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MERCHANT MARINE MISCELLANEOUS—Part 1

DOCUMENTS

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HEARINGS

BEFORE THE

COMMITTEE ON MERCHANT MARINE

OF THE

COMMITTEE ON

MERCHANT MARINE AND FISHERIES

HOUSE OF REPRESENTATIVES

NINETY-SIXTH CONGRESS

FIRST SESSION

ON

FEDERAL MARITIME COMMISSION OVERSIGHT

MARCH 6, 1979

U.N. CONFERENCE ON TRADE AND DEVELOPMENT
(UNCTAD) OVERSIGHT

APRIL 26, 1979

REBATING PRACTICE—H.R. 3055

MAY 16, 1979

Serial No. 96-10

Printed for the use of the
Committee on Merchant Marine and Fisheries



U.S. GOVERNMENT PRINTING OFFICE

WASHINGTON : 1979

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FEDERAL MARITIME COMMISSION OVERSIGHT

TUESDAY, MARCH 6, 1979

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON MERCHANT MARINE,
COMMITTEE ON MERCHANT MARINE AND FISHERIES,
Washington, D.C.

The subcommittee met, pursuant to notice, at 2:20 p.m., in room 1334, Longworth House Office Building, Hon. John M. Murphy (chairman of the subcommittee) presiding.

Present: Representatives Murphy, Myers, Donnelly, McCloskey, and Snyder.

Staff present: Ernest Corrado, Chief Counsel; Peter Kyros, counsel.

The CHAIRMAN. The subcommittee will come to order.

The subcommittee has been undertaking oversight over the Federal Maritime Commission since last year. We held hearings on August 10 and 15 and September 27, 1978. Of great concern to the committee is the circumstance that the Federal Maritime Commission has been impaired in its ability to administer our maritime regulatory policy because of the unnecessary or unseemly intervention by agencies of our own Government. This layering of regulation has been viewed as a severe impediment of the ability of the U.S. liner fleet to effectively compete internationally.

The September 27 hearing initiated the discussion we intend to pursue further today on the impact of these layers of regulation—layers which, too frequently, are time consuming and redundant or, worse, conflicting in their policy outlook and effect.

A particularly vexing problem facing the Federal Maritime Commission is its inability to obtain those documents necessary to adequately regulate our ocean trades. The physical location of records outside the United States makes their compelled production a most difficult task.

And, where nations have, by law, blocked their nationals from producing FMC-requested documents, the task, obviously, approaches impossibility.

On April 7, 1978, this committee considered the problem of U.S. Government-financed buses being moved in ships other than those flying the U.S. flag, in contravention of the law. At that time we were concerned with the carriage by Soviet vessels of Department of Transportation, Urban Mass Transportation Authority-financed buses from their place of manufacture in West Germany to the United States.

As a result of that hearing and the work of this committee, and the Maritime Administration, in the months following, the practice of using non-U.S.-flag carriers to carry U.S.-financed buses has

been abated to the extent that the final 102 articulated buses, of the total 398, have been carried from Germany in U.S.-flag liners.

During the course of the hearing, and as a direct result of our inquiry, it was reported by the Federal Maritime Commission that one foreign-flag carrier of the buses, Baltic Shipping Co., had failed to file the rate at which the buses were transported, in apparent violation of the Shipping Act, 1916.

The buses were accepted for transport in early February 1978 at an illegal rate by Baltic, and following that date, here we are, more than a year later, unable to say that the Federal Maritime Commission has been able to enforce the Shipping Act of 1916.

It is inconceivable that the gravity of this situation can escape any of the participants in what has become a most dismal display of regulatory delay and gamesmanship. We have a maritime policy which clearly directs the carriage of certain cargoes by U.S.-flag carriers and the very same maritime policy provides a regulatory scheme which insures carriers and shippers alike that discriminatory shipping practices will not interfere with their ability to engage competitively in the foreign commerce of the United States.

If delay of enforcement at the regulatory end can be as successful as it apparently has been for Baltic, then all our efforts to advance the legitimate interests of a strong and well-balanced merchant marine will be unavailing.

Let me set out the chronology of events which started with the bus carriage incident:

On March 17, 1978, Chairman Daschbach of the FMC informed this committee Baltic had failed to file the rate at which 25 buses were transported. On April 12, the Commission voted to issue a section 21 order. Section 21 of the Shipping Act, 1916, enables the FMC to require any common carrier to produce, in the form prescribed, any document pertaining to the business of such carrier.

The Commission order requested the information on or before May 30. On May 17, Baltic petitioned for reconsideration, which the FMC denied on May 26, but the Commission extended Baltic's response time to August 30. Through June and July of 1978, there were a series of responses by Baltic and replies by FMC hearing counsel which culminated in the August 30 filing by Baltic of its response to the section 21 order.

The Commission, apparently dissatisfied with the extent of Baltic's responses, issued, on October 5, 1978, an order to show cause why Baltic should not be found in violation of section 21, for failure to comply with the FMC orders of April and May.

At this point and upon publishing the show cause order on October 12, the Commission, in addition to rejecting Baltic's legal objections, granted still more time for Baltic to come forward and explain the possible application for foreign law to October 25, 1978.

Baltic consumed the time available prior to filing its answer, after which there was an exchange of replies and responses culminating in the Commission's denial of Baltic's requests for hearing, oral argument and postponement. On November 29, 1978, over 8 months after information available to the Commission indicating alleged violations of the Shipping Act, the FMC found violation of Section 21.

Two months before the Commission made its finding, this committee, on September 27, 1978, during FMC oversight hearings, heard representatives of the Departments of State and Justice state either directly or by clear implication that the maritime interests of the United States, as implemented by the FMC, are not exclusive and can, and indeed must, be arrayed against other factors, not the least important being those procompetitive and foreign policy positions which are advanced by these agencies.

Against this background, the FMC finding in the Baltic matter, a condition unfavorable to foreign trade, notified the Department of State and sought assistance in the resolution, through diplomatic means, of the dispute.

In last December, and concurrent with the diplomatic process underway, the Federal Maritime Commission determined to issue proposed rulemaking under section 19 of the Merchant Marine Act of 1920.

Section 19 enables the Commission to make rules and regulations "to adjust or meet conditions unfavorable to shipping in the foreign trade which arise out of or result from foreign laws, rules, or regulations or from competitive methods employed by owners, operators, agents or masters of vessels of a foreign country;"

From the promulgation of a rule pursuant to section 19 of the Merchant Marine Act of 1920, there resulted the expected flow of submissions, notices, orders, responses, protests, and comments including a comment from the Department of State which, while reiterating its concurrence with the Commission, "that all carriers, regardless of flag, must comply with the U.S. regulatory scheme if they are to serve our trades," nonetheless, opposed the action being contemplated in the Section 19 rulemaking as unnecessarily harsh and severe.

The State Department comment refers to the cooperative regime which State views as having resulted from the United States Consultative Shipping Group meeting of November 1978, and the extension of such cooperative regimes to other than CSG nations.

We think it necessary to determine whether such a meeting is the proper forum for the determination of our maritime policy, and at least to ascertain the extent to which such negotiations enhance or interfere with the administration of our shipping laws by the FMC.

The Baltic case—and I hope the members here listen carefully to this—is now before the U.S. Court of Appeals for the District of Columbia, Baltic Shipping Co. having petitioned the court to review and moved to stay the order of the Federal Maritime Commission.

This committee wishes to make clear that this hearing is not designed or intended in any way to examine or intervene in the issues which are before the court. We will not permit this hearing's purpose to be frustrated by any hint of impropriety, and in order to preserve the integrity of the case now before the U.S. Court of Appeals, I will exercise the utmost care in preventing the inquiry into matters which are appropriately exclusive for judicial consideration at this time.

Our interest today is directed at the broad questions which relate to an over 1-year delay in the enforcement of our shipping laws and the manner in which agencies other than those specifically

mandated to administer those laws, may enhance or interfere with their execution.

We have FMC, Justice and State here today.

The gentleman from Kentucky.

Mr. SNYDER. I would like to direct a question to the Chair. With regard to the last part of your statement which you asked us to pay particular attention to; would it be the Chair's opinion that it would not be proper to inquire of the State Department as to why they made a particular policy decision?

The CHAIRMAN. I think the question of policy is certainly within the bounds of this hearing.

Mr. SNYDER. I certainly agree with you.

The CHAIRMAN. We just don't want to get into a situation where we win the case on appeal for Baltic because this committee in any way, as it has in the past, interfered in a case; we wish to avoid any interference that we influenced a court in any way.

Mr. SNYDER. I agree with that.

The CHAIRMAN. Now, we have as our first witness from the Department of Justice, Mr. Donald Flexner, Deputy Assistant Attorney General of the Antitrust Division.

Mr. Flexner.

STATEMENT OF DONALD FLEXNER, DEPUTY ASSISTANT ATTORNEY GENERAL, ANTITRUST DIVISION, DEPARTMENT OF JUSTICE

Mr. FLEXNER. Mr. Chairman, I am happy to be here today.

I appreciate your comments about the sensitivity of the matter as it relates to the District of Columbia Court of Appeals proceeding. I commend the Chair for taking that position.

I have no prepared statement but I would be happy to answer any of your questions.

The CHAIRMAN. Mr. Flexner, does the Justice Department, either in the Antitrust Division or otherwise, play a role in the production of documents?

Mr. FLEXNER. We, of course, in the context of our own investigations will, from time to time, seek the production of documents either through voluntary or compulsory process in the course of an antitrust enforcement proceeding.

The CHAIRMAN. In effect, at times, you are the attorney for the FMC?

Mr. FLEXNER. I don't understand your question, Mr. Chairman.

The CHAIRMAN. You do represent the FMC in legal matters?

Mr. FLEXNER. No, we do not represent the FMC. Under the Hobbs Act, we are a statutory respondent. We are a party as of right. We are not representing the FMC in appearances on appeal. The FMC has its own attorney and is also a party as of right. While the Attorney General has control of the litigation on appeal, the Attorney General cannot settle or dispose of the litigation over objection of counsel for the Federal Maritime Commission, so we do not represent the FMC on appeal.

The CHAIRMAN. Does the FMC call upon you for assistance in obtaining documents?

Mr. FLEXNER. The FMC can do that and, I believe, the Civil Division would be the division in the Department of Justice that would provide assistance in court to obtain documents.

The CHAIRMAN. Has the Civil Division assisted FMC in that endeavor in the past?

Mr. FLEXNER. I am sure it has.

The CHAIRMAN. Does it assist any other Federal agency in obtaining documents located in foreign countries?

Mr. FLEXNER. I can't answer that, Mr. Chairman. I am sure that other agencies receive the assistance of the Department of Justice in obtaining documents.

The CHAIRMAN. The CAB, Department of Agriculture, the International Trade Commission?

Mr. FLEXNER. I just don't know. We could provide the answers to those questions.

The CHAIRMAN. I appreciate it if you would.

Do you have any discretion in the way in which you assist agencies who procure documents? In other words, could you reject a request?

Mr. FLEXNER. In a district court proceeding, I would think the answer to that is yes, but I am not sure under what circumstances that discretion would be exercised.

The CHAIRMAN. But if you did not reject a request, you could proceed?

Mr. FLEXNER. I think the Federal Maritime Commission can proceed with its own representation.

The CHAIRMAN. I am not worried right now about the FMC's representation. I am worried about the Justice Department's role in procuring documents for other agencies.

Mr. FLEXNER. I think, Mr. Chairman, if you would permit me to provide answers to those questions in writing we can clarify the matter. I am simply not familiar with that part of the Department of Justice representation.

The CHAIRMAN. Also, provide an answer to this question: Could the Civil Division, or whatever division of Justice is responsible, procure documents in such a way that it would be contrary to the interests of the initiating agency?

Mr. FLEXNER. I don't know, Mr. Chairman.

The CHAIRMAN. Would you find that for us and respond to it? [The following was submitted:]

U.S. DEPARTMENT OF JUSTICE,
ANTITRUST DIVISION,
Washington, D.C., April 2, 1979.

Hon. JOHN M. MURPHY,
Chairman, Committee on Merchant Marine and Fisheries,
House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: During the course of my testimony at the March 6, 1979 oversight hearings, a number of questions were raised regarding the manner in which the Department of Justice assists government agencies in procuring document production abroad. As I explained, this is the province not of the Antitrust Division but of the Civil Division of the Department.

As a general matter, the Civil Division will render its assistance to any federal agency that requests advice as to the best means of securing voluntary compliance with a document request in a particular situation. It is not possible to identify with precision which agencies have in fact received such assistance because the process is informal.

Where a government agency formally refers a matter to the Civil Division for representation in the courts, however, that Division can and will make use of available compulsory methods of securing document production where appropriate.

The Civil Division does have discretion as to whether, and in what manner, it assists in document procurement. In general, obtaining evidence abroad for use in domestic legal proceedings is a difficult and delicate task. Many foreign countries prohibit, as a matter of law or policy, the production of specified types of information or documents. In short, there may exist any number of practical and/or legal problems which may occasionally restrict the ability of the Civil Division to pursue a particular request for assistance. Absent such special circumstances, however, the Division stands ready and willing to extend its help to all government agencies requesting it.

I trust the foregoing discussion is responsive to the questions you raised on March 6, 1979. I will be happy to furnish whatever further clarification you may require.

Sincerely yours,

DONALD L. FLEXNER,
*Deputy Assistant Attorney General,
Antitrust Division.*

The CHAIRMAN. In the Ocean Shipping Act of 1978, otherwise known as the Control Carrier Act, the Congress enabled the FMC to procure documents in aid of its enforcement responsibility. Do you have any current position which would indicate opposition to any of the Commission's powers provided for in the Ocean Shipping Act of 1978?

Mr. FLEXNER. No, sir.

The CHAIRMAN. From your point of view, does the FMC now have sufficient powers to obtain documents located overseas?

Mr. FLEXNER. I can't answer that, Mr. Chairman. Obtaining documents overseas is a very difficult process whether it is for the Federal Maritime Commission or for the Department of Justice. As you know, many foreign countries have statutes which, if invoked by those countries, can prevent their nationals or other companies from producing documents or information that are located within those territories. The difficulty is that firms can be in a position where they are under potential penalty for failure to obey an order of the domestic court as well as an order of a foreign court.

In enforcement proceedings our domestic courts will usually take into account that dilemma. Mr. Atwood's testimony, I think, accurately points out that in many instances it requires consideration of matters of comity before foreign governments will determine to allow cooperation with domestic investigations, whether it is by the Federal Maritime Commission or the Department of Justice.

The CHAIRMAN. Who within the Department of Justice normally represents the Department of State?

Mr. FLEXNER. The Department of Justice doesn't represent the Department of State. The Department of State has its own counsel. In matters of various court proceedings the Department of State can make its views known to whatever division with the Department of Justice is responsible for the court action.

In the case of the Baltic Steamship Co., the division was the Antitrust Division and the section within the Antitrust Division was the appellate section, and the Department of State, as reflected in the brief—and I think this is a matter of public record, so we are not discussing the merits—made its views known to the Antitrust Division.

The CHAIRMAN. Does the Antitrust Division of Justice represent the FMC?

Mr. FLEXNER. No; as I indicated in my initial answer, we do not represent the FMC.

The CHAIRMAN. If the Department of Justice represents the United States under statute 28 United States Code 2348, then who represents the FMC point of view in an appellate proceeding?

Mr. FLEXNER. The FMC represents its own point of view.

The CHAIRMAN. Does the Department of Justice consider any foreign policy implications in its representation under 28 United States Code 2348?

Mr. FLEXNER. Our primary consideration would be one of law, but in making such an evaluation we would also take account of appropriate foreign policy considerations if brought to our attention by the expert, which is the Department of State.

The CHAIRMAN. When did you determine the Department of State was the expert in determining foreign policy considerations?

Mr. FLEXNER. I don't think I made that determination. I think the President did.

The CHAIRMAN. Doesn't the FMC have the right, totally exclusive of the Department of Justice or State, to determine what are general or special conditions unfavorable to shipping in the foreign trade?

Mr. FLEXNER. Mr. Chairman, I think that question goes to one of the issues in litigation before the D.C. Court of Appeals.

The CHAIRMAN. Why do other countries not permit their foreign service or departments of state to represent their countries in maritime matters or in trade matters? They generally use a minister of maritime or a minister of trade for representation in those policy areas.

Mr. FLEXNER. If that is a fact, Mr. Chairman, I don't know the reason.

The CHAIRMAN. Mr. Donnelly?

Mr. DONNELLY. I have no questions at this time, Mr. Chairman.

The CHAIRMAN. Mr. Snyder?

Mr. SNYDER. Thank you, Mr. Chairman.

I don't want to be repetitious but, did you say that Justice does not represent the State Department?

Mr. FLEXNER. We don't represent the State Department in the sense that we are their lawyers. The Attorney General is responsible for representing the interests of the United States in litigation and one of the interests that we will take in account is an appropriate foreign policy interest if that is represented to us by the Department of State.

Mr. SNYDER. Did Justice participate in the policy decision as to what side you were going to be on in this case?

Mr. FLEXNER. Yes.

Mr. SNYDER. With State?

Mr. FLEXNER. Yes, and the Federal Maritime Commission.

Mr. SNYDER. Is it correct that Justice is not a party to this action?

Mr. FLEXNER. Justice is a party as a matter of law under the Hobbs Act, 28 United States Code section 2349. Justice is a party as a matter of right.

Mr. SNYDER. If Justice is not representing State, would you please tell me who is the counsel for the State Department in this action?

Mr. FLEXNER. The views of the State Department are reflected in the Attorney General's brief, but the State Department is not a party to the proceeding. The Attorney General is a party to the proceeding on behalf of the United States.

Mr. SNYDER. You just told me they were a party to the proceeding under a certain statute.

Mr. FLEXNER. I said the Attorney General was a party as of right.

Mr. SNYDER. The State Department is not a party to this action?

Mr. FLEXNER. That is correct.

Mr. SNYDER. But you are representing the State Department in this particular action?

Mr. FLEXNER. Their views have been taken into account and are reflected in the Attorney General's brief.

Mr. SNYDER. It states that?

Mr. FLEXNER. That is correct.

Mr. SNYDER. A footnote: "This response represents the views of the Department of State as well as the Department of Justice."

Mr. FLEXNER. That is what I have testified.

Mr. SNYDER. And that is a representation of the Department of Justice?

Mr. FLEXNER. The Department of Justice, yes, it is.

Mr. SNYDER. But the State Department has not represented that.

Mr. FLEXNER. The State Department is not a party. Its views are reflected in the brief.

Mr. SNYDER. But they didn't attest that this brief represents their views. You indicated that this represented their views but you don't represent them.

Mr. FLEXNER. It is really not confusing, in my view. The Department of Justice is the party as of right. The views of the United States are presented to the court of appeals by the Department of Justice. Those views have taken into account the special perspective of the Department of State, and that is reflected in our brief and I don't think that there is anything very confusing about that.

Mr. SNYDER. I won't belabor the point.

Thank you, Mr. Chairman.

The CHAIRMAN. Mr. Kyros.

Mr. KYROS. Thank you, Mr. Chairman.

Mr. Flexner, in keeping with the chairman's caveat that we not go into the merits of the case, I would like to ask you a few questions. If they are within the merits of the case, I am sure you can advise the chairman so he can take appropriate action.

The first thing that comes to mind is that in this matter, which took 1 year after the moving of those buses by Soviet carriers, before the State Department filed, during the FMC rulemaking proceeding on January 22, 1979, a statement indicating that other means could be taken to negotiate this matter.

At that point the Justice Department does not become involved. Did you have the power at that time to become involved if you had so desired?

Mr. FLEXNER. We could have intervened, as you know, under section 15 of the Shipping Act.

Mr. KYROS. And it would have been——

Mr. FLEXNER. Or under the other provisions that were governing that proceeding.

Mr. KYROS. The section 21 proceeding and the rulemaking proceeding.

Subsequent to that, does the State Department come to you and ask you to intervene as a party of right or do you *sua sponte* intervene under the statute you have already discussed?

Mr. FLEXNER. It is automatic under the statute.

Mr. KYROS. So, in this case you, yourselves, decided to intervene with no discussions with the State Department?

Mr. FLEXNER. No. As I had indicated to an earlier question, we had discussions with the State Department, who brought the matter to our attention, as well as with the Federal Maritime Commission staff.

The CHAIRMAN. Who brought it to your attention?

Mr. FLEXNER. I think Mr. Atwood spoke with——

The CHAIRMAN. The State Department?

Mr. FLEXNER. The State Department.

The CHAIRMAN. Did they ask you to intervene?

Mr. FLEXNER. They asked us to take a position.

The CHAIRMAN. Did they tell you what position to take?

Mr. FLEXNER. Mr. Chairman, in the end we have to make our own judgment about what position to take.

The CHAIRMAN. Did they suggest a position that you take?

Mr. FLEXNER. They suggested that the foreign policy interests of the United States were seriously impacted by the action of the FMC and asked us to consider that viewpoint in deciding whether or not, as a matter of law, the FMC had erred.

The CHAIRMAN. They suggested that you side with the Soviet Union in a case against the Federal Maritime Commission on the issue of competitiveness, and you bought it?

Mr. FLEXNER. What we bought is reflected in our brief, Mr. Chairman.

Mr. KYROS. Mr. Flexner, a decision was made as a matter of law, not a decision of foreign policy on your part?

Mr. FLEXNER. That is correct.

Mr. KYROS. But based on foreign policy considerations?

Mr. FLEXNER. They brought the foreign policy considerations to our attention.

Mr. KYROS. It is difficult to even talk to this subject at this time in this hearing but, are you aware of the history of section 19 in the 1920 Act? Have you looked at the whole history of it?

Mr. FLEXNER. No, I am not.

Mr. KYROS. Have you ever looked at the use of it by the FMC prior to this case?

Mr. FLEXNER. No, I have not.

Mr. KYROS. As I recall your questions earlier, you do recall how vexing it is for this international maritime agency not to be able to get its hands on records that are located abroad? You know about that problem?

Mr. FLEXNER. It is a general problem that all enforcement agencies have when necessary documents are located abroad.

Mr. KYROS. The question of tariffs and enforcement you are aware of because you testified in the rebating proceeding. The question of enforcing a uniform, nondiscriminatory law places great stress on the FMC in obtaining documents.

Mr. FLEXNER. I am aware that if you are going to enforce the law in a nondiscriminatory way that it is necessary to be able to obtain necessary evidence.

Mr. KYROS. There were considerable hearings on the dual rate cases, Mr. Flexner, in 1961 by the then Chairman Bonner, and they really went through this entire issue again—do you recall some of that?

Mr. FLEXNER. I have read the record of the Celler committee hearings.

Mr. KYROS. Not only the Celler committee hearings but the Bonner hearings. They indicate the same problem. At that time, discussion was had that the 1920 act provided a possibility of section 19 being used. My question to you is, other than section 19, what measures can the FMC use prospectively to enforce or to attempt to get documents?

Mr. FLEXNER. They have got section 21, and beyond that, I am not aware of any.

Mr. KYROS. Now, with section 21, if you don't produce the documents you pay fines for past actions, but nothing happens to you in the future, as I understand it. It is not prospective in effect.

Mr. FLEXNER. That may be. By and large, that is in conformity with most sanctions that are available for failure to comply with a discovery order.

Mr. KYROS. We talk about production of these documents. What lends them immunity from scrutiny by American agencies is the fact that other nations have passed what are commonly called blocking statutes; is that correct?

