was a shortage in the supply of outbound shipping capacity, while inbound capacity was excessive. This led to a large increase in shipping costs for exporters and a decline in costs for importers.

4 Before that, a conference member could not offer discounts to shippers unless specified in the agreement.

5 Containerisation International (1998).

6 The trade balance deficit figure for shipping shown in the national balance of payments account understates the actual extent of foreign exchange loss. This is because most Thai businesses prefer f.o.b. arrangements when exporting and c.i.f. arrangements when importing. In that way, they need not deal with transport costs.

7 Other issues included are trade and investment, transparency of government procurement and trade facilitation.

8 The definition of "hard core" is not yet conclusive. OECD's definition includes price- and quantity-fixing, bid-rigging and market allocation.

[9] It is also interesting to note that obligations under trade and investment are to be binding. Making investment obligations binding and competition discipline voluntary raises a question concerning whether the interests of the host country and the foreign investors are properly balanced. That is, does this imply that foreign investors have the right to access the domestic market and pursue anti-competitive practices without any recourse?

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