Mr. FLEXNER. There are blocking statutes.

Mr. KYROS. Do you know whether the United States has passed any blocking statutes that would prevent or give immunity to any American shipping company from giving its records on demand to a foreign agency that so requested them?

Mr. FLEXNER. I don't think the United States has such statutes.

Mr. KYROS. In fact, to my knowledge, it doesn't.

Mr. FLEXNER. I think that is correct.

Mr. KYROS. As I recall your earlier testimony, you are not familiar with the historical utilization, by the FMC, of section 19. I don't mean the present case, using it with section 21. I mean in prior cases, by itself.

Mr. FLEXNER. No, I am not aware of the FMC's experience using section 19.

Mr. KYROS. Are you aware of any instances where, in the use of section 19 of the 1920 Act, by itself, the Commission's determinations of special conditions unfavorable to trade have been questioned by anyone? Do we know?

Mr. FLEXNER. I do not know. Maybe the FMC does.

Mr. KYROS. Did the Justice Department recommend a veto of the Rebating bill?

Mr. FLEXNER. Mr. Kyros, I would like to respond to that in writing. I am not sure it is appropriate that we disclose advice that we give in the executive branch. You may already know.

Mr. KYROS. Someone downtown gave me the letter you sent. I wouldn't have known otherwise, I can promise you that.

You did support the veto of the Rebating bill and so did the State Department, for many reasons, I understand. And you made it clearer subsequently that the Rebating bill would be anticompetitive.

Mr. FLEXNER. It is my recollection—if you have the letter and it is available, I can look at it quickly, but my recollection was that the Rebating bill, as it was finally enacted, had been quite different from earlier versions in at least one important respect, which was the reason for our advice. But, at this point I can't recall independently. I could read the letter if you have it.

Mr. KYROS. I don't have it before me, but I won't pursue, Mr. Flexner.

Recently there was a decision by the Maritime Administration concerning a tanker. It concerns CDS and the utilization of a vessel in domestic trades that was first committed to the foreign trades.

In that case, it is my understanding that the Justice Department is acting for the Maritime Administration.

Mr. FLEXNER. I believe, if I read the statute correctly, that the Justice Department—is this an appellate matter?

Mr. KYROS. This is an appellate matter, and I think it was a three-judge court and now they are asking for a decision en banc.

Mr. FLEXNER. I would assume—and I do not know this—that it is the same kind of proceeding as occurred in the Baltic case, that is to say, the Department of Justice is a statutory respondent and is not representing the Maritime Administration.

Mr. KYROS. The Antitrust Division does not represent the Maritime Administration—

Mr. FLEXNER. I don't think so. I think the Civil Division probably represents the Maritime Administration.

Mr. KYROS. Is that kind of split made because your particular division deals more frequently with the Federal Maritime Commission and, therefore, your lawyers are more familiar with the Commission's regulatory laws?

Mr. FLEXNER. The division is a function of the order of delegation from the Attorney General. In other words, it is not a matter of prior experience. It is a matter of regulatory delegation.

Mr. KYROS. When we talked about your proper intervention before the FMC, you explained to us patiently that it was your primary concern to inject competition into that field of economic activity.

Mr. FLEXNER. It was our concern to bring the competitive issues to the attention of the Federal Maritime Commission for that Commission's consideration.

Mr. KYROS. Wouldn't that also obtain in the case of representing the Maritime Administration in the Stuyvesant case?

Mr. FLEXNER. I don't know. I don't know the facts in the case.

Mr. KYROS. Are you aware that your department, the Department of Justice Antitrust Division, was represented at a recent London conference involving the United States and the consulta-

tive shipping groups, so-called, which is a group of western trading nations plus Japan? Are you aware of those talks?

Mr. FLEXNER. Sure.

Mr. KYROS. They were wide ranging talks with Americans providing options to the Europeans, including discussions in regard to documents. I never quite understood what the Department of Justice was doing there. I went there as an observer, but I just kept wondering what the Justice Department was doing there.

Mr. FLEXNER. The Justice Department is participating, as you know, in the interagency task force of the administration on ocean shipping policy and, as a member of that task force, we were part of the delegation to the CSG talks. Our view and our position is, again, to consider the competitive issues in ocean shipping, and that is important to the administration. I think it is important to the President.

Mr. KYROS. So the Justice Department was there because it was part of the interagency task force.

Mr. FLEXNER. That is correct.

Mr. KYROS. There, for the first time, I heard the Justice Department actually propose a plan in substance for a regulatory scheme for liners. Are you aware of that, Mr. Flexner?

Mr. FLEXNER. I am not aware that it is the first time that you heard a plan from the Department of Justice.

Mr. KYROS. You presented analysis before, like in your DOJ report of January 1977, and we have seen your own remarks which have become somewhat the authority for some of the conclusions reached by the President's Task Force on Antitrust, but this was really the first substantive position advanced by Justice that I had seen.

At that time we were sitting there with the foreign shipping companies, one thought that came to my mind, among many others, was that here in the United States we had had, I think, three shipping lines charged with criminal conspiracies under the Shipping Act, but no foreign companies.

Mr. FLEXNER. Are you referring to rebating?

Mr. KYROS. Exactly.

But no foreign company lines have been charged and I was wondering, when we are talking about a competitive merchant marine and fair and equal treatment, what is the reason for that policy?

Mr. FLEXNER. I don't think that reflects a policy, Mr. Kyros. I think you have heard me testify on any number of occasions that I and the Department of Justice believe strongly that whatever policy we have in the United States ought to be a policy that can be applied fairly and in a nondiscriminatory way. It ought to involve laws that can be applied in a nondiscriminatory way, and I am sure that that is now and will be U.S. policy.

Mr. KYROS. I think very highly of all the remarks you made—sometimes I don't agree with everything, but I think of the analysis that goes behind it and I think it is very scholarly. It is, however, very upsetting to see you coming and going from different directions.

Sometimes you seem to indicate—you, Mr. Flexner or other members of the Antitrust Division—that rebating merely reflects a

price-cutting device, that is, it is an economically sensible way of checking the market powers of conferences. I am sure you have seen those words somewhere before.

Mr. FLEXNER. I think what we said, Mr. Kyros, is that it is expectable. That is to say, if you have got a system that creates incentives for overcapacity—and, I think, if not in this committee, certainly in the Senate we have discussed that at some length—there will be tremendous market incentives for the members of those systems to cut prices in order to fill the vessels that are empty.

And what we have indicated is that another alternative to more stringent enforcement is a change in the system that would remove those incentives, if you can find such a change, that is, a system that would align capacity more closely with demand.

And, so, what we have advocated is that careful consideration be given to those kinds of alternatives because, frankly, there will never be a perfect enforcement solution to the problem of rebating where rebating occurs in a situation where those kinds of incentives exist.

Mr. KYROS. There is certainly a great deal of truth in that. On the other hand, you must and should agree that there are trades in the United States where those incentives don't work quite that way and rebating still exists. As I understand, at some time, you said the prohibitions against rebating should be eliminated?

Mr. FLEXNER. It seems to me that serious consideration ought to be given to that possibility.

Mr. KYROS. And I think I saw one administration official indicate that perhaps American companies who rebated should have mitigation applied, if they had to rebate to stay competitive or because other companies were doing it.

Mr. FLEXNER. I don't know specifically what you are referring to. You may have some drafts of papers that have been circulated in the interagency task force but, my view is that we are better off getting to the root causes and, from our perspective, root causes of rebating reside in the conference structure itself and we ought to be considering ways to reduce some of those incentives.

Mr. KYROS. This gives rise to my question about why you are coming the other way. Now, I don't want to blindside you, to use the modern vernacular. It is simply this, if there are these things about rebating, why do you, the Justice Department, go ahead and criminally prosecute American carriers for rebating if it is an area in which there is some economic merit?

Mr. FLEXNER. We will prosecute the cases. We are a law enforcement agency and we will prosecute the cases where we have the evidence to prove that a violation of law has occurred. I can assure you, the Department of Justice has made no policy determination that it would only be appropriate to prosecute U.S.-flag companies.

Mr. KYROS. One of the grounds reported for the veto of the rebating bill was that the executive agencies were negotiating settlement with foreign carriers as to rebating and perhaps we did not need legislation, but rather, would pursue negotiation.

Were you privy, or are you aware of executive agencies that were negotiating with foreign companies prior to the veto of the rebating bill?

Mr. FLEXNER. I am not.

Mr. KYROS. One last question, Don. In light of what you know now, and in the light of your being here at this hearing, and viewing this problem of agencies differing on an issue involving a foreign carrier, do you feel there is a necessity for a rebating bill?

Mr. FLEXNER. Mr. Kyros, we are at the final stages of a very long and difficult interagency process of debate. You know my personal views, and that is that I think we ought to try other solutions before we attempt to strengthen the rebating laws, and obviously, that will be a policy decision made by the President in a fairly short period of time when a decision memorandum reaches him.

My own view is that that is the wrong direction.

Mr. KYROS. Thank you very much.

Thank you, Mr. Chairman.

The CHAIRMAN. Mr. Snyder?

Mr. SNYDER. Thank you, Mr. Chairman.

You indicated that Justice is participating in the Interagency Task Force on Maritime Policy. Are you personally involved in that?

Mr. FLEXNER. I am, yes.

Mr. SNYDER. Is your participation involve policy or just technical advice regarding drafting, or both?

Mr. FLEXNER. No, it is policy.

Mr. SNYDER. I take it that you are familiar with the fact that a couple of years ago the Congress established the National Transportation Policy Study Commission for a 2-year term to look at overall transportation problems and possible solutions to the year 2000. It is made up of six Members of the House, six Members of the Senate, and six public members.

I think I am accurate in saying that there are no members of the Commission with what we might refer to as maritime expertise. I am not saying not on the staff but I mean Commission members.

I am wondering whether or not this task force is working in any way with that Commission, looking toward a unified policy on what direction the deep-draft industry should take or is each operating on its own, completely independently of each other.

Mr. FLEXNER. We have had input from a lot of sources, including foreign governments. Virtually all of the agencies and departments within the government that would be interested and have a specialty or expertise that would be important to this issue have been involved one way or another.

I am personally not familiar with the Commission study that you refer to.

Mr. SNYDER. It is not completed yet. It is in progress.

Mr. FLEXNER. And I am not aware that the members of that Commission have been contacted, and I think it is something that can and should be brought to the attention of the chairman of the task force. I would be happy to do that.

Mr. SNYDER. I would appreciate it if you would. I have inquired of the Director of the National Transportation Policy Study Commission as to whether or not they were aware of the fact that, supposedly, we were going to get, sometime soon, proposals from this interagency task force, to revamp our maritime policy. I don't

know whether that is an accurate statement or not, but that is the feeling that I have had.

It was indicated to me that they were not aware of that and were not able to get any cooperation at all from the administration. I don't know if that is necessarily bad or good or what. I am not passing judgment. But, it strikes me that if, in fact, the Interagency Task Force on Maritime Policy and the administration are going to be making recommendations to Congress as to some perhaps radical or drastic changes in our policy, or some new avenues—maybe those two words, radical and drastic, are not good, but a new approach—that it ought not to fly in the face of recommendations that an arm of the Congress would be simultaneously making.

Mr. FLEXNER. I will certainly pass this on to the interagency task force and let them know of your concern.

Mr. SNYDER. I have no views as to how they ought to be going, only that they ought to be cooperating with, and having input to, each other. I would assume that the Interagency Task Force on Maritime Policy, which I suppose has much more expertise in the subject, ought to be having some input into the National Transportation Policy Study Commission to see that they are not going in opposite directions, if that is possible.

Mr. FLEXNER. I understand.

Mr. SNYDER. Thank you, Mr. Chairman.

The CHAIRMAN. Mr. Flexner, Some members of this committee have recommended abolition of the Federal Maritime Commission. What is your opinion?

Mr. FLEXNER. That is not the Department's position. I think that there are plenty of useful things for the Federal Maritime Commission to do even though the Department generally is of the view that the industry could be, and should be, much more competitive. We have not recommended that the Federal Maritime Commission be abolished.

The CHAIRMAN. What is your personal opinion?

Mr. FLEXNER. That is my personal view.

The CHAIRMAN. And it is also the Department position?

Mr. FLEXNER. It is also the Department's view at this time.

The CHAIRMAN. Thank you very much, Mr. Flexner.

Our next witness is the Chairman of the Federal Maritime Commission, the Honorable Richard Daschbach.

Mr. Daschbach, we will recess for this vote. It is the final passage on H.R. 2439, the budget revision.

[A recess was taken.]

The CHAIRMAN. The committee will come to order.

STATEMENT OF HON. RICHARD J. DASCHBACH, CHAIRMAN, FEDERAL MARITIME COMMISSION, ACCOMPANIED BY BRIEN KEHOE, INTERNATIONAL AFFAIRS OFFICER, AND EDWARD GRUIS, DEPUTY GENERAL COUNSEL

Chairman DASCHBACH. Good afternoon, Mr. Chairman and members of the committee.

I am appearing here today at the request of the committee to testify on the Federal Maritime Commission's recent experience in enforcing our antirebating laws, with particular emphasis upon our

efforts to achieve the compliance of foreign flag carriers with U.S. law.

The past fiscal year has seen progress in some aspects of the Commission's campaign against illegal rebating. We have achieved settlements with 39 shippers and carriers, totaling \$4,683,000, nearly half our annual budget.

Among our recent settlements have been those concluded with Seatrain Lines for \$2.5 million, Zim Israel for \$1 million, and a consortium of Japanese-flag lines for \$2.5 million. The last mentioned case followed lengthy negotiations with the Government of Japan.

The Zim and Japanese settlements represent a major achievement in our attempts to conduct our enforcement program with equal vigor against both U.S.- and foreign-flag carriers. We firmly believe that all carriers, regardless of flag, must adhere to U.S. law if they seek to engage in the U.S. ocean commerce.

We have also amended General Order 7 to insure that neutral self-policing bodies furnish the FMC with valuable information about malpractices conducted by the conference carriers of all flags.

Unfortunately, our efforts under General Order 7 and Public Law 416 have not been enough to create a climate in which our shippers and carriers can compete freely and equitably. The constraints of governing statutes enacted 63 years ago have forced us to seek new legislative initiatives and support from other U.S. Government agencies.

It is with these limitations in mind that we entered into the CSG talks in London in November 1978, hopeful that cooperative diplomatic approaches to problems in our foreign trade would supplement our limited authority under the Shipping Act as it currently exists.

It is difficult to pass final judgment upon the agreed record which evolved from these talks, for it has only been in effect for 3½ months. Nevertheless, the diplomatic initiative developed in London has produced no new documents that have led to the resolution of our settlement claims. The settlements we have achieved on a government-to-government basis, notably with Japan and Israel, were both accomplished prior to the CSG talks.

U.S.-flag carriers meanwhile have pointedly asked the Commission why they are held to different reporting requirements and civil penalty exposure than their foreign competitors. In endeavoring to extend evenhanded treatment to domestic as well as foreign carriers, the Commission has committed substantial amounts of manpower and time during the past year and a half to processing and holding foreign flag operators to the same Shipping Act standards as our domestic liners.

The Commission has experienced delays and frustrations in seeking information from foreign-flag carriers under its section 21 and section 22 authority. Although section 21 of the Shipping Act vests the Commission with power to require any common carrier to produce records, memoranda, or other facts relating to their business, foreign-flag operators have resisted giving such information or have invoked their "blocking statutes as a bar to providing such information. The foreign carriers know very well that they can

continue with "business as usual" while the Commission spends months litigating the enforcement of such orders in court.

Achieving equity in our ocean commerce is difficult enough without the defiance of foreign governments or their carriers. In his memorandum of disapproval of the proposed antirebating bill, H.R. 9518, President Carter emphasized the importance of the CSG talks as a forum to secure foreign cooperation in "the elimination of any possible disparity in enforcement of our antirebating laws against U.S.-flag carriers as opposed to foreign flag operations.

Quite frankly, Mr. Chairman, this is not currently possible. There is disparity in the enforcement of antirebating laws against United States as opposed to foreign-flag carriers, and circumstances dictate that this inequity will continue until we have greater authority to secure production of documents located abroad.

At the present time we cannot compel production of documents needed to substantiate allegations of rebating against foreign carriers as easily as we can compel production of documents held by our own steamship lines. We cannot achieve the same extent of disclosure from foreign-flag carriers as from U.S.-flag operators. We cannot overcome foreign blocking statutes as easily as we can overcome a carrier's legal defenses under our own laws.

The CSG accords and our efforts to secure diplomatic cooperation through the Department of State have neither eliminated, nor even alleviated, this disparity. Other U.S. Government agencies have not been able to assist us in narrowing the gap between what we can get from foreign-flag carriers and U.S.-flag carriers. In the area of enforcement, our statutory mandate to maintain evenhanded regulation in our foreign commerce remains an ideal, not a reality.

The text of the CSG record itself envisages some continued discrepancies in treatment. For example, the agreement pertains only to conference members, not independent carriers. Thus one foreign government has informed the Commission it does not object to direct negotiation with a line under its jurisdiction on the U.S. outbound routes, since there the line is a conference member, but would object to negotiations concerning U.S. inbound transactions where the line operates as an independent.

Further, the scope of offenses covered by the CSG text in no manner covers all infractions of U.S. law. The agreement addresses improper rebating against conference tariffs or actions which border on fraud, such as intentional misweighing, miscubing or misdescription of freight. However, the document would not assist us in obtaining information concerning, for example, destruction of documents, discrimination against U.S. exporters or illicit absorption of freight charges by a carrier.

Having discussed the limitations within the document itself, it may be useful to review its implementation during the brief 3½ month period it has been in effect. Our approach has been to extend the procedures set out in the CSG record to all proceedings initiated after November 17, 1978—the date the document was agreed upon. This is the only means by which the Commission can act without discriminating between foreign carriers on the basis of flag or country of incorporation.

Beginning December 7, 1978, the Commission exchanged correspondence with the Department of State concerning claims and

investigations involving 10 foreign-flag steamship operators, including the Baltic Steamship Co. In six cases, there has been no notable progress. In two others, negotiations have been ongoing for a settlement of past infractions. In the Baltic matter, of course, negotiations for the production of documents have been proceeding for over 9 months and, as you know, the Commission's view is that their current submissions represent inadequate responses to our subpoenas. There has been one instance of a full settlement involving a joint service. The Leif Hoegh/Ned Lloyd Service agreed to pay the Commission's claim for \$40,000 in full in settlement of unlawful payments made to one U.S. shipper.

It may be useful to compare our recent progress with settlements negotiated directly with foreign carriers. As you know, the Commission has negotiated settlements with Zim-Israel for \$1 million and the Japanese-flag carriers for \$2,500,000. Under the terms of those agreements, disclosure was made as to all rebates paid, not only specific instances of which the Commission had evidence.

Further, these settlements provide incentives to prevent malpractices in the future. In the case of Japan, this assurance extends to the government itself. In contrast, the CSG record shows no active efforts to encourage compliance with the law. Moreover, the document is left to the interpretation of each government. Our experience has been that adherence has been uneven and that foreign governments continue to respond to our requests for assistance in greatly varying degrees.

Because illegal competitive practices challenge the very credibility of U.S. regulatory law and our ability to protect the shipping public and our consumers from unfair and deceptive trade practices, we have sought every statutory remedy at our disposal to maintain stability and equity in our foreign commerce.

Section 19 of the Merchant Marine Act, 1920 was specifically designed to combat conditions unfavorable to our foreign commerce. Rebating is clearly a condition unfavorable to our foreign commerce. Other unfair and deceptive trade practices have an equally detrimental effect upon the ability of U.S. and foreign-flag carriers alike to compete in a climate of equity and stability, and our importers, exporters, and ultimately our consumers, suffer adverse consequences as a result.

Our self-policing rules cannot be applied to carriers which do not belong to conferences; the CSG accords represent a laudable sentiment which has produced no results to date. When it became evident that the practices of the Baltic Shipping Co. were disrupting our foreign trade and defying the U.S. regulatory laws which we use as a prerequisite for engaging in our lucrative commerce, section 19 became a logical and obvious remedy.

Although we are anxious to utilize every tool at our disposal, we exercised the utmost restraint in dealing with Baltic's defiance. As you recall, Mr Chairman, I first testified before this committee a year ago in March 1978, regarding allegations of illegal rates and practices by that Soviet steamship line.

Since that time, we have repeatedly extended compliance deadlines in an attempt at comity. Our section 21 orders have been greeted with a frustrating combination of legal challenges, frivolous quarrels, patent disregard, and sporadic deliveries of partial

information. Viewed from even the most objective standpoint, Baltic Shipping has evidenced a consistent pattern of disdain for the U.S. regulatory policy with which we govern our commerce.

Even now, we are exercising great restraint in the implementation of our section 19 rules, and the party to be affected by that order could avoid its penalties by yielding required information to the Commission before the final deadline of April 26. On December 22, 1978, Baltic Shipping Co. requested 60 days in which to produce all documents required by the Commission. The FMC served its section 19 order on February 7, 1979, allowing Baltic an additional 78 days for compliance.

We have learned important but painful lessons since I last appeared before you. As you know, Mr. Chairman, I testified repeatedly to your committee regarding the need for a national maritime policy in which all agencies of the U.S. Government take a unified approach to the needs and problems of our ocean commerce.

At a time when the governments of all major maritime powers have constructed coordinated and integrated approaches to the exercises of their maritime policies, it is imperative that the U.S. Government speak with a single voice. If we cannot all support the regulatory policies that the U.S. Congress has reaffirmed for six decades, we invite confusion, chaos, and even contempt.

It is my clear understanding, Mr. Chairman, that the President expected the CSG talks to produce an agreement under which we would turn to other U.S. Government agencies for diplomatic remedies when we had exhausted all other attempts to enforce U.S. law.

We never contemplated a situation in which, having exhausted all our remedies, we would see those same agencies file briefs in support of foreign-flag carriers to which we were trying to apply the laws of the United States.

On a positive note, the Ocean Shipping Act of 1978, represents the type of additional authority we seek to maintain harmony in our liner shipping trades. We are moving forward under that law to minimize the threat posed by State-controlled carriers who penetrate our trades without market restraints that affect other carriers, including the U.S.-flag merchant marine. We expect the Ocean Shipping Act to stabilize an important facet of our ocean commerce; one law, unfortunately, is simply not enough.

We are also optimistic that the defiance of Baltic Shipping Co. will be satisfactorily resolved. We expect that objective parties will acknowledge that it is untenable for any carrier to place itself beyond the laws of any nation with which it seeks to do business. We are confident that our regulatory authority will prevail and that the need for fair trade in our ocean commerce will be affirmed.

I am personally satisfied with the action we have taken in the Baltic case, and I am optimistic about our efforts to achieve compliance with U.S. law. To have done less would have been an abdication of our responsibilities; I only regret that we did not have the authority and the tools to do more.

Thank you.

The CHAIRMAN. Thank you, Chairman Daschbach. That is a very strong statement.

Chairman DASCHBACH. I might say, Mr. Chairman, that accompanying me today are Mr. Brien Kehoe, International Affairs Officer, and Mr. Ed Gruis, Deputy General Counsel.

The CHAIRMAN. In the example of Baltic, to what do you attribute the many delays in your pursuit of documents?

Chairman DASCHBACH. Baltic's unwillingness to supply the documents.

The CHAIRMAN. Is the procedure in your Agency an ally of Baltic, or some other firm that would want to delay?

Chairman DASCHBACH. I do not believe so. I believe that the requirements of due process entitle Baltic, or any other party to the procedures they have followed. I am satisfied we treated each and every one of their requests for delay in an appropriate fashion.

I should say, at the Commission we have taken a number of steps to reduce overall delay by determining that we shall not give extensions to parties by, at the outset extending the comment period, so the parties really do not have a basis to come in and say, "10 more days, because the days you have given us under the existing rules are not long enough."

We have focused on the clear and present danger, if you will, of the use of the tools of due process to unnecessarily prolong proceedings.

The CHAIRMAN. Do you view the production of documents as critical to the administration of the 1916 act?

Chairman DASCHBACH. Absolutely.

The CHAIRMAN. You attended the United States/CSG meetings in London last November. It contained a framework of cooperation in the production of evidence to the Commission, is that right?

Chairman DASCHBACH. Yes, sir.

The CHAIRMAN. Did you concur in the agreed record?

Chairman DASCHBACH. Yes, I did.

The CHAIRMAN. Do you feel the cooperative regime established to be the principal method by which the FMC obtains necessary documents?

Chairman DASCHBACH. No, I do not. For one thing, the experiences we have had since the adoption of the record are not heartening. In addition to other actions we have taken, this clearly indicates we should go beyond the means of diplomatic resolution.

The CHAIRMAN. Do you and the FMC consider any foreign policy considerations in enforcing the shipping laws against foreign-flag carriers?

Chairman DASCHBACH. Well, clearly we do not ignore foreign policy aspects of what we do. I would, to some degree, make a distinction between enforcement and administration, insofar as it focuses on the decisions we make on section 15 agreements, for example.

However, with respect to enforcement of the letter of the law, I think the State Department certainly does an adequate job of infusing itself into the process, and advising us of the foreign policy implications.

I do not really think that is one of our primary responsibilities, to focus on foreign policy aspects. But it is certainly not a matter that we ignore.

The CHAIRMAN. What agencies of our Government intrude into your enforcement activities?

Chairman DASCHBACH. Well, I am not sure how constrained I am to speak about the Baltic motion to stay. The Department of Justice and the Department of State have intruded in that case.

The CHAIRMAN. Mr. Myers?

Mr. MYERS. I have no questions, Mr. Chairman.

The CHAIRMAN. Mr. Snyder?

Mr. SNYDER. Thank you, Mr. Chairman.

Excuse me for coming in late, but there were folks at the office from home.

Chairman DASCHBACH. My sister lives in Louisville, sir.

Mr. SNYDER. Whereabouts?

Chairman DASCHBACH. I will be happy to furnish for the private record her name and address.

Mr. SNYDER. Mr. Chairman, I think I need that information before I see what questions I want to ask. [Laughter.]

Mr. Chairman, in your statement you say at about the fifth page:

"In the Baltic matter, of course, negotiations for production of documents have been proceeding for over nine months * * *"

Are you with me?

"* * * As you know, the Commission's view is that their current submissions represent inadequate responses to our subpoenas."

I take it from that they have responded with some documents of some kind.

Chairman DASCHBACH. Yes, that is correct.

Mr. SNYDER. How many documents have you requested?

Chairman DASCHBACH. We have not sought a specific number of documents. What we asked for was all of Baltic Shipping Co.'s inbound and outbound bills of lading and manifests and other documents of transactions in and out of the Gulf of Mexico from March of 1977 through March of 1978.

I have no idea how many documents that would total. They have furnished us, I think, in the area of 6,600 documents to date.

Mr. SNYDER. Now, when you refer to the inadequacy of their responses, are you referring to the inadequacies within the 6,600 documents or that there are more documents that they have not submitted? Is what they sent deficient, or are there more you are trying to get?

Chairman DASCHBACH. What they sent was deficient. We sought the bills of lading and the tariff authority showing that the freight collected was correct. It is that latter part that is deficient; various documents related to their cargo movements, because it does not clearly show the tariff authority or from what tariff authority the rate was assessed.

And that link or that key is absent in most of the documents that they have sent to us.

Mr. SNYDER. Don't you have, within FMC, the information upon which to make that determination?

Chairman DASCHBACH. It is possible that we do. However, who knows better than the carrier who assessed the charge against the shipper what portion of its tariff is the basis for the particular charge in the particular transaction? These are transactions which have already occurred for which an exporter, say from Shreveport,

La., was charged \$2,000 to move a certain shipment. Who better than the person who charged him can say, I charged you \$2,000 because page 1 of the tariff shows that is for that particular item; that is what you owe me?

We could theoretically search through the tariffs and perhaps find—

Mr. MYERS. If the gentleman would yield, the questions you are discussing are in the line of approaching the court case. And I ask Mr. Snyder if he would refer to a different line of questioning at this time.

Chairman DASCHBACH. I will be happy to stop. I have been advised by counsel I was getting close.

Mr. MYERS. Discussing those facts at this time I do not think is appropriate.

I thank you.

Mr. SNYDER. On the next page of your statement, you refer to settlements in other cases.

Chairman DASCHBACH. Yes, sir.

Mr. SNYDER. I suppose we can talk about those without this difficulty. With regard to the cases where the parties agreed not to continue rebating, were they not already under that compulsion prior to the settlement?

Mr. GRUIS. Yes, sir.

But let me address myself to the Japanese settlement, please.

Mr. SNYDER. Wait a minute.

So that the specific incentives so far as FMC is concerned is the reporting requirement, is it not?

Mr. GRUIS. Yes, sir.

Mr. SNYDER. And in both of these cases, they have agreed to report?

Mr. GRUIS. They have agreed on some reporting requirements, yes, sir.

Mr. SNYDER. Go ahead.

Mr. GRUIS. One of the aspects, particularly where there have been term payments, there is a provision made in the promissory notes as well as the agreements themselves that in the event any violations are uncovered during the interim of their term payments, then the Commission would have the authority to set aside the agreement and proceed against them for all of their violations.

Mr. SNYDER. That is almost presupposing that there are violations, is it not?

Mr. GRUIS. No, but we will certainly keep monitoring the carriers during the period they are paying these penalties.

Mr. SNYDER. Is time payment of the charges customary in the trade?

Mr. GRUIS. Sir, when you are talking about millions of dollars, this is not an easy capital question for some of these carriers. As a consequence, the payment of penalties has been spread over a period of years.

Mr. SNYDER. Thank you.

Mr. MYERS. Mr. McCloskey?

Mr. MCCLOSKEY. You refer to settlements with Seatrain Lines for \$2.5 million, Zim Israel for \$1 million, and a consortium of Japanese-flag lines for \$2.5 million. May I ask, in making those settle-

ments with the three lines, what was the value to you of the information furnished by the Sea-Land Corp. regarding rebates made to particular shippers?

Chairman DASCHBACH. What was the value in reaching those settlements of the Sea-Land Corp.?

Mr. McCLOSKEY. Yes.

Chairman DASCHBACH. Immeasurable.

Mr. McCLOSKEY. I wonder if you would discuss for a minute the tracking by the Commission of illegal rebating. I recall earlier testimony that the Sea-Land disclosure of all shippers to whom they paid rebates brought to the Commission facts it would not have otherwise obtained.

Chairman DASCHBACH. That is correct.

Mr. McCLOSKEY. Using that list of shippers and going to those shippers, were you not able to find other carriers that paid rebates?

Chairman DASCHBACH. That is correct.

Mr. McCLOSKEY. Now that you have Zim Israel, Seatrain, and the Japanese lines disclosing all shippers to whom they have paid rebates, I assume you may track down other companies and find other evidence that you were not previously able to find.

Chairman DASCHBACH. Well, I cannot say yes or no, because there is a portion of your question which needs to be altered which I would ask Mr. Gruis to respond.

Mr. McCLOSKEY. Please do.

Mr. GRUIS. In one instance, the disclosure that was made was made as one of the terms that this information would be kept confidential within the Commission.

Mr. McCLOSKEY. Did that mean it was not to be used for prosecution?

Mr. GRUIS. No, sir, used by our investigative people for purposes of discovery or pursuing other people; but that information could not be used for purposes of prosecution of those people, that is correct.

Now, maybe you would like me to amplify on that.

Mr. McCLOSKEY. I really would.

In other words, there was a little plea bargaining going on.

Mr. GRUIS. Yes, sir, that is exactly what happened. When you get into plea bargaining, some determination must be made as to the value of the information the people are furnishing, together with penalties, to make sure they would not do it again.

In the Sea-Land matter we had much documentation and assurances that, in the event we encountered separate shippers unwilling to cooperate, we would sue those shippers, which we have done. Sea-Land at that time would back us up with either affidavits or statements or testimony or documentation to help us prove our case.

Now, it has to be contrasted to our settlement with the Japanese, where they did not want to take that extra step. They would assist us insofar as giving us a disclosure satisfactory to the Commission. But they did not want to go that one more step in having them point fingers against people in the event we had to prosecute.

Mr. McCLOSKEY. What has then been the result of the Japanese settlement now they have given you a list of shippers to whom they

have paid rebates? What action will you take with respect to those shippers?

Mr. GRUIS. Basically to outline—not with respect to just the Japanese. We would take that information, and refer it to the Bureau of Enforcement.

Mr. McCLOSKEY. What happens then?

Mr. GRUIS. The Bureau of Enforcement will start pursuing the leads established by that documentation, and either go directly to the shippers and ask for cooperation; or, if they have leads coming from several areas, they would go to the shipper and say, look, we have enough on you. If you will not cooperate, we will either send out a claim on this for a penalty settlement or we could go to court, if you like.

And that has been done in several instances.

Mr. McCLOSKEY. You really do not have a rule of law here at all, but rather your Bureau of Enforcement has the discretion of whether it wants to enforce the laws or not; is that not correct?

Mr. GRUIS. What I am describing is a routine approach for enforcement.

Mr. McCLOSKEY. You are describing that in return for incriminating information against one group of people, you promise the informant that you will not prosecute him or will not use the information furnished to prosecute those other people.

Mr. GRUIS. That is correct.

Mr. McCLOSKEY. Having discovered information that is incriminating against them, you feel then that you can go out and investigate the subject's activities, and if you, by yourself, can develop independent evidence, then you can prosecute.

Mr. GRUIS. That is correct.

Mr. McCLOSKEY. To what extent, with respect to all the people you have thus far prosecuted, has the evidence come from sources other than your own investigation?

Mr. GRUIS. I would say, using our whiplash techniques, which apparently this is, shipper to carrier——

Mr. McCLOSKEY. Do you understand my question, sir?

Mr. GRUIS. Yes, sir.

Mr. McCLOSKEY. What percentage of your prosecutions have resulted from information developed by yourselves, as opposed to information furnished you under a promise not to prosecute?

Mr. GRUIS. I cannot give you the percentage.

When you say prosecutions, do you mean court prosecutions, sir?

Mr. McCLOSKEY. Any kind of prosecution. You have described court prosecution and threat of court prosecution.

Mr. GRUIS. We have two categories. In one instance, we deal with ability to compromise a claim.

Mr. McCLOSKEY. But you threaten prosecution to get them to compromise, do you not?

Mr. GRUIS. Sometimes we do; yes, sir.

Mr. McCLOSKEY. Can you give me a breakdown as to the settlements you are achieving, how many result from your own investigation and how many result from someone else giving you information based on a promise not to prosecute?

Mr. GRUIS. Could I submit that information to you, sir?

Mr. McCLOSKEY. I would be glad to have you submit it for the record.

I am trying to find out what has come to the Commission's attention through the Bureau of Enforcement and what has resulted from disclosure by companies like Seatrain?

My recollection is that the Commission has said, we are unable to discover rebating and to enforce it, what broke this open was the Sea-Land disclosures.

Chairman DASCHBACH. I think you can certainly cite instances where that is not the case.

Mr. McCLOSKEY. If the chairman will cite for me examples of successful prosecutions of rebating prior to the Sea-Land disclosures. I can think of none.

Mr. GRUIS. There was no major prosecution.

Mr. McCLOSKEY. As I recall, the testimony of the Assistant Secretary for Maritime Affairs was that the first time he learned about widespread rebating was 3 hours before he testified on the subject.

Mr. GRUIS. Yes, there was a successful prosecution against Seatrain in 1972.

Mr. McCLOSKEY. Wasn't that brought by the Justice Department, not the Federal Maritime Commission.

Mr. GRUIS. No, sir, it was in the criminal court in New Jersey and referred to the Justice Department because we cannot prosecute criminally.

Mr. McCLOSKEY. Before that, you had no real success record of prosecution by the Commission, isn't that correct?

Mr. GRUIS. That is correct.

Mr. McCLOSKEY. What broke this open then, was the Seatrain case in New Jersey and subsequently the disclosure by Sea-Land which resulted from the promise by the Commission that it would fairly prosecute others or enforce the law equally against them.

What I am trying to find out, what I ask for you to submit for the record, is—What successes has the Commission's Bureau of Enforcement had on its own, of ascertaining evidence of illegal rebating as compared with that evidence that has been broken loose, in effect, by the criminal prosecutions of the Justice Department and the Sea-Land disclosures. If I understand correctly, all of the settlements that have occurred since the Sea-Land disclosure can be traced back to the information Sea-Land furnished to the Commission, either voluntarily or under threat of criminal prosecution.

Mr. GRUIS. That is an incorrect statement, sir.

Mr. McCLOSKEY. I would like you to supply that for the record, the additional information that your own Bureau of Enforcement has obtained on its own hook. Is that a fair question?

Mr. GRUIS. That is a fair question, sir.

[The following was submitted:]

FEDERAL MARITIME COMMISSION,
OFFICE OF THE CHAIRMAN,
Washington, D.C., April 20, 1979.

HON. JOHN M. MURPHY,
Chairman, Committee on Merchant Marine and Fisheries,
House of Representatives, Washington, D.C.

DEAR CHAIRMAN MURPHY: During my recent appearance before your Subcommittee on Merchant Marine, the Commission was requested to submit a response to

several inquiries by Congressmen Snyder and McCloskey regarding the FMC's anti-rebating activities. In reviewing the transcript of this hearing, some clarification of the Commission's testimony appears desirable to ensure that there is no misunderstanding or confusion about the procedures used by the Commission in carrying out its enforcement activities.

Reference is made to pages 53-54 in the transcript where Congressman McCloskey alludes to the disclosures made by Zim Israel and Seatrain and the Japanese Lines as including the identification or listing of specific shippers to which they, respectively, paid rebates. In negotiating settlements with these and other carriers, the extent of disclosure made by the different carriers varied considerable. In some instances, the disclosure did not include, by name and amount, all shippers receiving rebates from the carriers, e.g. Zim, Japanese, Seatrain and U.S. Lines. Even in the case of Sea-Land's extensive disclosure, it did not, and indicated it could not, furnish the names of all shippers receiving rebates. Zim, Cunard-Brockelbank, Hoegh and Nedlloyd were limited by their "blocking statutes" from making certain kinds of disclosure. Such foreign laws, of course, restrict the Commission's ability to obtain full information about shipments moving in our country's foreign commerce, and for this reason, the Commission has fully supported and urged enactment of a rebate law like H.R. 9518 so that all carriers, domestic and foreign-flag, are treated alike under our shipping laws.

Cunard-Brockelbank, Hoegh, Nedlloyd and D'Amico Line decided not to make any disclosures to the Commission. These carriers therefore paid proportionately higher penalties and the immunity they received from further civil penalty prosecution was limited by the settlement agreement to only those shippers named in the Commission's claim. In other words, for any other shippers receiving rebates from these carriers that may be discovered in the future, the Commission could again proceed against such carriers by claim or prosecution.

The disclosure by Zim, the Japanese and some other foreign-flag carriers did not include shipper identification of the type given by Sea-Land, or to a more limited extent by Seatrain. Moreover, the terms of settlement with these carriers provided that their disclosures would be held confidential and protected to the extent permitted by law. These disclosures, as Congressman McCloskey was advised on page 55 of the transcript, could be used by the Commission in its investigation of other Shipping Act violators, but neither the information furnished by the disclosure nor carrier assistance would be available for use in prosecuting or asserting civil penalty claims against such violators. One of these disclosures, however, clearly pointed the way for Commission investigators to determine the identity of shippers receiving rebates from the carrier.

Congressman McCloskey also requested at pages 56 and 58 of the transcript, a breakdown as to settlements the Commission was achieving and that were accomplished by its own investigation, and that have not relied, or been based, upon "criminal prosecution of the Justice Department and the Sea-Land disclosures." A list of court proceedings and claims that have been settled by the Commission, exclusive of information furnished by Sea-Land or resulting from Justice Department criminal prosecutions is attached as Appendix A. These cases or settlements developed by the Commission represent about 36.9 percent of all the rebate settlements and court cases handled by the Commission during the past two years.

The remaining inquiry made by Congressmen Snyder and McCloskey dealt with the Commission's experience in its prior cases for enforcement of section 21 orders to obtain information from carriers (Transcript, pp. 57, 58 and 66). Reference is made on page 57 of the transcript to the rebate case against Seatrain Lines, Inc., *U.S. v. Seatrain Lines Inc.*, Crim. No. 129-73, D.N.J., which resulted from the Commission's initial investigation of the carrier under section 21 of the Shipping Act, 1916. The original section 21 order was served on Seatrain on September 21, 1970. The Commission applied to the U.S. District Court in New Jersey, pursuant to section 29 of the Act, for enforcement of the order on November 27, 1970. An application for enforcement and sanctions for violating the Court's mandate directing compliance with the section 21 order was filed on May 17, 1971. The additional time given to Seatrain for compliance was not met, and the Commission again applied to the Court for enforcement and sanctions on July 9, 1971. On December 14, 1971, the Commission through the Justice Department initiated actions for civil and criminal contempt for failure to comply with the Court order directing, enforcement of the section 21 order. The case ultimately resulted in a mistrial, but the court suggested that it might be more appropriate for a criminal proceeding to be initiated charging Seatrain under the then misdemeanor provision of section 16, prohibiting the payment of rebates. In an information filed on March 1, 1973, Seatrain was charged under 674 counts with violating section 16. After a series of motions and pretrial hearings, Seatrain pleaded guilty to 100 counts on November

11, 1975. In July 1976—more than five years after the original section 21 order and after spending thousands of dollars and manpower hours in pursuing this case, the Court imposed a fine of \$57,000 on Seatrain.

This experience with section 21, together with a similar experience the Commission has had in seeking enforcement of two Fact Finding 9 subpoenas, which have been pending in California's federal courts for the past 15 months, *U.S. v. Paper Fibres Int'l*, C.D.Cal. Civ. No. 78-2294-WPG; *Ryoichi Takazato, et al. v. FMC*, N.D. Cal. Civ. No. C77-1575-WHO, illustrates clearly the difficulties confronting the Commission in having "reporting requirements" enforced by the Courts.

I hope that this is fully responsive to your Committee's inquiries in this area. Please let me know if we can be of further assistance.

Sincerely,

RICHARD J. DASCHBACH,
Chairman.

Mr. McCLOSKEY. This is not to be critical of the law or your enforcement, but to determine what role the Department of Justice has played in this and what part the Commission has played.

Mr. MYERS. We are going to move on if it is OK, and we will come back to you in a few minutes.

Mr. Donnelly?

Mr. Donnelly. No questions.

Mr. MYERS. Any questions by counsel?

Mr. KYROS. You referred to the settlement with the Japanese shipping company, Mr. Daschbach. And would you tell us succinctly the specific role of the State Department in the Japanese line settlement?

Chairman DASCHBACH. They were helpful to us in two respects: in January of 1978, the Director of the Office of Maritime Affairs accompanied a number of officials from the Commission and introduced us to some officials from the ministry of transport from the Government of Japan. That introduction definitely provided the opening of negotiations with the Government of Japan.

Mr. KYROS. Was that in Tokyo?

Chairman DASCHBACH. San Francisco.

Mr. KYROS. Why did he have to introduce you? Could you have gone and met them yourself?

Chairman DASCHBACH. I had been at the Commission for, I believe, 4 months at that time. The individual ministry of transport officials I had not met before. And I thought it would be valuable. The Director knew those people well.

Mr. KYROS. In addition to introducing you, what did he do, Mr. Daschbach?

Chairman DASCHBACH. Nothing—excuse me. There is a second instance.

At one point in the negotiations, the Government of Japan suggested that the documents which were made available would be examined by some individuals in Japan outside of the shipping industry, one of whom was a former ambassador to the United States of America. And in order to encourage him to participate and to assist his Government and ours in this, we asked former Senator and now Ambassador Mike Mansfield to contact this gentleman to see if he could be helpful to us. So Ambassador Mansfield and members of the U.S. Embassy staff in Tokyo were of great assistance to us.

Mr. KYROS. So that is a specific role that State played—introducing you to the Japanese negotiators.

Chairman DASCHBACH. Yes.

Mr. KYROS. Why did you request State's assistance?

Chairman DASCHBACH. Well, for one thing, the mandate from this Committee. It made good sense that, if they could be helpful to us, we would use them.

Mr. KYROS. What input did the State Department have in drafting the final settlement document?

Chairman DASCHBACH. Absolutely none. I do not believe that is an appropriate role for the State Department to play.

Mr. KYROS. Did State ever confer with Justice?

Chairman DASCHBACH. I do not know.

Mr. KYROS. Now, did the Japanese settlement provide for a one-time payment or a stretched out payment?

Chairman DASCHBACH. For some of the carriers, it was a lump sum payment. For others, it was a stretched out payment.

Mr. KYROS. What is the largest amount that is stretched out, that is, the principal amount that is subject to time payment?

Chairman DASCHBACH. K Line, I believe.

Mr. KYROS. Roughly, approximately what?

Chairman DASCHBACH. I am sorry?

Mr. KYROS. K Lines' liability is approximately what amount—approximately?

Chairman DASCHBACH. K Line had promised to pay \$484,000. Their final payment is due in 1981.

Mr. KYROS. You recall during the rebating hearings, we discussed the settlement that was imposed and negotiated with Sea-Land. Regarding that settlement, there were many conditions about providing documents, not rebating; in the event that any violation of the settlement terms occurred, the FMC was remitted to all sanctions it had.

Do you have all these provisions in the Japanese settlement?

Chairman DASCHBACH. Not all of them. None of our settlement agreements are boiler plated or slavishly copied after others. They are tailored to the negotiation and settlement reached between the parties.

Mr. KYROS. Did State or anyone else at that time discuss non-prosecution of the Japanese lines under the general conspiracy statutes?

Chairman DASCHBACH. No.

As I recall, however, there was a point in our discussions at which time I pledged, as Chairman of the Commission, that if a criminal prosecution appeared to be forthcoming, that I would certainly approach the appropriate U.S. Government officials and plead that the Japanese carriers had made a good faith civil settlement with us and that they withhold criminal prosecution.

Mr. KYROS. Did anyone make a similar plea on behalf of Sea-train?

Chairman DASCHBACH. I do not know.

Mr. KYROS. Does that seem like unequal treatment under the laws to you?

Mr. GRUIS. There was a proviso in the Sea-Land agreement that said that the Commission would not refer violations prior to 1972 to the Department of Justice for criminal prosecution. And I believe in other instances, we had also indicated we would endeavor not to

have the Department of Justice proceed after the people criminally.

Mr. KYROS. There was an indictment brought against Sea-Land, same thing with Seatrain and U. S. Lines.

If a shipping line has been rebating, as I recall the definitions as they were explained to us, automatically you have two people doing something illegally.

What I am saying to you or asking you, does this not pose an enormous moral problem: We can go against American lines but cannot go criminally against foreign shipping lines?

Mr. GRUIS. I do not think the Chairman testified on that.

Mr. KYROS. Is there one case that has occurred where a foreign company has been indicted?

Mr. GRUIS. The three cases you mentioned were settled. They were not litigated.

Mr. KYROS. In all three cases, the companies pleaded——

Mr. GRUIS. That is what I meant. They did not go to trial.

Mr. KYROS. The companies had to plead guilty.

Now, Mr. Daschbach, you were present, I understand from your testimony, at the US/CSG meeting.

Chairman DASCHBACH. Yes, sir.

Mr. KYROS. You say you were there when the Agreed Record, which was a summary in essence of a central part of the meeting, was committed to writing.

Chairman DASCHBACH. That is correct.

Mr. KYROS. And according to State Department officials' views—I do not want it mistaken, Mr. Atwood will state this position more accurately than I—it is a singular step forward.

Chairman DASCHBACH. You are indicating they believe that.

Mr. KYROS. That the State Department feels that way, yes.

Chairman DASCHBACH. Fine.

Mr. KYROS. Since that time, there certainly have been rumors and discussions about the antitrust grand jury proceedings going on here in Washington, D.C.

Chairman DASCHBACH. I only know what I read in the newspapers about that.

Mr. KYROS. I think you were present when discussions occurred about extraterritorial use of our antitrust laws. What effect will it have on the era of negotiation developed by the State Department if such prosecutions really occur against foreign shipping companies?

Chairman DASCHBACH. I do not feel that I am qualified to make any comment on what antitrust prosecution would do to our foreign relations.

Mr. KYROS. Do you view section 19 of the 1920 act as a more efficient tool than the other tools available to you at the FMC in attempts to do something in international shipping, to use some sort of sanction to obtain documents?

Chairman DASCHBACH. I would have to say yes, because if you examine the track record of section 19, it works, or has worked in the past.

Mr. KYROS. Thank you, Mr. Chairman.

Mr. MYERS. Mr. Snyder, round two.

Mr. SNYDER. When did you promulgate the rule under section 19?

Chairman DASCHBACH. February 7, 1979.

Mr. SNYDER. Roughly a month ago?

Chairman DASCHBACH. Yes, sir.

Mr. SNYDER. Prior to the promulgation of that rule, how did you normally proceed in similar, but not this cases?

Chairman DASCHBACH. Since I have been at the Commission, we have not had a similar case.

Mr. SNYDER. No violations of section 21?

Chairman DASCHBACH. Oh, I am sorry, I misunderstood your question. I thought you meant with respect to the investigations.

Mr. SNYDER. You have had violations of section 21, and you are attempting in the *Baltic* case to force compliance with section 21.

Now, I assume that prior to the rule that was published on February 7, you attempted to enforce section 21 against other carriers.

Chairman DASCHBACH. I am a bit concerned that to respond to that question may bump heads with the same difficulty that Chairman Myers raised.

Mr. SNYDER. If you think so, I will not pursue it.

I am not asking you about this case: I am asking you about others, and how you proceeded there. As I understand the *Baltic* case, the issue is whether or not your new rule is valued. I am not asking you any question about your new rule. I want to know what you did before you had that rule.

If your counsel tells you that this is an issue in this case, I will certainly accede to his opinion. I do not want to affect your case. But I do not see how it is.

Chairman DASCHBACH. I think the only case at the Commission since I have been here which is similar to section 21, and that is with respect to enforcement of subpoenas which the Commission issued under a factfinding order known as Fact Finding No. 9. Two shippers alleged that the subpoenas were not lawful. And we attempted to enforce them in the same manner that we would have the option of enforcing section 21 orders.

Mr. SNYDER. That is what I want to know. What were your options for enforcing section 21 orders prior to the publishing of the rule at issue in the *Baltic* case?

Chairman DASCHBACH. Under the statute, there is a penalty provision of section 21 of \$100 a day for violation of section 21. First a court has to find such a violation.

Mr. SNYDER. Then one of your options is to go to court.

Chairman DASCHBACH. Yes, sir.

Mr. SNYDER. Now you have another one, have you not?

Chairman DASCHBACH. Well, we could go to court to have the order enforced, or we could—

Mr. SNYDER. Let me back up and see. Maybe I am wrong.

Prior to February 7—

Chairman DASCHBACH. Yes, sir.

Mr. SNYDER. Did you not have two options: one to attempt to negotiate with the assistance of the State Department, or, two, to go to court?

Chairman DASCHBACH. Yes, we did. Now, the latter option we attempted.

Mr. SNYDER. You attempted?

Chairman DASCHBACH. In seeking a diplomatic resolution.

Mr. SNYDER. In Baltic?

Chairman DASCHBACH. Yes, sir.

Mr. SNYDER. When did you call on the State Department?

Chairman DASCHBACH. On November 29 we sent them a letter.

Mr. SNYDER. When did you make a determination that there was a violation of section 21?

Chairman DASCHBACH. My counsel is getting nervous.

Mr. SNYDER. OK. I guess he probably has cause to.

I have no further questions.

Mr. MYERS. The Chair thanks the gentleman.

Mr. McCloskey?

Mr. McCLOSKEY. Mr. Daschbach, I can recall in those days when you were first confirmed a promise that you made to this committee and that, unlike your predecessor who had gone to Leningrad, you felt that the Chairman of the Federal Maritime Commission should limit his duties to presiding over the Commission.

Do you recall that statement?

Chairman DASCHBACH. Well, if you recall it I accept it as true.

Mr. McCLOSKEY. My recollection is somewhat dim—

Chairman DASCHBACH. I am sorry.

I certainly do recall that I indicated that I did not think it was the role of the Federal Maritime Commission or its Chairman to negotiate agreements with foreign governments, or government-to-government.

Mr. McCLOSKEY. That was my impression. I remember that at the time the State Department was highly incensed that the Chairman of the Federal Maritime Commission was getting into the negotiation business. In my recollection, I did not know whether they imposed that as a condition of appointing you to this high position.

Chairman DASCHBACH. Not at all.

I am not sure whether they preferred to have me here or as Maritime counsel to the U.S. Senate.

Mr. McCLOSKEY. I take it that is a painful lesson. In order for you to conduct your job you would have to negotiate with foreign governments such as during the London meeting.

Chairman DASCHBACH. I would not characterize the London meeting as a negotiation with foreign governments.

Mr. McCLOSKEY. What was its purpose?

Chairman DASCHBACH. I am referring to negotiations on the part of the Commission.

Mr. McCLOSKEY. But you were talking with foreign government representatives, were you not?

Chairman DASCHBACH. Yes, sir.

Mr. McCLOSKEY. And you were talking about a subject calculated to improve the shipping prospects for U.S. shipping companies, were you not?

Chairman DASCHBACH. Yes, sir.

Mr. McCLOSKEY. But it was not a negotiation?

Chairman DASCHBACH. Well, it was never contemplated that an agreement between governments would result therefrom.

First of all, it was an invitation by CSG governments to exchange views, but no ultimate settlement or no agreement between the governments was ever reached.

Mr. McCLOSKEY. Well, in reading your testimony today and comparing it with your testimony of last August 10 before this committee, you testified today that you have learned—I want to put it in your language precisely—painful lessons——

Chairman DASCHBACH. Yes, sir.

Mr. McCLOSKEY. Is one of those lessons that, in order to do your job, you must negotiate with representatives of foreign governments?

Chairman DASCHBACH. No, I do not find that to be painful.

I also inserted in my text the words, "We have all learned important but painful lessons."

Mr. McCLOSKEY. Well, the most painful of the lessons is that the U.S. Government should speak with one voice in shipping matters, am I correct?

Chairman DASCHBACH. I would say that is the most desirable goal, and it is most painful to me that that is not a fact today.

Mr. McCLOSKEY. On page 8 of your statement, you say, "As you know, Mr. Chairman, I testified repeatedly to your committee regarding the need for a national maritime policy in which all agencies of the U.S. Government take a unified approach to the needs and problems of our ocean commerce."

And I quote further, "* * * it is imperative that the U.S. Government speak with a single voice."

Now, in a litigation matter where the Federal Maritime Commission speaks with one voice and the State and Justice Departments allege that the action taken by the Commission is unprecedented and is beyond its power, it is clear we have an obligation to change the laws so that does not occur. As I understand the thrust of your testimony, is that not correct?

Chairman DASCHBACH. Would you be nervous if I said yes? [Laughter.]

I would say yes.

Mr. McCLOSKEY. Let the record show your counsel shook his head and gave you permission to make that answer.

In your testimony last August, Mr. Corrado, the chief counsel of the committee, asked you this question:

Mr. Daschbach, I would like to get back to your statement about the revision of the shipping laws coming under your jurisdiction. Did I understand you to say that in the event the interagency task force report is not forthcoming by the end of this year, you will send to this Committee your package?

Your response to that point was:

Well, I would just like to repeat that we will send the package to the Committee.

Mr. CORRADO. With or without them—"them" meaning the interagency task force report?

Mr. DASCHBACH. Well, I do not want to get our agency kicked off the task force by virtue of a full response to your question.

I think, frankly, if I were to say yes, with or without, it occurs to me that the position might be taken that, "Well, you fellows might as well leave now, because you do not intend to follow the mandate, if you will, of the task force." The task force is not under our control, for one thing——

Mr. CORRADO. That is one of the things that worries me. We have the Justice Department, and the Treasury Department, and the State Department, and OMB, and none of them are friends of the Merchant Marine.

Mr. DASCHBACH. Well, I hope that the great weigher of facts will see it in the public interest.

Who is the great weigher of facts you were referring to?

Chairman DASCHBACH. The President of the United States.

Mr. McCLOSKEY. Let me ask again the question Mr. Corrado asked you 11 months ago: Will you send us your legislative revisions independent of whether or not the interagency task force does or does not send them?

Chairman DASCHBACH. Yes.

Mr. McCLOSKEY. When?

Chairman DASCHBACH. As soon as they are prepared.

Mr. McCLOSKEY. When will that be, sir?

Chairman DASCHBACH. I would hope within 6 weeks.

Mr. McCLOSKEY. No further questions.

Mr. KYROS. Mr. Daschbach, just a few questions, because the day is closing.

With regard to the orders in these proceedings that you submitted to the Baltic Steamship Co., what, if anything, did the State Department do prior to December 4, 1978—that is, on December 4, 1978, you made a request of the Department of State to assist you in obtaining documents, generally, from Baltic. Prior to that time, what action did you have with State with regard to the production of documents?

Chairman DASCHBACH. None.

Mr. KYROS. Had you called on State or talked to them informally?

Chairman DASCHBACH. I did not. I do not know whether Mr. Kehoe wants to or did, and has anything to say about that.

Mr. KYROS. We have the testimony of Mr. Richard Bank from the State Department that he is in constant touch with your agency concerning the production of documents.

So, the document proceeding, the document request began getting exacerbated and intense back in the summertime; is that correct?

Chairman DASCHBACH. That is correct.

Mr. KYROS. And did you have any relations with the State Department about documents, informally or formally, about that time?

Chairman DASCHBACH. No.

Mr. KYROS. During the discussion prior to your order of January 27, did the Department of State discuss with you any possible action they might take?

Chairman DASCHBACH. No, they did not—Mr. Kyros, could you explain more clearly what you mean by that?

Mr. KYROS. What I mean is, on January 27 you issued some kind of an order in the *Baltic* case.

Chairman DASCHBACH. I think on January 27 we issued an order finding Baltic in default of a section 21 order.

Mr. KYROS. January 27 you issued this order finding them in default.

Now, prior to that time, did you discuss the matter with State?

Chairman DASCHBACH. Yes, on December—November 29, we sent a letter to the Department of State asking them to use diplomatic resources to obtain for us the documents.

Mr. KYROS. Now, did the State Department set up a meeting with Soviet officials at some point?

Chairman DASCHBACH. Yes.

Mr. KYROS. Did members of your staff—

Chairman DASCHBACH. Yes, Mr. Kehoe attended that meeting.

Mr. KYROS. Was that taken into consideration in issuing the orders that you did?

Chairman DASCHBACH. Yes; it was.

Mr. KYROS. Has the State Department consulted with the Federal Maritime Commission subsequent to the case that was brought before the court some time in February? Did the State Department consult with you afterwards?

Chairman DASCHBACH. The rule was served on February 7. The motion for stay was filed on February 13.

Now, are you asking, did the Department of State contact us after February 7?

Mr. KYROS. Yes.

Chairman DASCHBACH. No.

Mr. KYROS. No discussions with you about possible negotiating—continuing negotiation of the matter?

Chairman DASCHBACH. Excuse me. I am sorry. Could you repeat the question?

Mr. KYROS. Is it an ongoing method between you and the State Department to discuss possible negotiation of this or any other matter regarding the production of documents? Do you have a method of operation between State and you? We were given to understand this by the testimony of Mr. Richard Bank.

Chairman DASCHBACH. Well, Mr. Kehoe and Mr. Bank are in constant communication. And Mr. Kehoe relates to me the substance of these conversations.

With respect to specific—I do not think you are seeking information with respect to the opinion of either Mr. Bank nor Mr. Kehoe as to whether we are approaching this wisely or whether we should be more diplomatic and give these fellows another year or two. I do not think that is the sort of reporting that you are seeking or transaction that you are seeking.

With respect to any formal communication, the only—we saved our rule on the 7th of February—I should go back one step. When the rule was proposed, the Department of State did comment on the proposed rule. That was a formal step taken by the Department.

Mr. KYROS. I understand that. And around January 22, they commented on the rule.

Apart from that formal context of rulemaking and formal action before the appellate court, does State discuss with you, as we have been told, on an ongoing basis, consulting all the time, about the production of documents from a foreign country?

Chairman DASCHBACH. I think any such—certain conversations of that nature could be ex parte, particularly in a matter such as this. So I am certain Mr. Kehoe would not engage in any such conduct.

Mr. KYROS. Then your answer would be you do not consult on a continuing basis, period?

Chairman DASCHBACH. The Commission clearly follows section 19. Commission orders under section 19 require that we notify the Department of State of a finding of—

Mr. KYROS. Excuse me, sir, putting section 19 to one side, I am trying to develop a perception that since you attended the US/CSG proceedings, the State Department and FMC had embarked on a new era of negotiation on a consultative basis between themselves and foreign nations.

Chairman DASCHBACH. Following the commencement of that new era—those are not my words—we did dispatch a series of letters to the Department of State in an attempt to utilize the great services that they had offered to us. And we sent letters in early December to the Department. I think we sent either eight or nine.

We have—since that time, we have sent 10 altogether requesting that they provide through their diplomatic skills and expertise a resource that we had not been able to utilize and to achieve results we had not been able to bring.

Mr. KYROS. Mr. Chairman, if one reads the agreed record, particularly the relevant part of it—and it is included in the report as part of Mr. Atwood's testimony—we note the CSG governments propose that the U.S. Government would offer consultation with foreign governments before it would publish its rules and regulations for commerce. In other words, the CSG is asking they be advised before the U.S. shipping companies are advised.

Would you care to comment on that?

Specifically it says here—

Chairman DASCHBACH. What subnumber of the agreed record is that, Mr. Kyros?

Mr. KYROS. Subnumber (d). It appears on page 4 of the supplement to Mr. Atwood's testimony.

With respect to enforcement matters, the FMC currently provides notice to foreign governments merely on an information basis. In response to CSG concerns, the FMC representatives pledged, to the extent legally possible, to grant at least a 30-day period to CSG governments to allow for consultations and, where appropriate, consideration of—

Chairman DASCHBACH. Yes, I have it.

Mr. KYROS. All right.

Now, what I would like to ask you is, What kind of foreign policy pressure would be placed on the FMC under those circumstances? Do you understand that that is what that meant?

Chairman DASCHBACH. No, I did not take it as such.

Mr. KYROS. What did you believe it meant?

Chairman DASCHBACH. My perception of it, that we would extend the diplomatic courtesy to the parent nation of a carrier against whom we were contemplating an enforcement action, that we would extend the courtesy of a 30-day notice to that government that we were on the threshold of pursuing one of its corporate citizens.

Mr. KYROS. Are American shipping companies accorded the same diplomatic courtesy?

Chairman DASCHBACH. They do not need a diplomat.

Mr. KYROS. Do they get 30 days' notice?

Chairman DASCHBACH. I think it is fair to say if you examine the record of all or any of our enforcement actions, that considerably more than 30 days notice—I am not sure to whom you would give the 30 days notice, a state or what.

Mr. KYROS. Consultations and, where appropriate, consideration of alternative solutions, that is an alternative to what? An alternative to enforcement under the Shipping Act, apparently.

Chairman DASCHBACH. Alternative to the solution that we might have had at the outset of the 30-day period.

Mr. KYROS. That is right, the proposed FMC enforcement actions.

Chairman DASCHBACH. That is right.

I believe, in all candor, this is an example of what I testified to, that the law is not equal.

Mr. KYROS. No further questions. Thank you, Mr. Chairman.

The CHAIRMAN. Any further questions?

[No response.]

The CHAIRMAN. Thank you, Mr. Daschbach.

Chairman DASCHBACH. Thank you, sir.

The CHAIRMAN. The next witness is Mr. James Atwood, Deputy Assistant Secretary for Transportation Affairs, Department of State.

Mr. Atwood, you can proceed.

STATEMENT OF JAMES ATWOOD, DEPUTY ASSISTANT SECRETARY FOR TRANSPORTATION AFFAIRS, DEPARTMENT OF STATE, ACCOMPANIED BY STUART E. BENSON OF THE OFFICE OF THE LEGAL ADVISER

Mr. ATWOOD. Mr. Chairman, I am James R. Atwood, Deputy Assistant Secretary for Transportation Affairs, Department of State. Accompanying me is Stuart E. Benson of the Office of the Legal Adviser.

We have been asked to appear today on behalf of the Department of State regarding the role of our Department in relation to the responsibilities of the Federal Maritime Commission to regulate common carriers by water in the foreign commerce of the United States. The committee has asked that we focus on the need for the Commission to secure documents and other information relating to pricing practices of foreign-flag carriers.

My colleague, Richard K. Bank, testified before this subcommittee on September 27, 1978, on this and related subjects, and there is no reason to repeat the points he made at that time. Rather, I would like to focus on some of the important developments over the last 5 months, developments which have on the whole been very positive.

As the committee is aware, the most significant recent development was the November meeting in London between representatives of the United States and the 13 nations of the Consultative Shipping Group—CSG.

I served as chairman of the U.S. delegation, which included the Chairman and Vice Chairman of the Federal Maritime Commission and three high-level staff members of this committee. An important topic at the London talks was the need for foreign governments to cooperate with the FMC in its enforcement efforts against rebating and other malpractices. On the eve of those talks, Presi-

dent Carter had issued his memorandum of disapproval of the proposed antirebating bill—H.R. 9518. The President in that memorandum had called attention to the upcoming diplomatic talks and had emphasized the need to secure cooperation from foreign countries that would permit effective FMC enforcement and, in particular, the elimination of any possible disparity in enforcement of our antirebating laws against U.S.-flag carriers as opposed to foreign-flag operations.

The London talks were, in my judgment, a successful step in this regard. The agreed record of the talks, which is attached to my prepared testimony and which I request be included in the subcommittee record, lays out a framework for cooperation in the production of evidence to the Commission in malpractice enforcement cases. The critical paragraph from the agreed record is as follows, and I quote:

The U.S. side presented its serious concern regarding the enforcement of U.S. law in the area of rebating and other malpractices. Attention was, in particular, drawn to the President of the United States' recent memorandum of disapproval of H.R. 9518 (the antirebating bill). The President had asked the Federal Maritime Commission to step up its enforcement efforts, and to seek the assistance of the Department of State in obtaining any necessary cooperation from foreign governments. The CSG welcomed the President's recognition that both the substance of U.S. law on these practices and the procedures for enforcement should take account of the international dimension of shipping and the significance he had attached to the present talks. CSG governments reiterated their dislike and disapproval of these activities—including hidden rebates from conference rates—identified by them at the September working group to constitute 'malpractices.' In relation to such 'malpractices,' CSG governments indicated that, where the FMC is investigating a CSG conference line for suspected illegal rebating within U.S. jurisdiction and first, had exhausted the possibilities for obtaining evidence from within the U.S. or on a voluntary basis, and second, could specify what kinds of further evidence it needed from within a CSG country, the CSG country concerned would undertake as an act of comity to seek the cooperation of and encourage the carrier to provide the necessary evidence to allow a settlement to be reached. It has been suggested that in some cases information in summary form might be drawn up by independent mutually agreed upon accountants, to meet the requirements of a satisfactory settlement, in accordance with the interests of both governments. In cases where production of evidence on such a cooperative basis proved ineffective, the U.S. side stated its view that the relevant CSG government should grant waivers (or abstain from prohibitions as the case may be) for the production of evidence, and the CSG side agreed that the individual government(s) concerned would, of course, be prepared to discuss with the U.S. and to consider this.

On a related point, the CSG governments also indicated their interest in measures to prevent future malpractices in conference trades with the United States. Where hidden rebates were shown to be prevalent, the CSG countries stated that "They would be prepared to discuss the matter with the CSG lines concerned with a view to establishing the principal reasons for the prevalence of malpractices, and devising possible solutions to be reviewed with the U.S. authorities."

Now, how important as a practical matter will the US/CSG arrangement prove to be in FMC enforcement actions? Words are nice, but will the arrangement in fact work? It is too early to be definitive, but early indications are that the spirit of cooperation that prevailed in London will yield important assistance to the Commission in its enforcement efforts. In this regard, I must disagree with Chairman Daschbach's description and assessment of the record.

First, on November 7, 1978, just a week before the London talks, the Commission announced a \$2.5 million settlement of malpractice claims against various Japanese lines. Japan, of course, is an important CSG country. That settlement had been negotiated by the Commission, with help from the Department of State, prior to the London talks, but it demonstrates how the methodology set forth in the agreed record can yield concrete results.

Second, in December the Commission asked the State Department's assistance in seeking settlement of five cases of alleged rebating by foreign-flag carriers. We were requested to obtain the cooperation of the governments involved in permitting and authorizing the carriers to make a full documentary disclosure and report of rebating practices in U.S. foreign commerce. The Commission had been working on those cases for some time—in two instances, for several years.

Within 3 days of receipt of the FMC's request for assistance in these cases, the State Department's Office of Maritime Affairs met with representatives of the embassies involved. Several followup calls were made to each. Exactly a month later, the embassies of The Netherlands and Norway informed us that Ned-Lloyd Lijnen and Leif Hoegh and Co. had agreed to settle the claim against them by paying the full penalty of \$40,000. A representative of the Embassy of Norway wrote that "The Norwegian authorities support the 'agreed record' and consider the common efforts against malpractices in the U.S.—as well as other liner trades—to be of the greatest importance for the reestablishment of orderly and healthy conditions in these trades." In the other cases, we believe that the Department's efforts have contributed progress toward settlements. Negotiations in these cases are continuing, principally between the Commission staff and counsel for the companies involved. We are participating in discussions at the intergovernmental level to the extent requested by the Commission.

Of course, in any case where cooperation and diplomatic efforts do not secure settlement of the matter, the Commission remains free to pursue the remedies available to it under U.S. law; the US/CSG talks place no restraints on the Commission in this regard.

What of enforcement actions against lines from non-CSG countries? We hope that the CSG arrangements will prove acceptable to other countries as well, and this has proven to be so in two post-November cases against non-CSG lines in which the Commission has sought our assistance. One of these cases is the *Baltic Steamship Co.* case, involving a Soviet-flag carrier, about which the committee has expressed special interest.

The *Baltic* case dates from April of last year, when the Commission issued two section 21 subpoenas to investigate Baltic's rates and practices in various respects. Baltic's initial responses were, in the Commission's view, inadequate. In a letter which the Department received on December 4, 1978, the Commission asked the Department to seek resolution of the dispute through diplomatic channels. The Commission asked for a report on the results of our efforts within 1 week—a rather short deadline given the complexities of the case. My staff promptly met with the Commission staff to discuss the particulars of the case, and on December 6, we met with the Maritime Attaché of the Soviet Embassy and with counsel

for Baltic. At that meeting we explained the nature of the Commission's proceeding and requested the assistance of the Soviet Government in insuring Baltic's compliance with the outstanding Commission section 21 orders. The Soviet Maritime Attaché indicated that our request would be promptly forwarded to the proper authorities in Moscow.

At approximately the same time, the Department also contacted representatives of the Government of the Federal Republic of Germany, seeking that government's assistance in insuring Baltic's compliance with the section 21 order entitled "Rates on Buses in the United States Gulf Coast/North Europe Trade" (Docket 78-38). We were subsequently advised that the FRG had no objection to Baltic's production of documents in compliance with that order, and thereafter Baltic delivered the requested documents to the Commission.

I would add two points here. First, this is a specific instance in which the US/CSG accords have resulted in the production of documents to the Commission. The German Government specifically cited those accords in giving its permission for the production of those documents.

Second, the production which was made pursuant to our discussions with the German Government fully satisfied the subpoena in that case. At least the Commission has so ruled.

On December 14, the Soviet Maritime Attaché advised the Department that a delegation of Soviet maritime officials would be prepared to discuss the *Baltic* case during their previously scheduled visit to Washington in mid-January. This development was promptly reported to the Commission. The following week, however, the Commission voted to issue the proposed rulemaking under section 19 of the Merchant Marine Act of 1920 (46 U.S.C. 876) which threatened, in effect, to expel Baltic from the U.S. trades.

Over the next several weeks, there were various informal contacts between the State Department and Soviet officials in preparation for the January meeting. Thereafter, on January 17, a delegation led by Igor M. Averin, Head, Foreign Relations Department, Ministry of Merchant Marine of the U.S.S.R., met with a U.S. delegation which I chaired. A member of the Commission staff attended the meeting. After considerable discussion, the Soviet delegation stated that the Soviet authorities were prepared, as an act of comity, to permit Baltic to cooperate with the Commission's one outstanding section 21 order. The second section 21 order had, by this time, been complied with. The cooperation which the Soviets envisaged was approximately along the lines of that specified in the Agreed Record of the November US/CSG meeting.

In response to these representations of the Soviet delegation, I urged that Baltic meet promptly with the appropriate officials of the Commission to see whether the outstanding matters could be resolved. I further advised the Soviets that their representations appeared to be a positive step, and that it was now important for Baltic and the Commission to attempt serious negotiations leading toward early satisfaction of the Commission's needs. We were then informed by representatives for Baltic that the carrier was prepared to undertake further efforts to meet the substance of the

outstanding aspects of the remaining section 21 order. There is now only one subparagraph of that subpena in dispute.

We reported these developments formally to the Commission on January 22, suggesting that they justified new negotiations between Baltic and Commission staff.

I would like to interject, regarding a response to a question earlier on extent of informal discussions, that I met with Mr. Daschbach and Mr. Kehoe in the chairman's office on January 19 in the middle of this process, not for the purpose of discussing the merits of the *Baltic* case but rather to discuss the efforts which I thought we were making on the diplomatic front.

The Commission, however, voted to finalize the section 19 order on January 27. The details of the subsequent court challenge to the Commission action are set forth in the papers filed with the court of appeals, and I think those papers speak for themselves.

There was additionally a meeting on February 24 with the Commission to discuss what position the Departments of Justice and State might take in the court case.

I stated at the outset of my testimony that I thought that developments over the last 5 months on the subject before the subcommittee have, on the whole, been positive. The CSG countries have stated that they will be more responsive to the Commission's needs, and there is concrete evidence to show that this commitment is being honored. The same approach has been adopted by non-CSG countries. The Commission and the Department of State have cooperated successfully in a number of cases, and I am confident that continued cooperation will bring more positive results. I take no relish in seeing elements of the U.S. Government expending resources in fighting each other, and I know Chairman Daschbach shares that view. We are all paid by the same taxpayers, and we all have an obligation to serve the broad public interest. We should concentrate our efforts by coordinating them, and we are usually successful in doing that.

It is critical for the Commission to have the information needed for it to fulfill its statutory obligations in a nondiscriminatory manner. It is also critical that we respect the sovereignty of foreign nations. It is also critical that the United States be serviced by an efficient and effective merchant marine. Occasionally there is tension among these goals, and this is when the Commission and the Department must work closely together. I am confident that we can continue to do so.

That ends my prepared statement, Mr. Chairman. I would be happy to respond to questions.

The CHAIRMAN. Thank you, Mr. Atwood. We certainly appreciate your patience in appearing this late in the day.

Why is the Soviet Union a member of the CSG?

Mr. ATWOOD. The Soviet Union is not a CSG member. However, they indicated in the consultations in January that they would nevertheless cooperate with the Commission along the same lines as the CSG countries had said they would.

The CHAIRMAN. It seems in the chronology you have laid out that the—first, before I ask that question, were you aware the FMC had been trying to get documents throughout last year?

Mr. ATWOOD. From newspaper reports, I was.

The CHAIRMAN. Was it any secret that this case was going to be made an issue and to try and resolve the question of rate cutting and other problems in the U.S. trades, that this case would be brought?

Mr. ATWOOD. I think it was unclear whether the case would be brought. It was certainly my hope as a reader of the newspapers that the Commission and Baltic would be able to sort it out among themselves, that Baltic would comply with the Commission's requirements, and that no litigation would be necessary.

The CHAIRMAN. In the negotiations you then entered into with Baltic and the FMC, why did you not resolve this issue?

Mr. ATWOOD. I would be willing to take advice of committee counsel as to whether my response to that question would be troublesome to the committee.

Mr. KYROS. It is somewhat close to the issue in the appellate court.

The CHAIRMAN. Just disregard that question.

What matters of foreign policy present themselves in this particular FMC proceeding?

Mr. ATWOOD. We tried to identify those elements in general terms in our filing with the Commission and in the brief which the Justice Department submitted to the court of appeals.

Briefly there is an obvious foreign policy interest for the United States that FMC enforcement action against foreign flag carriers be fair, nondiscriminatory, reasonable, and consistent with U.S. law. Further, we think that results can best be achieved in dealing with foreign governments if the evidence is adequate to convince those governments that the Commission is, in fact, acting fairly, is perceived to be acting fairly, and is taking into account the international aspects of ocean shipping.

I would point out, for example, that the litigation now in progress is, to my mind, playing into the hands of the Baltic Steamship Co. I think we and the Commission can be more effective if we can avoid this type of litigation in the future.

The CHAIRMAN. In essence, it is a commercial matter, though.

Mr. ATWOOD. The details of the case are certainly a commercial matter and certainly a matter within the competency of the Federal Maritime Commission and not within the competency of the Department of State. I have emphasized repeatedly to the Commission we have no interest in looking over their shoulder as they enforce the U.S. laws. We hope to keep interventions by the Department of State at an absolute minimum.

The CHAIRMAN. I wonder if the Department of State would have taken the same position with some other country?

Mr. ATWOOD. Under the circumstances present in this case, we would have. We think it is critical that our enforcement be nondiscriminatory, and that involves actions by the Department of State.

The CHAIRMAN. What if it was a country which the press refers to as "right wing?"

Mr. ATWOOD. Same position by the State Department, I would think, Mr. Chairman.

The CHAIRMAN. Mr. Snyder.

Mr. SNYDER. Thank you, Mr. Chairman.

Mr. Atwood, I am a little bit confused. At the bottom of page 8 of your prepared text, you indicate that "Soviet authorities were prepared, as an act of comity, to permit Baltic to cooperate with the Commission's one outstanding section 21 order."

In the next paragraph on page 9, you "urged that Baltic meet promptly with the appropriate officials of the Commission to see whether the outstanding matters could be resolved."

Mr. Atwood. I am sorry. By "matters," I meant items in the one subpoena that was still outstanding.

Mr. SNYDER. All right.

The acquiescence on their part to cooperate in complying with the one outstanding section 21 order is the same thing that you are referring to in the next paragraph when you talk about the outstanding matters to be resolved.

Mr. Atwood. Yes.

As of mid-January there was a number of subparagraphs of the subpoena in dispute. But there was only one, by January 22. At that point, there was only one item still outstanding on the subpoena.

Mr. SNYDER. There was only one outstanding item as of January 22?

Mr. Atwood. One subparagraph. It was obviously an important one.

Mr. SNYDER. Thus at the bottom of page 8 you state that they had agreed to work out compliance with the one outstanding order still outstanding on January 22?

Mr. Atwood. The Soviet authorities had told us that the carrier would be asked to cooperate along the lines of the US/CSG accord. Now, that is admittedly a rather general statement. And I was not competent to press them on precisely how that representation would be implemented since that involved details on the case with which I was not familiar.

That would not necessarily mean responding precisely to every aspect—

Mr. SNYDER. Well, I do not want to get into too much particularity.

So you are telling us that as of January 22, or about that time, the Soviets had agreed to comply with the order, but there was still a "misunderstanding" between FMC and Baltic as to whether or not they were complying?

Mr. Atwood. No, I cannot go quite that far.

What the Soviets said is that they would cooperate further to provide the information to Commission that was necessary as to the settlement of the case. Now, that might not mean, depending on the particulars of the subpoena, a response that was precisely along the lines that the Commission at that point had in mind.

For example, in the Japanese case discussed earlier, an arrangement was worked out with independent accountants to provide the Commission the information it needed to effectively negotiate a settlement, although the information provided to the Commission may not have been precisely what the Commission had in mind in the first instance. This was a matter we hoped could be worked out between the Commission staff and the carrier.

Mr. SNYDER. Did you, on any of the dates mentioned, or during the time frame mentioned, feel you had resolved the matter?

Mr. ATWOOD. We felt it was very close to resolution and that good faith efforts on both sides would result in a resolution.

Mr. SNYDER. But you had never concluded that you resolved the matter?

Mr. ATWOOD. No, I had not.

Mr. SNYDER. In response to a question from Chairman Murphy about the State Department's policy with respect to the foreign policy aspects of this case, you said something about—and I did not get it all down—the necessity of the Commission to take into consideration world shipping.

Mr. ATWOOD. The international character of shipping, or words to that effect.

Mr. SNYDER. The international character of world shipping.

Now, can I conclude from that that the State Department's belief or policy is that the international character of world shipping is more important—more in our national interests, more to the benefit of those taxpayers that you pay tribute to in your closing paragraphs than the preservation and equal treatment of American shipping interests?

Mr. ATWOOD. No, Mr. Snyder, I certainly did not mean that.

In order to have effective enforcement against foreign-carriers, and we support having effective enforcement against foreign-flag carriers, it is important that our shipping policies and our shipping laws and the specific actions of the Federal Maritime Commission and of the Department of State recognize that we are not alone in the world. If we are going to be more effective in securing a fair and equitable regime in which U.S. carriers can compete effectively, we must face realities. Shipping goes both ways and involves more than one country.

Mr. SNYDER. You do not have any problem with understanding—you do not have any problem with feeling, that it is vital to this country's national best interests that our merchant marine be protected, do you?

Mr. ATWOOD. No, sir, I have no problem with that at all.

Mr. SNYDER. In your policy position, you take into consideration the international character of world shipping. Do you include the United States?

Mr. ATWOOD. Yes, sir.

Mr. SNYDER. Thank you.

The CHAIRMAN. Mr. McCloskey.

Mr. McCLOSKEY. Mr. Atwood, I want to read to you the last sentence of your testimony, "Occasionally there is tension among these goals, and this is when the Commission and the Department must work closely together. I am confident that we can continue to do so."

Do I understand from your testimony that you and the Commission are working closely together at the moment?

Mr. ATWOOD. In most instances.

Mr. McCLOSKEY. What about this particular instance of this lawsuit?

Mr. ATWOOD. No, I do not think we coordinated well in this case.

Mr. McCLOSKEY. What do you recommend in the future for cases of this kind?

Mr. ATWOOD. Earlier discussions between the agencies, certainly. And the agencies giving more due respect to each other's needs in trying to work out a solution between ourselves, instead of litigating against each other in court.

Mr. McCLOSKEY. Do you agree with Mr. Daschbach's statement that the United States should speak with one voice in shipping matters?

Mr. ATWOOD. Yes, I do.

Mr. McCLOSKEY. Who's voice should that be?

Mr. ATWOOD. I think it will depend on the issue in question. There are all types of shipping issues. There are different fora.

Mr. McCLOSKEY. Take rebating, who should speak with respect to that issue?

Mr. ATWOOD. In terms of enforcing our rebating laws, it should be the Federal Maritime Commission.

On other aspects of the rebating question, such as, for example, prophylactic measures to avoid malpractices, statements of basic policy position, it might well be a different agency of the Government.

Mr. McCLOSKEY. Is the Commission not acting this way in the *Baltic* case?

Mr. ATWOOD. Certainly that is what they are doing. The question before the court of appeals is whether they were doing it in a manner consistent with U.S. law.

Mr. McCLOSKEY. Do you feel any compunction about discussing U.S. law as opposed to the facts of this case at the present time?

Mr. ATWOOD. I do not think we should discuss the issues of law as they apply to the *Baltic* case. But I have no compunction about discussing legal issues as they may apply generally in the rebating field.

Mr. McCLOSKEY. Well, section 19 of the law gives the Commission power to speak on matters affecting shipping in the foreign trade, whether in any particular trade or upon any particular route or in commerce generally, and which arrives out of, or results from, foreign laws, rules or regulations, or from competitive methods or practices employed by owners, operators, agents or masters of vessels of a foreign country.

Now, in this case, is it not clear that the Federal Maritime Commission is trying to make a rule which arises out of, or results from, competitive methods or practices employed by owners of vessels of a foreign country?

The CHAIRMAN. If the gentleman will yield, I think we are getting very close to the line.

Mr. McCLOSKEY. If that is the case, I will be glad to withdraw the question.

Mr. ATWOOD. I think, Mr. McCloskey, that is the issue before the Court of Appeals—whether the Commission acted in accordance with this provision or not, in this case.

The CHAIRMAN. Mr. Kyros.

Mr. KYROS. That is the very issue. We have available all the briefs, and the issue before the court is whether the Federal Maritime Commission can use section 19 to enforce a rule promulgated under section 21 of the 1916 act. Those are the central issues and facts.

If you dealt with section 19 separately, apart from this case, I see no problem with your pursuing this line.

Mr. ATWOOD. If it will help you in this regard, I will state something that is in the briefs.

The brief filed for the United States does not argue that section 19 is unavailable in all situations. It speaks to the facts in the *Baltic* case and argues the applicability of that section in the facts of that case.

But we do not maintain section 19 is unavailable in all cases to combat rebating.

Mr. McCLOSKEY. That is why I wonder if my question is not proper. What I am trying to get at is: If you say that the Federal Maritime Commission has the right to enforce the antirebating law, and if it has a right to enforce it in a manner which arises out of the competitive methods of ships owned by the Soviet Union, then should they, and not the State Department, be the voice for the United States?

Mr. ATWOOD. The agency of the United States which should decide whether or not the Commission is acting properly under section 19 in the case should be the U.S. court of appeals. And that is the agency which has been asked to decide the issue.

Mr. McCLOSKEY. I think we will leave it at this Mr. Atwood, I would hope we would never be in a position of saying the single voice that speaks for the United States in foreign policy is the judicial branch.

Mr. ATWOOD. I concur with that.

Mr. McCLOSKEY. That is what you said.

Mr. ATWOOD. I did not mean to say that. The court must decide what the laws of the United States mean in particular cases.

Mr. McCLOSKEY. Let me make a subsidiary point, it seems to me that it is the obligation of this committee to change the laws so that we do not have to go to courts to decide which agency speaks for the United States in carrying out the President's authority to conduct foreign affairs under the Constitution. I hope that the interagency task force, who's work product has been so long in gestation, will make a clear and specific recommendation to the Congress as to how we do amend the law to make it specific with respect to who speaks for the United States in enforcing the laws to protect the merchant marine against improper competition.

We have not gone into section 301 of the Trade Act, which gives the Special Trade Representative some authority in that field.

Will the task force enlighten us with respect to the use of section 301?

Mr. ATWOOD. To my knowledge, the question of the applicability of 301 in shipping has not been raised within the task force. So I suspect the answer to that will be no.

Mr. McCLOSKEY. Has the Special Trade Representative participated at all?

Mr. ATWOOD. Not to my knowledge.

Mr. McCLOSKEY. Who is the lead agency in the task force?

Mr. ATWOOD. The White House.

Mr. McCLOSKEY. I have no further questions.

The CHAIRMAN. Mr. Kyros.

Mr. KYROS. Thank you, Mr. Chairman.

Just a few questions because of the lateness of the hour.

The CHAIRMAN. Do not worry about the lateness of the hour.

Mr. KYROS. Sir, on page 7 of your statement, you said your Department contacted the Federal Republic of Germany seeking that Government's assistance in insuring Baltic's compliance with the section 21 order.

Of course, Baltic is not a German citizen.

Mr. ATWOOD. That is correct.

Mr. KYROS. Are you aware the German Government circulated a brief stating that when we Germans allow a Soviet company to give up its documents under our blocking statutes, in no way does it set a precedent for other Germans?

Mr. ATWOOD. I am aware they have made representations along those lines, yes, sir.

Mr. KYROS. In other words, we are still quite a way from resolution. The German Republic, which has not been too friendly, to Soviet shipping companies—

Mr. ATWOOD. The Federal Republic of Germany is a CSG country. So we have no reason at all to think that the German Government will not honor what it stated at London.

Mr. KYROS. You put the exact words of the Agreed Record in your statement today. And you put the most salient provisions in there. And I think it was one of the most marvelous pieces of antiquarian work I have ever seen. Only if good will operates will another country do anything we ask of them. You will have to concede that.

Mr. ATWOOD. Good will is very important if this arrangement is to work. It in no way limits the Commission's powers if it does not work.

Mr. KYROS. I happened to be there—in no way does that limit the excellent work you did, patient and thorough work in trying to get some understanding. It just points up the difficulties we have, and I am glad for the comity between you and I.

When we were over there that day, I asked one of the CSG representatives what would happen if suddenly antitrust proceedings were brought against any company here at CSG. Mr. Bank was all joyful and you were rushing out to get an airplane. He said we will take these pieces of paper and we will rip them to shreds.

If, indeed, proceedings are brought, would that mean you would have to start all over again? Have you considered that?

Mr. ATWOOD. I am afraid I really should not comment on that matter, which is a pending law enforcement matter.

Mr. KYROS. The reason it is so significant is there is a very strong body of opinion which says we need a rebating bill. And yet a lot of people say we do not need it because we have a framework for negotiation which can supplant a rebating bill and its methods. So it becomes relevant, does it not?

Mr. ATWOOD. Yes.

Mr. KYROS. It also becomes relevant since it has taken us a year to take all the differing opinions and put them before the White House so they can look at them and try to resolve them. It surely is going to be another 2 or 3 years before we alter the system we have currently.

In the interim, whether through your own good efforts or through a rebating bill, we have to have some measure to provide equity to the FMC in its attempts to procure documents.

Mr. ATWOOD. I must say on the basis of the present record you know our views stated previously on the antirebating bill.

There is no evidence to believe that the Commission cannot successfully invoke existing U.S. law to effectively enforce the antirebate laws.

And again, referring to earlier comments the Department of State has made on the antirebating bill, it is not clear that stronger enforcement measures will necessarily result in stronger enforcement.

Mr. KYROS. You cited today you intervened in the Japanese cases—of course, the Japanese settlement occurred before the CSG.

Mr. ATWOOD. It was negotiated before, yes, sir.

Mr. KYROS. You heard Chairman Daschbach's compliments in that regard. Of course, there is a slight difference of emphasis on what role State played—

Mr. ATWOOD. He also paid compliments to the Embassy in Tokyo. You will recall his press statement announcing the settlement. He was very kind to give the State Department considerable credit for the settlement.

Mr. KYROS. With regards to the Netherlands and Norway, what, if any, documents or proof were made available to the FMC so that they would fit "necessary evidence to allow"—

Mr. ATWOOD. In that case when the request was given, their response, was "Do not worry. We will pay whatever you ask."

Mr. KYROS. There are no documents?

Mr. ATWOOD. That is right. They did not contest the claim.

Mr. KYROS. Now, is the Department of State in favor of legalizing rebates in foreign trades? Have you ever discussed or suggested that anywhere?

Mr. ATWOOD. It has been considered in the task force. It was discussed, as you know, in London. And I would say in some circumstances yes and in other circumstances no.

I do not think that is an issue you can form a judgment on in isolation. You have to look at the full range of parameters of shipping regulation that are under review.

Mr. KYROS. Mr. Atwood, earlier, you were asked, by Mr. Snyder, I believe, just when the State Department got into the controversy that now surrounds the Baltic Shipping Co. He noted the case began April 12, the first request for documents by the FMC. You did not get into it until December, by formal request on December 4, by the FMC; is that correct?

Mr. ATWOOD. That is correct.

Mr. KYROS. Let me read to you some of the words stated by Mr. Richard Bank, Maritime Affairs Office, Department of State on January 24, 1978, pages 556 and 557 of the Rebating Practices record, H.R. 9518.

Mr. ATWOOD. What is the date?

Mr. KYROS. January 4, 1978.

Mr. ATWOOD. Thank you.

Mr. KYROS. He is testifying on rebating proceedings, and states, "may I say at the outset, Mr. Chairman, that these contacts and

these discussions have been coordinated at all times with the Federal Maritime Commission. At no time in my memory, and I have been in shipping in the State Department since 1972, had we had as close a cooperative relationship with the Federal Maritime Commission in the field of rebating, document procurement, and negotiation as we have today."

I said what gave rise to that? He said good personal relationship between my staff and the FMC staff.

You can read that.

My question—it took from April until December—you, and another Federal agency financed by taxpayers took nearly 9 months to get involved in the case. Do you think that is close cooperation?

Mr. ATWOOD. Well, given the fact that we were not asked by the Commission to become involved in that case, it was my thought that the discussions between the Commission and Baltic and the proceedings between the Commission and Baltic had not reached a point where, in the Commission's judgment, it was appropriate to raise the issue to an intergovernmental level.

We obviously have to defer to the Commission since it is involved in the day-to-day enforcement in these cases. We have to defer to their judgment as to when the issue has to be raised to an intergovernmental level.

Mr. KYROS. Between April and December did any Soviet official contact you, and complain about Baltic, and ask that you leave their company alone, or appropriate words to that effect? Do you know?

Mr. ATWOOD. I believe there were probably some representations made from time to time. I cannot be certain though, Mr. Kyros. It would not surprise me.

Mr. KYROS. Does that not then give you an opportunity to contact the FMC?

I thought there was close cooperation, and if I recall the CSG meetings, and I do, you made a great point of that, and also that point was made by Mr. Bank. I am sure you have heard his speeches.

Mr. SNYDER. Mr. Chairman, if the gentleman will yield, would it be possible for you to ascertain the answer to the question Mr. Kyros asked? Whether or not an emissary of the Soviet Government contacted the State Department between April and December? For the record?

Mr. ATWOOD. Yes, sir. I will be happy to do that.

I would like to add, without necessarily referring to this case, that we find that frequently the government of the foreign-flag carrier involved will make such approaches at a very early stage with the hope of getting the State Department to intervene on their behalf with the Federal Maritime Commission. Our response almost inevitably will be this is a matter before the Commission; they are the appropriate law enforcement agency. It is your responsibility to have your carrier satisfy the Commission's desires.

So we ordinarily resist accepting the invitation of the foreign government to raise these things to the intergovernmental level.

Mr. SNYDER. Are you saying you would consider a contact by Baltic the same as a contact by the Soviet Union Government?

Mr. ATWOOD. No; I would not.

Mr. SNYDER. Mr. Kyros' question, I think, related to the Government per se.

Mr. ATWOOD. Yes.

In the typical situation, without reference to this case, we would tell the Government to send its carrier down to the Commission and meet the Commission's needs.

Mr. SNYDER. I think it would be helpful to the committee, in attempting to determine how good this cooperation is, if you would respond to that after reviewing your records at the office.

Thank you, Mr. Chairman.

Mr. KYROS. In hindsight, going back to the point between April and December, if you had this to do over again, and you were looking back, at how your Department cooperates with the Federal Maritime Commission, would you have been more apt to contact the FMC and say we want to start discussing now how to obtain documents? Would you say that in hindsight?

Mr. ATWOOD. In hindsight, we should have discussed the matter informally with the Commission at a prior stage, although maybe not for the purpose you mention. I think it would have been more of a fact-finding investigation to make sure we were in a position to move quickly if the case reached the point that our assistance was necessary.

Mr. KYROS. I think that is very fair.

Mr. CORRADO. May I ask a few quick questions?

The CHAIRMAN. Chief Counsel.

Mr. CORRADO. Thank you, Mr. Chairman.

Mr. Atwood, in the Japanese settlement, was there any production of documents?

Mr. ATWOOD. It is my belief, Mr. Corrado, there was not a production of documents. Instead there was an independent, mutually agreed upon accountant who was appointed who went through the carriers' books and submitted in tabular form the information that the Commission was asking. And obviously that information was on documents. But they were documents generated by the accountant rather than the carriers' original records.

That is my understanding.

Mr. CORRADO. And no criminal conspiracy charges or criminal charges, whatever, against anybody, the same as the Netherlands and Germany?

Mr. ATWOOD. We have not been involved in discussions on that issue. That would be a matter between the Commission and the Justice Department.

Mr. CORRADO. What I am getting at, absent our anti rebating bill, the way it is now, if we were to follow along on the CSG scheme, obviously the foreign countries are willing to buy out if they can. If they do that, they pay their fine. \$2.5 million is no great thing to the Japanese. Then they do not have to bother about the production of documents or the FMC, blocking statutes, or possible criminal charges. Whereas, on the other hand, a domestic carrier is still subject to all those things. Is that not correct?

Mr. ATWOOD. Well, I am not familiar with, What happened in the Sea-Land case. I do not know whether there was both criminal and civil action.

Ordinarily, for either U.S.- or foreign-flag carriers, if there is to be a settlement, it would ordinarily be the exclusive remedy which the United States would seek. I think that should apply regardless of the flag of the carrier.

Mr. CORRADO. But that was not the case with Sea-Land, and I think it is still true that in the event of a rebating problem, the domestic carrier is, as compared to the foreign carrier, still not only subject to the fine but subject to the total production of documents and possible criminal action. And you know, we have said this on the record 2 years ago, and I say it again, that this situation is not fair or proper or correct.

Mr. ATWOOD. Well, I believe it is not fair if U.S. carriers are treated more harshly than foreign carriers.

Mr. CORRADO. Thank you, Mr. Atwood. Thank you, Mr. Chairman.

The CHAIRMAN. What documents do we need for this record? A Baltic chronology?

Mr. KYROS. Yes, Mr. Chairman.

Other than that, we have all the briefs, but I do not think the briefs should be part of this record.

I would put the statutes in, however, in the record.

The CHAIRMAN. Without objection, we will include those as part of the record.

[The following was received for the record:]

DEPARTMENT OF STATE,
Washington, D.C., April 18, 1979.

Hon. JOHN M. MRUPHY,
Chairman, Committee on Merchant Marine and Fisheries,
House of Representatives, Washington D.C.

DEAR MR. CHAIRMAN: I refer to the question which was posed to Deputy Assistant Secretary James R. Atwood on March 6, during the Oversight Hearings on the Subcommittee on Merchant Marine of the House Merchant Marine and Fisheries Committee into the ability of the Federal Maritime Commission to obtain documents which are located overseas. It was requested that Mr. Atwood supply the Committee with the date of the initial Soviet Government contact with the State Department concerning the Baltic Steamship Company case.

The Department has no record of any Soviet Government official making a representation involving Baltic before December 18, 1978. At that time, the Soviet Government asked the State Department to intervene with the Commission to obtain a brief postponement of any FMC action. The Soviets pointed out that a high-ranking delegation of Soviet merchant marine officials would be in Washington January 15 in connection with other business and that the group wished to discuss the Baltic matter with all relevant US governmental bodies. The Department promptly forwarded the Soviet request to the Commission. This initial request came 12 days after the Department had raised the Baltic case to the intergovernmental level by requesting the assistance of the Soviet Government in obtaining documents requested by the FMC from Baltic.

Sincerely,

DOUGLAS J. BENNET, JR.,
Assistant Secretary
for Congressional Relations.

BALTIC CHRONOLOGY

April 12—Commission voted to issue section 21 Order.

April 17—Section 21 order served requesting information on or before May 30.

May 17—Baltic requested that the Commission reconsider April 17 Order.

May 25—Commission voted to deny Petition.

May 26—Order served in which Commission rejected Baltic's arguments and denied Petition its Petition for Reconsideration. Allowed Baltic until August 30 to respond in light of Baltic's objections as to the burdensomeness of compliance.

Commission also gave Baltic an opportunity to be heard on any legal objections it might have to April Order.

June 13—Baltic filed Legal Objections.

June 30—Hearing Counsel filed Reply to Objections.

July 1—Baltic files "Responses to Section 21 Order."

July 12—Baltic files responses to HC's Reply (reply to reply).

August 30—Baltic files "Responses to Section 21 Order."

September 13—Commission meeting—voted to issue show cause order—assigned Docket No. 78-36.

October 5—Show Cause Order served.

October 12—Show Cause Order published in Federal Register in this order the Commission notified Baltic that its legal objections to the April Order had been considered and rejected by the Commission—except that further time was provided for Baltic to come forward with an explanation of the possible application of foreign law—October 25 was the deadline for such further elucidation.

October 25—Baltic filed Answer to Show Cause Order.

November 9—Hearing Counsel filed Reply to Answer.

November 20—Baltic filed a response to HC Reply (reply to reply).

November 29—Commission meeting—denied hearing, oral argument and postponement, found violation of § 21, referred matter to Department of State found unfavorable condition in foreign trade.

LETTER TO STATE

December 22—Baltic files supplemental responses to section 21 Order.

Baltic files a protest letter.

Proposed rulemaking published.

January 15—Letter denying extension sent to Baltic.

January 15—Baltic submission.

January 17—Commission meeting—notice of failure to comply voted to be issued.

January 17—Order and Notice of Default served.

January 22—Comments filed by Baltic, USL, State.

January 26—Baltic submission.

January 29—Commission meeting—rule voted to be published with extra 45 days to comply.

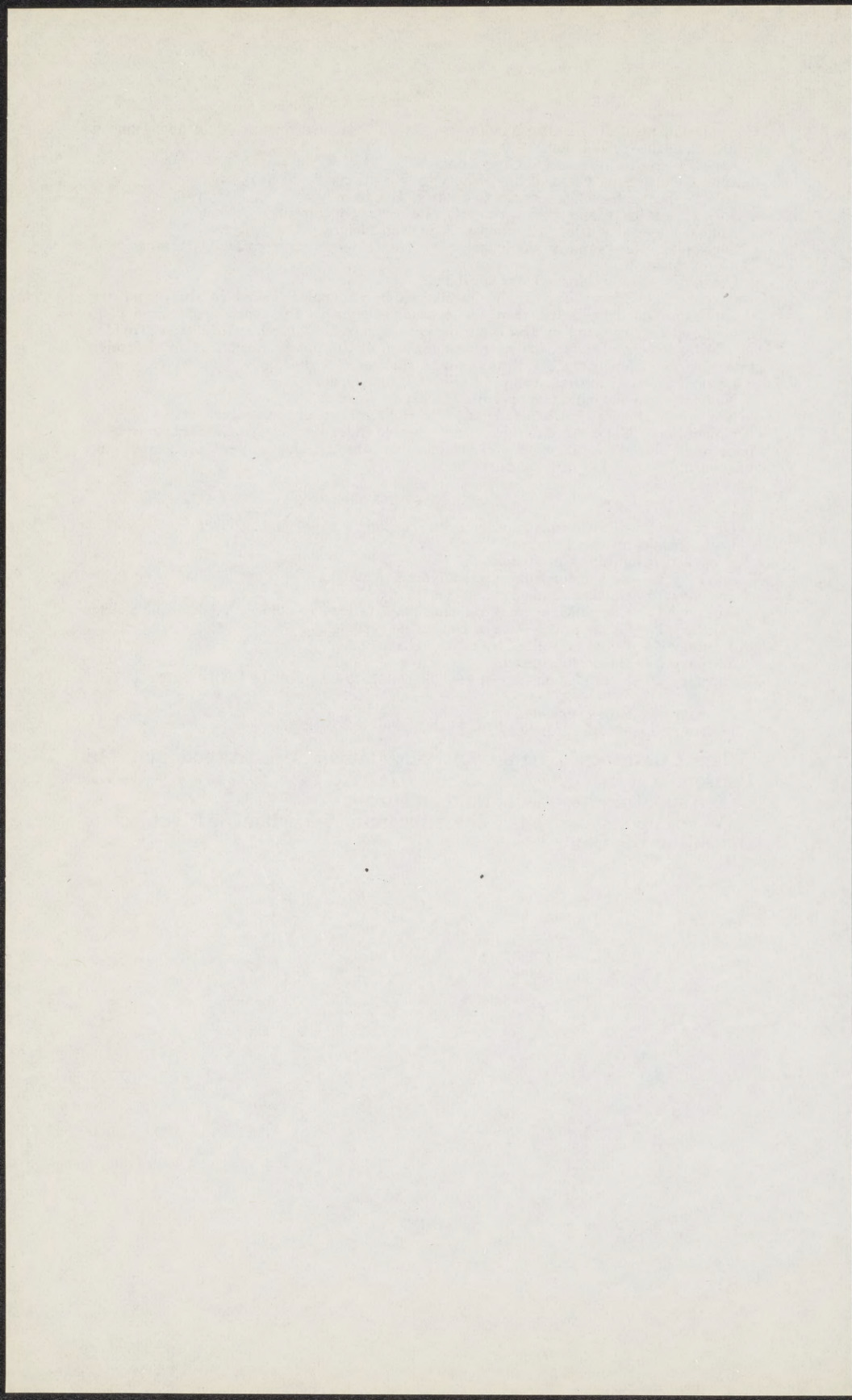
February 7—Rules served.

February 13—Motion for Stay filed.

The CHAIRMAN. Thank you very much, Mr. Atwood and Mr. Benson.

The subcommittee will stand adjourned.

[Whereupon, at 6 p.m., the subcommittee adjourned, subject to the call of the Chair.]



U.N. CONFERENCE ON TRADE AND DEVELOPMENT—UNCTAD—OVERSIGHT

THURSDAY, APRIL 26, 1979

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON MERCHANT MARINE,
COMMITTEE ON MERCHANT MARINE AND FISHERIES,
Washington, D.C.

The committee met, pursuant to notice, at 10:10 a.m., in room 1334, Longworth House Office Building, Hon. John M. Murphy (chairman of the subcommittee) presiding.

Present: Representatives Murphy, Jones, McCloskey, Snyder, Donnelly and Wyatt.

Staff present: Carl Perian, chief of staff; Ernest J. Corrado, chief counsel; Peter Kyros, counsel; Larry O'Brien, deputy counsel; Gerry Seifert, economist; Jack Sands, chief minority counsel; Ron Losch, deputy minority counsel; and Elizabeth Coker, subcommittee clerk.

The CHAIRMAN. The subcommittee will come to order.

Today we begin oversight hearings on the U.N. Conference on Trade and Development's Code of Conduct for Liner Conferences.

A conference, meeting under UNCTAD auspices, convened in Geneva in 1974 to try and seek an international agreement which would foster fair and efficient liner service for all the nations of the world. On April 7, 1974, the UNCTAD Code was presented to the world for ratification and accession.

Until recently, the Code had not received sufficient support to go into force. This May UNCTAD will again meet in Manila, where final approval of the Code, a distinct possibility, could mean radical alterations in the operations of the world's liner conferences.

In this light, the Merchant Marine Subcommittee has convened these hearings in order to review the provisions of the UNCTAD Code in its present form, provide information on the likelihood of final adoption, the potential effect of the Code on U.S. trades and the manner in which it would impact on the laws of the United States.

The Code addresses and affects the underlying economic and shipping philosophy of the entire trading world. It is truly a momentous and significant effort to achieve universal comity and national resolution of shipping problems which have vexed international shipping for the past century. However, compelling the desire to reach an accommodation by all the divergent interests it remains essential to examine meticulously the provisions of the Code as it affects U.S. trades.

Even the most cursory review of the history of activity on the UNCTAD code reveals that representatives of the agencies before

us today, traveled many miles, spent many days and expended much effort in preparing and presenting the position of the United States before the United Nations' Conference on Trade and Development. We expect no less than the most complete and lucid explanation of each agency's view on the consequences to the United States of the UNCTAD code. And, we should add, statements by agencies concerned with maritime policy that are awaiting the results of the Interagency Maritime Task Force are no longer acceptable to this committee.

We have waited a long time, and I understand the President has on his desk now the final approval document for that interagency study.

Our first witness is Mr. Ron Capone, a member of the Maritime Law Association and a participant in the early UNCTAD meetings on liner conduct.

Mr. Capone, we welcome you to the committee.

STATEMENT OF RONALD A. CAPONE, PARTNER, LAW FIRM OF KIRLIN, CAMPBELL & KEATING, WASHINGTON, D.C.

Mr. CAPONE. Thank you, Mr. Chairman.

I understand that because of the number of witnesses, it is desirable that I paraphrase and shorten my written presentation as much as possible.

The CHAIRMAN. We are going to include all witnesses' statements in the record in their entirety, and in the wish to be as concise as possible, I would ask the witnesses to paraphrase their statements, Mr. Capone, as you have just indicated.

[The following was received for the record:]

STATEMENT OF RONALD A. CAPONE

Mr. CHAIRMAN: My name is Ronald A. Capone. I am a partner in Washington of the law firm of Kirlin, Campbell & Keating. Since 1971, I have been Chairman of the Committee on Ocean Liner Conferences of The Maritime Law Association of The United States. I have had the privilege of serving as adviser on the United States delegations attending the UNCTAD meetings on the Code in Santiago, Chile in 1972, in Geneva in 1973, and later in Geneva in 1974 at the Conference of Plenipotentiaries when the text of the Code in Convention form was approved.

I am equally privileged, at your Committee's request, to submit an overview of the Code: its origins, some comments on various of its provisions, including the most controversial ones, the current status of the Code, and illustrative differences and conflicts between the Code and United States laws. I understand that the merits of the Code, its economic ramifications, including its impact upon U.S.-flag carriers and shippers and our regulatory structure, will be the subject of observation by others.

ORIGINS

The Code originated with the developing countries who, under the auspices of UNCTAD, in the 1960's and 1970's embarked upon a series of studies and activities to improve their economies and stature in the community of nations. One of their interests was international liner shipping, particularly liner conference operations.

On the whole, they did not oppose the concept of conferences. However, they were of the belief that conferences were made up almost entirely of, and controlled by commercial interests from the developed maritime nations; that the predilections of traditional shipowners, including their governments and their judicial and other tribunals precluded, conference actions responsive to the special needs and objectives of the poorer countries of the world.

Their objectives were, and still are, to increase their exports, decrease or exert downward pressure on the cost of exporting their products and their imports, and for some to establish and maintain their imports, and for some to establish and maintain their own merchant marine.

An important step for the developing countries, therefore, was to promulgate a legally binding multilateral code regulating the conduct of liner conferences, containing provisions specially recognizing their needs and aspirations, and a code whose rules should be enforced in the event of disputes through mandatory international arbitration. The Code should also require conferences to consult with shippers and shippers' organizations.

My acquaintance with draft texts of the Code occurred some months prior to the UNCTAD conference held in Santiago, Chile in the spring of 1972. The draft text then being circulated had been prepared, under UNCTAD auspices, by the Group of 77—composed of the developing countries then numbering about 77 and now substantially more. Working conferences under UNCTAD were held again in Geneva in 1973 and in 1974, culminating in a conference of Plenipotentiaries in the spring of 1974 which produced—in the last few days—the final text of the Convention.

During those years, participation in the UNCTAD deliberations and negotiations was based upon groups of countries: the Group of 77, previously referred to; Group B, the developed countries, including the United States, Canada, Western Europe, Japan, Australia and New Zealand; Group C, the African, Asian and other developing countries; and Group D, the Soviet bloc. Within each group, as well as between them, there were substantial conflicts and differences in regard to the concepts as well as texts, depending upon whether a particular country was in the category of a user or supplier of shipping, a mixture of both, or cross-traders. Deliberations and discussions, formal and informal, were courteous but vigorous. The differences between Groups, as well as within them, seemed irreconcilable.

The principal protagonists were: Group B who considered the Group of 77 draft too formalistic, rigid, commercially unrealistic and harmful to commerce; and the Group of 77 who fervently believed that the flexible non-binding Group B guideline approach would be ineffective for them, and that unilateral regulation, e.g., the Shipping Act approach and enforcement by government entities, was also unacceptable for reasons previously mentioned. The Soviet bloc and China tended to remain in the background.

Nevertheless, during the last few days of April 1974, seemingly out of nowhere, a final text of the Convention emerged and was approved. 72 votes were cast for adoption by the developing countries, the Soviet bloc, China, France, Germany, Belgium and Australia. Five developed countries abstained from voting; 7 developed countries including the United States, voted negatively.

HIGHLIGHTS OF CODE PROVISIONS

The Code regulates conference activities only. During my attendance at the UNCTAD sessions, no delegate took the view that conferences should be outlawed. On the contrary, they supported the conference system despite its imperfections as the best method of regulating liner services.

Indeed, when the time came for the Plenipotentiaries finally to vote upon the Code, the spokesman for the Group of 77 stated that:

"The Group of 77 had agreed to the provisions in the Code . . . on the clear understanding that non-conference shipping lines will not be permitted to operate in a manner which damages the smooth functioning and operation of liner conferences. . . . While . . . non-conference lines have a place in liner shipping, in no circumstances can we accept a situation where through their operation, the national shipping lines of developing countries are made to lose what, after great difficulty, they are entitled to get under the Code in respect of participation in the trade."

The conference activities governed by the Code are in a number of respects similar to those found in the Shipping Act, 1916 and the Censa Code of Conduct. In fact, both documents were major sources of the Code concepts.

Subjects covered by the code

It is not possible without writing volumes to analyze the 145 Articles in the Code, plus subparagraphs in the Code. They regulate conference conduct relating to: membership, trade participation (also cargo pools, berthing and sailing arrangements), preferential status for national shipping lines, decision-making procedure, self-policing, availability of conference agreements to others, loyalty arrangements with shippers and dispensation of shipper obligations, availability of tariffs, consultation machinery between the Conference and shippers, criteria for determining the freight-rates, treatment of similarly-situated shippers, time between general freight rate increases, promotional freight rates, surcharges, currency charges, fighting ships, adequacy of service, head office of conference, representation, contents of conference agreements, trade participation agreements, and machinery for the settlement of disputes.

Few of these provisions were without controversy, which is not surprising to find in an assembly of delegates from 84 countries. My impression of the most controversial were the following.

Trade participation

Article 2 of the Code entitles conferences to allocate shares of trade to their members, including entering into arrangements for pooling of cargo or revenue, spacing of sailings, and berthing rights.

The dominant theme of these provisions is preferential treatment of national shipping lines.

The most frequently mentioned provision is the so-called 40-40-20 concept found in Article 2(4). It provides that, unless otherwise mutually agreed, national shipping lines (as national groups) of the country at each end of the conference trades shall have "equal rights to participate in the freight and volume of traffic generated by their mutual foreign trade and carried by the conference".

There are additional provisions covering situations where national shipping lines do not operate or do not desire to participate in the trade.

National shipping lines are also given a dominant voice on trade participation matters. See, for example, their entitlement to a majority vote under Article 2(13) in conference decisions on whether to establish pools or adjust sailings. Furthermore, Article 3, gives them veto power in respect of conference matters relating to their trades.

At the UNCTAD Conferences, the Group B countries did not object to commercially agreed pooling or other conference arrangements to rationalize vessel tonnage and carrier sailings. However, they were generally opposed to a legally mandated trade allocation concept, especially one resting upon national-flag preferences. Their shipowners for the most part were equally concerned.

Group B believed that the best results could be obtained by leaving such matters for determination by the shipowners on the basis of the market place; that a mandated 40-40-20 national-flag approach would stimulate unnecessary and inefficient liner capacities and services; would result in costs and services ultimately detrimental to the interests of the shippers-consignees.

Needless to say, the third-flag share and role in conference activities was also a matter of considerable objection by countries whose shipowners substantially participate in cross-trades.

The United States did not object to trade sharing provisions which would help the developing countries establish their own merchant marines, but it shared the concern of other Group B countries with the various proposed texts, including the provisions finally adopted in 1974. In this connection, it will also be observed that while the Shipping Act, 1916 does not forbid pooling and sailing arrangements, they are permitted only after they are filed with the Commission and approved under the standards of the Shipping Act. Furthermore, as a result of court decisions, the proponents have a heavy burden of showing that such arrangements should be approved.

As your Committee has no doubt recently heard, the European Community countries apparently have agreed, or may shortly agree, that their members can accede to the Code subject to several reservations. One reservation is that the trade participation provisions in Article 2 shall not apply in the trades between the European Community countries and, on a "reciprocal" basis, the trades between their countries and other OECD countries which are contracting parties to the Code. In all other situations the Article 2 provisions will be applicable.

Freight rates

In one of the first drafts, the Group of 77 proposed that freight rates should be increased not more often than once every 24 months. In the final text, Article 14(1) in conjunction with Article 14(9), general freight rate increases can be effectuated at not less than 15 month intervals. More precisely, notice of 150 days, or according to regional practice or agreement, must be given for general rate increases under Article 14(1); and under 14(9), unless otherwise agreed between the conference and shipper organizations, 10 months between effectuation of a previous general freight rate increase and the date of notice for the next such increase.

The Group B countries considered the 15 month freeze on rate increases unrealistic and harmful for various reasons. For example, it was anticipated that operating costs and capital investments in replacement vessels would continue to escalate. Shipowner profits, if any, were (and still are) generally too low to absorb mounting costs for an appreciably long period of time. Furthermore, if rates were increased in part in anticipation of costs 15 months later, current shippers could be unfairly burdened; and if rate increases were held down during that 15 month period (assuming no cash flow burdens and problems), they would then have to be in-

creased to greater levels so as to enable the shipowners to recoup the past and again to anticipate the future. The time-span would be fiscally traumatic for both shipowners and shippers.

Settlement of disputes.

The developing countries were of the strong view that in order to accomplish their basic objectives (improve their economies and develop their own merchant marines, if they so wished), the implementing rules should be legally enforceable, conferences should be required to consult with shippers and especially shipper organizations (or similar entities designated by their governments), and disputes on matters governed by the Code should be the subject of mandatory arbitration. International arbitration before a panel selected from an international list of arbitrators would be held in respect to general Code matters in dispute; it would be conducted before local arbitrators on disputes involving predominantly local issues. For example, if the dispute involved port surcharges, it would be arbitrated at the port in question. This approach stemmed from their considerable skepticism about the objectivity of courts and other tribunals in the jurisdictions of the traditional developed maritime countries.

Most of the Group B maritime countries were opposed in 1972-1974 to a legally binding Code. They considered that such an approach would burden carriers and commerce with unrealistic rigidity and unproductive litigation. They were especially concerned with the arbitration proposal originally submitted by the developing countries as it would apply to disputes on rate increases. For example, if the conferences gave notice of a general rate increase, a disputing shipper organization could take the matter to arbitration and delay the effective date of the increase for as long as the arbitration went on, thereby extending existing rates for periods far longer than the basic 24 months.

Also, most of the Group B countries espoused commercial self-regulation. Disputes should be resolved by arbitration, if so agreed, otherwise by negotiations and perhaps non-binding conciliation. Unilateral regulation by governments, their courts or regulatory agencies was not favored.

For the United States, Germany, Japan, and I think Brazil, mandatory arbitration also raised serious constitutional questions. In the United States, for instance, it is one thing to enact law making arbitral awards binding and enforceable where the commercial interests voluntarily consent to arbitration. However, it is constitutionally most doubtful, by statute or treaty to compel U.S. citizens to go to arbitration against their consent and to deprive them of recourse to our courts.

The compromise concept in the text, as you will observe, is that disputes in respect to certain matters shall be resolved by mandatory non-binding conciliation, except where the parties agree to arbitration or some other type of proceeding. The various provisions on this subject are set out in Chapter VI, Articles 23-45, including model rules of procedure in Annex I.

Oversimplified, the disputes settlement provisions in the Code include the following.

Where the parties agree to a particular procedure, such as arbitration in dual rate contract situations, that procedure will be followed provided it is permissible under national law. Otherwise, disputes between the parties listed in Article 23(1) and on the subjects listed in Article 23(4) shall, at the request of any of the parties, be submitted to international mandatory conciliation.

Time limits for initiating conciliation proceedings are prescribed in Article 24. Further time and procedural requirements are found in other sections of the Code. There are also rules on where the conciliation proceedings shall take place.

Conciliators are to be selected from an international panel whose members are designated by each of the contracting parties. See Article 30.

While a conciliation proceeding is mandatory if requested by one of the disputing parties, the recommendation of the conciliators can be rejected by any or all parties. Article 37.

Under Article 39, a recommendation of the conciliators which has been accepted by the parties is entitled to recognition as if it were a final court judgment by each of the contracting states. Exceptions are: legal incapacity of the party accepting the recommendation, fraud or coercion, a recommendation contrary to public policy in the enforcement country, or where the composition of the conciliators or the conciliation procedure was not in accordance with the Code.

In agreeing to this novel conciliation procedure, a number of delegates from the developing countries made it clear that they were most doubtful it would work. However, in order not to hold up final action on the text of the Code in April 1974, they were willing to accept this approach on a trial basis.

The European Community may also have recently agreed that their member states shall not insist on applying the disputes settlement procedures in Articles 23

to 46 of the Code in their mutual relationships or, on a reciprocal basis, in relation to shippers and shipowners of other OECD countries. The details of their agreement on this point remain to be examined.

CURRENT STATUS OF THE CODE AND RESERVATIONS

Article 49 provides that the Code Convention will come into force six months after the date on which (a) not less than 24 states (b) whose tonnage amounts to at least 25 percent of the 1973 world general cargo tonnage based on Lloyd's Register of Shipping, Statistical Tables, 1973, become contracting parties.

The Convention has not yet come into force. Attached is a November 24, 1978 UNCTAD report listing the countries that have definitively signed, ratified, or acceded to the Convention (there may have been a few since November, but it would not change the situation). It shows that the 24 State requirement has been satisfied. However, their combined vessel tonnage is slightly less than 6 percent—far short of the 25 percent requirement.¹

The Convention, incidentally, will not apply to trades controlled by intergovernmental agreements. At least this was the position taken in 1974, when the Plenipotentiaries in Geneva were concluding deliberations and voting to adopt the text of the Code. At that session, the spokesman for the Developing Countries, including the Soviet bloc, stated that "there is no scope for the operation of the Code where shipping operations between the countries concerned are controlled by intergovernmental shipping agreements." And, in August 1978, it was reported that India ratified the Code on the understanding that "Intergovernmental Agreements fall outside the purview of the Convention".

The entry into force tonnage requirements cannot be satisfied unless some of the traditional western maritime countries and Japan accede. The statistics have eluded me; but my recollection is that accession or ratification by Germany, France, Belgium and/or Japan would be sufficient. In any event, if one or two of them do so, a number of others will quickly follow suit.

Germany, France and Belgium several years ago signed the Convention subject to ratification. Other European Community countries thereupon instituted action in the European Court, contending ratification by the three would violate the Treaty of Rome. In result, Germany, France and Belgium agreed to hold up ratification pending efforts by the European Community to resolve their differences and reach a common position—the target date being the end of April or early May, 1979, not by happenstance just prior to the convening of the Fifth Session of UNCTAD in Manila.²

The European Community may have in most recent days resolved their differences—and in the direction of acceding to the Convention subject to agreed reservations. At the time this submission was being prepared news reports and other information indicated that under a Regulation to be agreed by The Council of The European Community, its Member States ratifying or acceding to the Convention should, on doing so, enter several reservations to the following effect:

1. Article 2 of the Code—the trade participation provisions—shall not apply (a) to the trades between the European Economic Community countries and (b) on a "reciprocal basis" between them and the other OECD countries which are Contracting Parties to the Code; and

2. Article 3 of the Code (relating to voting rights) and Article 14(9) (freezing, absent agreement with shippers, general freight rate increases for 10 months between the effective date of one general rate increase and notice of the next increase)³ shall not apply to the conference trades between the European Community countries, and between them and other OECD countries, thus including the United States, Canada, Australia, New Zealand and Japan.

The Regulations apparently have other provisions and will require analysis when the final text is available.⁴

If the summary of the reservations is reasonably correct, and if the United States should not accede to the Code and the European Community should do so; (a) in

¹ The Convention can of course be adopted by countries as their domestic laws; and its various concepts are on occasion referred to by one or another in support of particular actions or views.

² UNCTAD V is scheduled to be held at Manila from May 7 to June 1, 1979. Last fall, an item on the Provisional Agenda was "Developments" relating to the Convention. Article 52 of the Convention provides for a Review Conference in 1979 if requested by one-third of the States entitled to become Contracting Parties, to review the Code and to consider and adopt appropriate amendments.

³ The 5 month notice provision in Article 14(1) is not mentioned.

⁴ At this writing, final action reportedly was scheduled for Apr. 23, 1979.

terms of European law, the Code in its entirety⁵ would apply to the trades between European Community countries and the United States; (b) this would include the Article 2 trade participation provisions; but the Code voting and rate freeze provisions would not.

Finally, predictions are risky. However, if this recent action of the European Community materializes, one cannot foreclose the possibility that the Code will come into force as a Convention in the not too distant future.

DIFFERENCES AND CONFLICTIONS BETWEEN THE CODE AND UNITED STATES LAWS

If, as appears increasingly likely, the Code comes into effect in the near future, it will become the law of many countries at the other ends of the United States trades, including in total or substantial part the other ends of our trades with the European Community, Japan, Australia and New Zealand.

Accordingly, early reassessment of the United States position on the Code and the related European Community reservations and regulations is most desirable. To that end, it would seem useful to review some of the basic differences and conflicts between the Code, the Shipping Act, 1916 and our antitrust philosophy.

General

The basic philosophy of the Code is self-regulation by the commercial interests with a minimum role for governments. That role is not a regulatory one in the sense of the Shipping Act, 1916.

Conference carriers can cooperatively regulate their activities and reach agreements with shippers and shipper councils without first obtaining approval of government entities, such as the Federal Maritime Commission; and they can do so without having to satisfy the standards of the Shipping Act or being exposed to the penalties of anti-competitive laws, such as our antitrust laws.

The Code is limited to conference activities. On the other hand, the Shipping Act, 1916 also regulates non-conference carriers. As obvious instances, the Code does not regulate the rates of non-conference carriers or their joint service or sailing agreements, whereas the Shipping Act does.

The Shipping Act prescribes monetary penalties for violations of its requirements. So do the antitrust laws. The Code does not.

Conference membership

Under Article 1 of the Code, national shipping lines have the right to become full conference members in their country's trades. Under Article 1(3), the conferences can deny membership to third country applicants. In contrast, Section 15 of the Shipping Act requires open conferences and entitles all "qualified" carriers regardless of flag to become conference members on "equal" terms and conditions.

Voting

Under Article 2(13), the national shipping lines of countries at both ends of the trade have a majority vote in deciding whether to establish pools or adjust sailings. Under Article 3, each full member generally has equality in the making of decisions; however, in respect to matters relating to the conference trade between their two countries, national shipping lines have the right of veto. In contrast, as interpreted by the Federal Maritime Commission, each conference member shall have one vote regardless of flag.⁶

Trade participation, pooling, sailing and berthing agreements

Under Article 2 of the Code, unless they otherwise mutually agree, the national shipping lines of each country, shall have equal rights to participate in the traffic of their respective countries; third-flag lines shall have the right to a "significant part, such as 20 percent," of that traffic. This is generally described as "40-40-20".

In addition, Article 2 permits the conference carriers to establish pooling, sailing and berthing agreements—giving national-flag shipping lines a dominant voice in this type of activity.

Also Article 19 of the Code permits and requires conferences to arrange services so as to avoid bunching and gapping of sailings.

In contrast, the Shipping Act, 1916 does not grant preferential trade participation to national-flag lines. Except for recent Commission decisions in the equal access trades, pooling and similar agreements must be justified by transportation needs sufficient to overcome the anticompetitive standards of our antitrust laws.

Agreements covered in Article 2 of the Code relating to the United States trades cannot be implemented until the parties file and have them approved by the

⁵ Assuming it comes into force as a convention.

⁶ The Federal Maritime Commission generally limits joint services to one conference vote.

Commission under Section 15 of the Shipping Act. If the parties should fail to do this, they are exposed to penalties under that Act and also to criminal and civil actions under the antitrust laws.

Moreover, the Commission is required to disapprove or modify such agreements if it finds that they will operate in a manner unjustly discriminatory or unfair as between carriers, shippers, exporters, importers or ports, or that they will operate to the detriment of the commerce or be contrary to the public interest of the United States. These standards are not found in the Code.

Cargo preference laws

The Code provides in Article 2(17) that the trade participation provisions shall apply to "all goods" with the sole exception of "military equipment for national defense purposes." Depending on the particular circumstances, this could create a conflict with several cargo preference laws of the United States, namely, the United States Act of 1904 on defense cargoes, 10 USC Section 2631, Public Resolution 17 relating to Export-Import Bank cargoes, 15 USC Section 161a, and PL 480 cargoes, 46 USC Section 1241(b). The first two statutes require all defense and Ex-ImBank cargoes to be transported on U.S.-flag vessels; the last reserves 50 percent of the cargo to U.S.-flag vessels.

Loyalty arrangements

Article 7 of the Code entitles conferences, in consultation with shippers or shipper organizations, to institute loyalty arrangements which could include not only the dual rate contract system but also deferred rebate arrangements.

Section 14 First of the Shipping Act prohibits deferred rebates; and there could be conflict if conferences situated in a country acceding to the Code should, especially in agreement with shippers, agree to institute the deferred rebate system.

Similar problems could arise if shipper organizations in Code countries at the other ends of our trades should insist on modifying dual rate contracts in a manner not approved or approvable under the requirements and standards of Section 14(b) of the Shipping Act, 1916. This could be especially true if modifications were the result of a conciliation agreement in a Code country, bearing in mind that such agreements would be binding under that country's laws as provided in Article 39 of the Code.

Consultations and shippers' councils

Article 11 of the Code requires conferences to confer with shippers and shipper organizations on matters of common interest, including tariff matters. Section 15 of the Shipping Act, 1916 requires conferences to adopt and maintain procedures for hearing and considering shippers' requests and complaints. However, the Department of Justice refuses to rule that consultations between shippers councils and conferences would not violate the antitrust laws.

Criteria for freight rate determination

Article 12(a) of the Code sets out the criteria for determining freight rates, namely, that they shall be fixed "at as low a level as is feasible from the commercial point of view and shall permit reasonable profits for shipowners." In comparison, Section 18(b)(5) of the Shipping Act authorizes the Commission to disapprove a rate or charge "so unreasonably high or low as to be detrimental to the commerce of the United States."

Intermodal service

According to Justice, the Federal Maritime Commission does not have authority under the Shipping Act to immunize conference through intermodal rates. Its position in part hinges on the provision in Section 18(b)(1) of the Shipping Act concerning the filing of rates between "ports." Its views, as you know, are disputed and clarifying legislation is being considered. On the other hand, the Code provisions are broad enough in my view to authorize such rates and services and in any case other countries do not apply antitrust laws to conferences.

There is the related problem in the United States of ICC jurisdiction over the inland segment of the through rates and services. The problem does not exist in other countries under the Code.

Tariff publication

The Shipping Act requires tariffs to be filed with the Commission and that rates (conference and non-conference) become effective a prescribed time after such filing. Code Article 9 does not require filing with governments; only that tariffs be made available to shippers and others so requesting, at reasonable costs.

Foreign-to-foreign trades

Under Article 1(3) of the Code, United States carriers theoretically can be denied membership in conferences serving foreign-to-foreign trades, or as a third-flag carrier granted less than "equal" participation in the conference traffic in that trade. This could, depending on the circumstances, conflict with the membership and equal treatment provisions of Section 14(a) of the Shipping Act.

Freight-rate notices

Unless the Conference and shippers agree, Code Article 14(1) in conjunction with Article 14(9) freezes general freight rate increases to 15 months. This applies also to dual rate contract situations. While the Shipping Act does not preclude the 15-month freeze, it does entitle conferences to increase rates on 90 days notice in dual rate trades and otherwise on 30 days notice.

Promotional rates

The Code specifically addresses "promotional" freight rates, Articles 12(c) and 15, for the benefit of developing and landlocked countries. The Shipping Act does not.

The Federal Maritime Commission

The Code provides for settlement of disputes on matters governed by the Code by arbitration, conciliation, or other agreed procedure the results of which are binding and enforceable in Code States.⁷ In the United States, arbitral awards or other commercially resolved disputes involving activities governed by the Shipping Act can be overturned by the Federal Maritime Commission if the Shipping Act requirements and standards are not satisfied. Not to be overlooked are court actions for antitrust violations.

The European Community may also have recently agreed that their member states shall not insist on applying the disputes settlement procedures in Articles 23 to 46 of the Code in their mutual relationships or, on a reciprocal basis, in relation to shippers and shipowners of other OECD countries. The details of their agreement on this point remain to be examined.

CONCLUSIONS

While no opinion is expressed on the merits of the Code in relation to the Shipping Act, 1916, or the European Community approach to the Code, several general and obvious conclusions cannot be resisted.

International liner carriers serve the trades of two and often more countries. In result, they operate in social, economic, juridical and strategic environments which vary from country to country. And over the years, they have been an important tool in bridging these diverse environments and serving international commerce.

It would of course seem obvious that the greater the complexities, the greater the burdens upon both the suppliers and the users of liner shipping. Conversely, the less complicated the environment, the greater the potential benefits for everyone (strategic considerations and objectives aside). And if legally binding rules of conduct are desirable, ideally it would be preferable to have a common set of such rules.

Regrettably, the trend is in the opposite direction. In the United States trades, for example, the liner carriers and conferences for many years were regulated primarily under the Shipping Act, 1916. In later years, they have been exposed to our antitrust laws. In addition, governments at the other ends of some of our trades have promulgated laws or decrees requiring a very substantial portion of cargoes in their trades to be moved on their national-flag vessels. Bilateral agreements are arranged. Apparently, the UNCTAD Convention will shortly be added to this list, plus variations on the Code in the trades between European Community Countries, between the United States and the European Community Countries, perhaps also in the trades between the United States and Canada, Japan, Australia or New Zealand.

Abandonment of the economic philosophy and regulatory laws of the United States is not urged, if they rest upon unassailable foundations. But it is surely evident that those foundations should be most carefully re-examined and that every effort made to relieve international liner shipping and commerce from proliferating and conflicting laws.

⁷ Acceptance of conciliation results is assumed.



United Nations Conference on Trade and Development

Distr.
GENERAL

TD/B/C.4/INF.24
24 November 1978

Original: ENGLISH

TRADE AND DEVELOPMENT BOARD
Committee on Shipping

SIGNATURES AND RATIFICATION OF, OR ACCESSIONS TO,
THE CONVENTION ON A CODE OF CONDUCT FOR
LINER SHIPMENTS

Note by the UNCTAD secretariat

.. As stated in TD/B/C.4/INF.15, the UNCTAD secretariat will report from time to time on the status of definitive signatures, ratifications or accessions to the Convention on a Code of Conduct for Liner Conferences.

. By 21 November 1978, 55 countries had made definitive signatures (s), ratified (r) or acceded (a) to the Convention. The countries, arranged in chronological order, are:

Algeria	24 June 1975	r
Bahamas	25 June 1975	s
Bolivia	25 June 1975	s
Burkina Faso	27 June 1975	s
Burundi	30 June 1975	s
Cameroon	30 June 1975	s
Chad	30 June 1975	s
Cote d'Ivoire	30 June 1975	s
Dominican Republic	24 July 1975	a
Egypt	10 September 1975	a
Equatorial Guinea	27 October 1975	a
Ghana	3 November 1975	a
Greece	14 January 1976	r
Haiti	2 March 1976	r
Indonesia	3 March 1976	r
Kenya	6 May 1976	a

United Republic of Cameroon	15 June 1976	a
Cuba	25 July 1976	a
Indonesia	11 January 1977	r
Ivory Coast	17 February 1977	r
Central African Empire	15 May 1977	a
Senegal	20 May 1977	r
Zaire	25 July 1977	a
Madagascar	25 December 1977	a
Cape Verde	15 January 1978	a
India	14 February 1978	r
Kenya	27 February 1978	a
Mali	15 March 1978	a
Sudan	16 March 1978	a
Gabon	5 June 1978	r
Ethiopia	1 September 1978	r
Iraq	25 October 1978	a
Costa Rica	27 October 1978	r
Peru	21 November 1978	a
Egypt	25 January 1979	a

Mr. CAPONE. Thank you.

My name is Ronald A. Capone. I am a partner of the law firm, Kirlin, Campbell & Keating. So you may have some indication of my predilections, my firm and I represent ocean carriers of every description and every flag, including substantially U.S.-flag carriers.

I have been Chairman of the Committee on Ocean Liner Conferences of the Maritime Law Association of the United States, and I have served as adviser on the U.S. delegation at the UNCTAD Conferences relating to the code in Santiago, Chile, and in Geneva in 1972, 1973, and 1974.

At your committee's request, I am most privileged to submit an overview of my recollections and impressions in respect to the code. My written statement addresses the code's origins, some of its provisions, including the most controversial ones, the kind of status of the code and illustrative differences, and conflicts between the code and U.S. laws. It is by no means an exhaustive presentation.

I understand the merits of the code, including its impact on carriers and shippers will be discussed by other witnesses. I should indicate that my representations are strictly my own. I do not represent any interests in this matter.

As you have indicated, the code originated with developing countries. In the sixties and seventies, these countries began to study, under UNCTAD auspices, ways and means of improving their economies. Their aspirations were, and still are, to increase their imports, decrease, or hold the line as much as possible on the ocean costs of their exports and imports, and for some of them, to establish and maintain a merchant marine. They did not oppose the conference system, and as it turned out, they very actively supported it.

However, they believed that conferences were controlled by the commercial interests of the developed maritime nations, that the predilections of the traditional shipowners, including their governments and their judicial and other tribunals, precluded conference actions which would be responsive to the needs of poorer countries. They were of the firm view, therefore, that the most important step would be to promulgate a legally binding, multilateral code regulating the conduct of liner conferences, and a code that would be enforced through mandatory arbitration, international on general matters, and local in respect to local matters.

So, in 1972, the developed countries prepared such a draft code under the auspices of UNCTAD, which was first taken up at the Conference in Santiago, Chile. At the UNCTAD deliberations, it was interesting to me to observe the procedures.

The Group of 77 consisted of developing countries, now more than 77 countries, group B consisted of the developed Western countries, including the United States, Japan, Australia, Canada, and New Zealand, and maybe one or two others. Group C, the African, Asian, and other developing countries, and group D, the Soviet bloc. There were some countries that did not fall in any category.

Debate was conducted in terms of these groups. Throughout the deliberations and negotiations there were extensive debates, conflicts, and differences, not only between the groups, but also within

them. Views differed, depending upon whether the particular country was a user or supplier of shipping, or a mixture of both, or cross-traders.

The principal protagonists were group B, who considered the Group of 77 draft too formalistic, rigid, and unrealistic; and the Group of 77, who believed that the flexible nonbinding guideline approach of the European countries would be ineffective to accomplish their objectives; and they were also of the view that statutory regulations, such as we have with the Shipping Act, with the Federal Maritime Commission, would also not do the job.

The Soviet and China bloc chose to remain in the background until the critical moment.

Nevertheless, seemingly miraculously, in the very last days of the 1974 Conference of the Plenipotentiary Session in Geneva, a text emerged, and it was approved by 72 countries: The developing countries included the Soviet bloc, China, France, Germany, Belgium, and Australia. Five developed countries abstained from voting; seven, including the United States, voted negatively.

Now, as to the Code provisions, it should be noted again that at none of the UNCTAD sessions, to my knowledge, did any delegate take the view that conferences should be outlawed. Indeed, at the final vote, of the Plenipotentiary, the spokesman for the Group of 77 stated, and I quote in part:

* * * nonconference shipping lines will not be permitted to operate in a manner which damages the smooth functioning and operation of liner conferences.

While non-conference lines have a place in liner shipping, in no circumstances can we accept a situation where through their operation, the national shipping lines of developing countries are made to lose what, after great difficulty, they are entitled to get under the Code in respect of participation in the trade.

Few of these provisions were without controversy, but three of the most controversial were those relating to trade participation, the time between general freight rate increases, and machinery to enforce the code, and settlement of disputes.

The group B countries did not object commercially to an agreement on a commercial basis for pooling, and other conference arrangements to rationalize vessel tonnage and carrier sailing. However, they believed that the best results could be obtained by leaving such matters for determination by the shipowners, and that the so-called 40-40-20 national flag approach to trade participation would stimulate unnecessary and inefficient liner capacity and service, ultimately not only to the detriment of the carriers, but to the shippers and consignees.

The third-flag share and role in conference activities was also a matter of considerable objection by those countries whose shipowners substantially participate in cross-trades.

The United States did not, so far as I know, object to the aspiration of the developing countries for a merchant marine of their own. But it did share the concern of group B and others as to the text in the trade participation provision, and in consequence, it voted against it.

The freight rate provision basically was objectionable because in the view of the developed countries, a 15-month freeze—and there are some exceptions to that—would be unrealistic and harmful to shipowners.

The disputes settlement provision ultimately came out with the novel concept of a mandatory, nonbinding conciliation. Group B itself firmly opposed mandatory arbitration. The final result, and I do not think there is substantial quarrel with the concept that now is in the code, on a trial basis, is that where the parties agree to arbitration, or other procedure, that procedure will be followed; otherwise anybody that is specified in the code can request conciliation.

However, the recommendations of the conciliators need not be accepted. If they are accepted, those recommendations then become enforceable and must be recognized in the states that are contracting parties to the code.

As to the current status of the code, it has not yet come into force as you know, under article 49, at least 24 states must sign and become parties, whose combined tonnage is 25 percent of the world trade general tonnage. Thirty-four states have signed. However as far as I can tell, their tonnage totals a little less than 6 percent of the required 25 percent.

The tonnage requirement cannot be satisfied unless some, or a number of the traditional maritime countries, including Japan, accede.

According to recent news reports, the European Community has agreed to accede to the code in accordance with a regulation they have drawn up, and certain agreed reservations. I do not know whether that has come to pass or not.

The reported reservations, and the final text of the EC regulation remains to be studied. One reservation would exclude the application of the trade participation provisions in article 2 of the code; that is, they would exclude it in respect to the trade between the European Economic Community countries, and on a reciprocal basis between them and the other OECD countries, which are contracting parties.

If the United States should not accede to the code, and the European Community should do so, in terms of European law, the code in its entirety, including the trade participation provision, would most probably apply to their trades with the United States. That is a point that people are studying very carefully.

Now, as to differences in, and conflicts between the code and U.S. laws, and I will try to speed this up a little more for you, if the Code should come into force in the near future, it would become, obviously, the law of many other countries, at the other ends of our trades.

Accordingly, it would seem useful to review some of the differences and conflicts between the code, the Shipping Act 1916, and our antitrust laws.

In a general sense, it should be noted that the basic philosophy of the code is self-regulation by commercial interests with a minimum role for Governments. Conference carriers can cooperatively regulate their carriers, and reach agreements between themselves and shippers, or shippers' councils, without first obtaining the approval of Government entity, such as the Federal Maritime Commission. They can do so without having to satisfy the standards of the Shipping Act, or being exposed to the penalties of anticompetitive laws, such as our antitrust laws.

The code is limited, as I noted earlier, to conference activities. On the other hand, the Shipping Act of 1916 also regulates nonconference and other matters. The Shipping Act prescribes monetary penalties for violation of its requirements, so do the antitrust laws; the code does not.

As to conference membership, under article I of the code, national shipping lines have the right to become full conference members in their own country's trade. Under article I, subparagraph (3), the conferences in the right circumstances can deny membership to third country applicants.

In contrast, the Shipping Act requires open conferences, and that any qualified carrier shall be admitted as a full member on equal terms and conditions regardless of flag.

Voting under the code gives a preferential position to national shipping lines. Indeed, under article 3 in respect to matters relating to conference trades between their two countries, national shipping lines shall have the right of veto.

In contrast, under the Shipping Act, any member is entitled to one vote. One member, one vote, is the rule.

The code has provisions, which in regard to trade participation, apply to all goods with the sole exception of military equipment for national defense purposes. As you know, we on the other hand have a number of cargo preference laws.

The code entitles conferences, in consultation with shippers, or shipper organizations, to institute loyalty agreements. They may be either dual rate contracts, or deferred rebate systems.

Section 14 first of the Shipping Act, on the other hand, prohibits deferred rebates. That is not to say, however, that conferences in our trades could not agree to dual rate contracts, but they may want to agree to a deferred rebate system.

Problems could also arise if shipper organizations in code countries at the other end of our trade should insist on modifying dual rate contracts in a matter not approved, or approvable, under the requirements of section 14(b) of the Shipping Act of 1916.

The code requires conferences to confer with shippers and shippers' organizations on matters of common interest. In contrast, the Department of Justice still refuses to rule that consultations between shipper conferences and councils would not violate our antitrust laws.

Also, according to the Department of Justice, in its recent submissions to the Federal Maritime Commission, the Commission does not have authority to authorize conferences, to offer through rates and services on an intermodal basis. Therefore, they cannot be immunized from the antitrust laws.

As I read the code, such services are permissible. Moreover, as you know, most, if not all, of the countries do not apply their anticompetitive laws to liner shipping.

The Shipping Act also requires tariffs to be filed with the Commission and that rates become effective a prescribed time after filing with the Commission. The code simply requires that conferences make tariffs available to shippers and others so requesting, at a reasonable cost.

There are differences in respect to the foreign-to-foreign trades as they relate to section 14(a) of the Shipping Act of 1916.

Freight rate notices are different in regard to the time for effectuating rates under the code as compared to the Shipping Act of 1916.

Finally, the code provides for settlement of disputes on matters governed by the code by arbitration, conciliation or other agreed procedure, the results of which are binding and enforceable in code states. In the United States, however, arbitration awards or other commercially resolved disputes involving activities governed by the Shipping Act can be overturned by the Federal Maritime Commission if the Shipping Act requirements and standards are not satisfied. And not to be overlooked' of course, is if the Shipping Act is not satisfied, neither will be the antitrust laws.

Now, I have said that I would not express a view on the entire subject, but I cannot help observing that the trend nowadays is in the opposite direction of what would be the ideal, namely, to the extent possible that international liner shipping should be governed by a common set of rules.

In the U.S. trades, we have the situation where liner carriers, independently and in conferences, for many years were regulated primarily under the Shipping Act. In later years, they have been exposed to our antitrust laws.

In addition, governments of some of our trades have promulgated laws or decrees requiring a substantial portion of their cargoes in their trades to be moved on their national-flag vessels. Bilateral agreements are starting to come into being. Now apparently we will have the UNCTAD Convention to which probably should be added a variation, depending upon what the European Community does.

I do not, of course, urge abandonment of the economic philosophy and the regulatory laws of the United States if they rest on sound foundations. But it is surely evident that those foundations, as well as the code provisions, should be most carefully reexamined and that every effort should be made to relieve international liner shipping from proliferating and conflicting laws so that they can do the job they are supposed to do, which is to serve international commerce.

Thank you.

Mr. JONES [presiding]. Thank you very much for your testimony. I do have two or three questions if you do not mind, sir.

If the code does not go into force, and as you state on page 13 of your statement, the provisions could be adopted as "local law." How long would it likely be for the code to become customary international law in your opinion?

Mr. CAPONE. On the time element, I get conflicting reports but, at the moment, every indication is that before the end of this year, the code will come into force as a convention. I hesitate because it may require ratification by various other governments, as is true here in the United States, and there is some view that that might take 1 or 2 years for some countries. On the other hand, once it comes into effect as a convention, there are probably a number of other countries where it will go into force immediately.

Mr. JONES. What, in your opinion, would the U.S. position be in the event that the code does not go into force and local law is implemented?

Mr. CAPONE. I am sorry?

Mr. JONES. What would be our Nation's position—

Mr. CAPONE. If the United States should not accede to the code, then I think you have a very confusing situation in terms of international law. So far as the developing countries are concerned in our trades with them, from their viewpoint, the trade participation provisions would apply. There would be problems that should be examined and explored as to the consequences in regard to the foreign-to-foreign cross-trades which, for some of our carriers, would be important. They could, under the code, be cut out from such cross trades.

As far as the European Community is concerned, if I understand their reservation correctly' the trade participation provisions would not apply as to the trade between the European Community countries. However, the second part of that reservation also says that the trade participation provision shall not apply on a reciprocal basis, whatever that means, in respect to their trades with other OECD countries who are contracting parties to the code. Therefore, if the United States should not be a contracting party to the code, so far as the law of the European countries would be concerned, the trade participation provisions of the code would apply in their entirety in the trades with the United States.

Now, there are some nice legal questions then as to whether we could go forward or would dare go forward, facing at this end the admonitions of the antitrust laws, as well as the requirements of the Shipping Act to get approval of, say, pooling agreements under the trade participation provisions. But it is just an unfortunate set of circumstances so far as I am concerned and, if possible, those conflicts should be eliminated.

Mr. JONES. Thank you, sir.

You have a great sense of anticipation. You have already answered two questions that I had in mind to ask you. So we will go on a little further.

Does the so-called 40-40-20 trade participation provisions apply only to those conferences which operate a pool?

Mr. CAPONE. In terms of the text of the code, it does not speak of doing so in regard to—or, I am sorry, let me restate that.

In terms of the code text, the so-called 40-40-20 provision is not in its language tied to pooling agreements. However, if I may anticipate the next question, I really do not see how the trade participation provisions could be effectively administered without some sort of a pooling arrangement because someone has to know who is carrying what cargo and what quantities. Maybe your technique could be worked out, but I have not thought that one through.

Mr. JONES. Thank you, sir.

Finally, how compelling a requirement is it in the code operation to have shipper's councils in place and functioning?

Mr. CAPONE. Could you repeat that?

Mr. JONES. How compelling a requirement is it for code operation to have shipper's councils in place and functioning?

Mr. CAPONE. It is an absolute requirement under the code that there shall be shipper councils and that conferences must consult with them on the matters prescribed in the code. And there is also

another interesting provision which entitles the code State government to designate appropriate authorities who in turn may designate shipper councils? That incidently stems from the fact some of the poorer countries did not feel that they could have an effective shipper council because they were so limited in their resources; and because they lacked sufficient knowledgeable educated people in those days. Of course, they are now improving their educational systems.

Mr. JONES. Thank you.

The Chair recognizes the gentleman from Kentucky for any questions he might have.

Mr. SNYDER. Mr. Chairman, I would like Mr. Losch to ask the questions.

Mr. JONES. Mr. Losch.

Mr. LOSCH. Thank you, Mr. Snyder and Mr. Chairman.

Mr. Capone, you were an adviser to the delegation in 1974, is that correct?

Mr. CAPONE. Yes, sir.

Mr. LOSCH. Given that the United States is a major maritime power, presumably with some influence among the other shipping countries in the world, what procedures or what factors at that conference contributed to an outcome which was not consistent at all with our views?

Mr. CAPONE. Well, I think it should be noted that in substantial measure, a number of these provisions, in terms of the text, were acceptable to the United States, leaving aside the broader concept of a code which would, in effect, do away with the Shipping Act of 1916. But as powerful as the United States was and is, at least as I like to think it, the developing countries had banded together and they were bound and determined to come out with a multilateral legally binding code. Indeed, they made it abundantly clear that if the developed countries did not go along with them and try to reach some sort of a compromise agreement, they had the necessary votes and they were going to take those votes and they would promulgate a code which would be strictly in terms of language and provisions of their own.

Now, what was very interesting—I am sorry if I am delaying this—at one point there was a total impasse between group B and the Group of 77. The remarkable gentleman who was chairman of the conference, Mr. Sravistavas, a mild spoken Indian, for some reason or another, was able to persuade the delegates to at least go through a theoretical exercise of setting out code provisions, of trying to agree on text; and where there was disagreement, to enclose the disagreed text in brackets. The text finally submitted for voting was full of brackets and brackets on brackets. And, in the final result a text emerged.

Mr. LOSCH. I am familiar with some of those outcomes in international negotiations.

Did the United States work behind the scenes to try to avoid such an outcome?

Mr. CAPONE. Vigorously.

Mr. LOSCH. Pardon?

Mr. CAPONE. Vigorously.

Mr. LOSCH. Did we have a coherent consistent policy when we entered those negotiations?

Mr. CAPONE. Yes. Not only that, but the officials of the U.S. Government who were actually working on the matter day in and day out spent countless hours not only canvassing and getting the views of the various departments and agencies of this Government, but also the commercial interests. I was really very proud of the effort that they put in.

Mr. LOSCH. Did they put in as much effort in negotiating with foreign countries as they did with our own domestic interests?

Mr. CAPONE. Yes, they did.

Mr. LOSCH. Why did we only get the support of Switzerland on our statements supporting open conferences?

Mr. CAPONE. Practically all of our allies, as you know, ardently dislike the open conference system under U.S. laws. There was only one country that was vigorously fighting for the open conference system, and that was Greece. But they did not, and they still do not believe that our open conference system makes any sense whatever.

Mr. LOSCH. Do you agree with that?

Mr. CAPONE. I agree with that myself. I believe—I am sorry, I am not supposed to be expressing an opinion here, but it just seems to me that the open conference system in the U.S. trade is economic nonsense. Perhaps that is too strong a word. But it certainly is not productive of more efficient liner services in our trades.

Mr. LOSCH. One final question.

In the winter of 1975, you wrote an article to the Virginia Journal of International Law which analyzed the various provisions of the text and, at the end, made some recommendations. One of the recommendations suggested exploring with other governments, prior to the code coming into force, modifications to the existing text which would make the code acceptable to the United States.

Has that recommendation been followed up?

Mr. CAPONE. I do not know, sir.

Mr. LOSCH. Has anyone drafted a series of amendments to the code which would make it acceptable to the United States?

Mr. CAPONE. If there have, I do not know of that either.

Mr. LOSCH. Do you have such a series of amendments?

Mr. CAPONE. No, I have not. I have the unhappy or happy problem of trying to contribute to the revenues of my law firm, and I spent considerable time pro bono publico on this, and I find it such a fascinating field that I still do so. One day someone ought to do that.

Mr. LOSCH. Yes, sir. Have you been an adviser to the U.S. delegation to the UNCTAD negotiations between 1974 and the present time?

Mr. CAPONE. No, I have not. I do not know what has gone on. Occasionally, we have had a sort of loose discussion, that is myself and some of the people in our Government.

Mr. LOSCH. Having read your law review article, I am sorry that you are not an adviser to the delegation. I think that many of the recommendations in your article should have been followed up.

Thank you very much, Mr. Chairman.

Mr. JONES. The Chair now recognizes majority counsel.

Mr. KYROS. Thank you, Mr. Chairman.

Mr. Capone, thank you for your enlightening analysis. Just a few short questions.

Back in 1974 when you were an adviser, it is stated that the United States had a position, for example, in his statement today, Mr. Atwood discusses the U.S. position in 1974, and you recall that one of the policy statements articulated was that the conference sharing schemes under the code were not palatable to us because we were interested in competition. Also in the long run, they would not benefit any of those who sought to be protected. That is stated as their position back in 1974.

Now, if that was the position that competition was the best policy, how does that square with the repeated statements, for example, by the Chairman of the Federal Maritime Commission, the Maritime Administrator, and even the interagency task force study, whatever we received from it so far, that the United States should pursue bilateral agreements, nation by nation? Is that a competitive policy?

Mr. CAPONE. No. I think it is an inconsistent policy.

Mr. KYROS. Now, back in 1974, you were an adviser, and in addition, there were advisers from the various agencies, there were also private shipping lines, operators.

I would like to ask you to recall, were you specifically consulted as to the positions that the U.S. delegation was taking, or were you there only as an observer?

Mr. CAPONE. No, I was a consultant. We would meet every morning, and the days went from 7 a.m., at the latest, to about 10 or 11 or 12 o'clock at night.

Mr. KYROS. Were the members from the shipping operators, were they consulted, of your knowledge?

Mr. CAPONE. Yes, they were.

Mr. KYROS. You are certain?

Mr. CAPONE. They very actively participated.

Mr. KYROS. And were consulted about the positions that the U.S. delegation had, and were going to take as the code went on day by day?

Mr. CAPONE. Yes.

Mr. KYROS. Since 1974, you have had no contacts with the State Department concerning the code?

Mr. CAPONE. Well, I have had contacts, but it has been sort of casual.

Mr. KYROS. Informal?

Mr. CAPONE. Informal, casual.

Mr. KYROS. Ever discuss the code with the Federal Maritime Commissioners?

Mr. CAPONE. Pardon?

Mr. KYROS. Ever discuss the code with the Federal Maritime Commissioners?

Mr. CAPONE. Yes, with some of their staff, from time to time. Not much in recent days.

Mr. KYROS. In the last year, when we have seen this interest by the EC nations to try to achieve accommodation between the views of the developing nations and the EC, reservations to the code

which may well go into effect, have you discussed those late developments with the State Department?

Mr. CAPONE. No, sir, I have not.

Mr. KYROS. Did they ever call you?

Mr. CAPONE. No.

Mr. KYROS. Did you discuss them with the FMC?

Mr. CAPONE. No.

Mr. KYROS. Do you know anyone that the State Department called, outside of the State Department, to discuss these new changes in the code with?

Mr. CAPONE. No. But I must say, however, that I did receive word that there will be a meeting May 1, which presumably—at the State Department, which apparently will consider recent developments.

Mr. KYROS. In all of this time have you known of any attempts by the State Department, FMC, or MarAd, to dissuade the EC from proceeding with the reservations and the method of proceeding with the code?

Mr. CAPONE. Oh, look, I may have misled, by some of these cryptic answers. I do know that the State Department people have followed developments, I do know that is, because some of them have told me, and I believe they have followed developments very closely, of what has been going on in Europe in regard to the code. That has gone on, my recollection is, at least 3 years.

Mr. KYROS. Thank you, Mr. Capone.

Thank you, Mr. Chairman.

Mr. JONES. Thank you very much for your appearance this morning, Mr. Capone.

Our next witness is Mr. James Atwood, Deputy Assistant Secretary for Transportation Affairs, Department of State.

Go right ahead. Welcome to the committee.

STATEMENT OF JAMES ATWOOD, DEPUTY ASSISTANT SECRETARY FOR TRANSPORTATION AFFAIRS, DEPARTMENT OF STATE, ACCOMPANIED BY RICHARD K. BANK, DIRECTOR, OFFICE OF MARITIME AFFAIRS

Mr. Atwood. Thank you, Mr. Chairman.

I am James R. Atwood, Deputy Assistant Secretary for Transportation Affairs, Department of State. Accompanying me is Richard K. Bank, Director of the Office of Maritime Affairs.

I have been asked to appear today to comment on the U.S. position toward the United Nations Code of Conduct for Liner Conferences and its possible impact on American carriers and ships and the Government's current regulatory scheme.

Following approximately 7 weeks of arduous and, in our view, inadequate plenipotentiary negotiations, the UNCTAD Liner Code was adopted in April 1974, subject to ratification by individual countries. The United States, the United Kingdom, Switzerland, and the four Scandinavian countries opposed the code on the grounds it would impose undesirable rigidities and inefficiencies in international shipping and world trade.

I mentioned that we viewed the discussions and consultations which led to the code as inadequate, and I wish to elaborate on that point. Considering the number of countries involved, the com-

plexity of the subject, the novelty of the enterprise, and the importance of the consequences, insufficient time was available for full consideration and discussion. This was manifest most clearly at the final plenary meeting of the conference, where the individual provisions of the code were voted upon into the early hours of the morning. At that time, new texts and amendments were introduced and adopted which had not been reviewed or discussed in the main committees of the conference. In addition, the text of the convention was not submitted to a legal drafting group, which is customary practice in conferences of this nature.

Pressure to achieve a code favorable to the political interests of the developing countries led, in our view, to the relative neglect of their and our economic interests, as well as of international juridical and administrative problems inherent in the code as drafted. Hence the code as it stands is an incomplete and unmanageable vehicle, traveling down the wrong road in the wrong direction.

The code is to come into force 6 months after the date on which it is ratified or acceded to by not less than 24 countries having a combined tonnage of not less than 25 percent of the world's liner tonnage as of 1973. So far, 34 nations, meeting approximately 6 percent of the tonnage requirements, have become parties to the code. If members of the European communities were to adopt their compromise proposal on accession by its members to the UNCTAD Code, the code would come into force among the states party to that instrument, provided of course that the reservations contained in the EC compromise are not so broad as to nullify the accessions of the EC countries.

I will return to this subject later. I would like to note, at the outset, though, that the European community has not yet taken a final position on its compromise proposal.

The code contains a set of rules intended to regulate the liner conferences, in which a significant part of the world's ocean shipping is organized. Liners, operating on regular schedules around the world, transport 20 percent of the world's ocean cargoes. The code focuses on liner trades because of the belief of the developing countries that conferences were dominated by the developed countries and discriminated against entry by the national lines of the developing countries.

Further, the developing countries argued that conferences operated against their shipper interests by setting excessive rates. Thus they maintained that the carriers of the developed countries, through their conferences, provided inadequate services at excessive rates, making the exports of the developing countries less competitive, increasing the costs of LDC imports, and necessitating large payments of scarce foreign exchange.

The code is thus designed to protect the interests of the developing nations through encouraging the establishment of national liner fleets, insuring developing countries' access to conferences serving their ports, reserving cargo for the national lines, and limiting increases in shipping rates. The code attempts to accomplish these goals by a variety of means.

First, national shipping lines would have the right to become full members of any conference serving their country's trade with other nations. To qualify for membership, the applying national line

need only demonstrate an intention to operate adequate, regular and efficient liner service over a period of time. Existing conferences normally have admitted as new members only those lines that posed a serious competitive threat. By providing automatic entry for national lines, the code has the potential of altering the existing structure of conferences. The code's existence has already altered previous conference practice of often refusing membership by national lines.

More importantly, the code establishes trade participation by allocating equal shares of most conferences' cargo to conference lines of the nations at either end of the route; conference liners of the remaining countries are entitled collectively to a "significant part, such as 20 percent." Thus, once national shipping lines join a conference, a 40-40-20 split of cargo is contemplated.

The code also provides complex procedures for the initiation of rate increases, including the requirement of a 15-month interval between general increases. Finally, the code contains an elaborate dispute-resolution mechanism, consisting of an ad hoc international panel of conciliators. A large number of disputes are subject to conciliation—including conference membership questions and general freight increases—although conciliation recommendations are binding only on those who agree to be bound.

The United States had supported, and continues to support, the concept of an international code to insure that anticompetitive and discriminatory, and consequently costly, practices are not indulged in by shipping conferences. We have a long tradition in the United States of opposition to monopolistic activities and in promoting the free play of economic forces while protecting U.S. economic interests. Therefore, we had sympathized with the developing countries in certain of their objectives. But since 1974 the United States has opposed this code, and continues to do so.

To begin with, we believe the basic analysis of the developing countries in regard to the code is erroneous. While U.S. law does not permit closed conferences, we believe the adverse effects of the conference system are exaggerated by the UNCTAD Secretariat and the developing countries. Studies of the existing structure of the shipping industry suggest that liner conferences are not in an all-powerful position to monopolize the trades.

The availability of independent, nonconference operators and substitute sources of goods in receiving markets exert competitive pressures on liner conferences. Moreover, competitive forces within liner conferences, due to differing perceptions of advantage among the members of the conference, sometimes act as a control on excessive rates. Without attempting to defend conference behavior in all circumstances, we can safely conclude that the developing countries' attack on traditional conferences was frequently not well founded. And, as explained below, the impact of the code is almost surely to increase rather than decrease shipping costs.

Provisions basic to the code conflict with fundamentals of U.S. law and economic policy, fundamentals which are to the benefit of other partners in world trade as well. The most objectionable sections of the code to us are:

First, the cargo-sharing provisions. The worldwide cargo sharing of commercial cargoes would further cartelize ocean transportation,

subordinating the objective of efficient and sound transportation to other goals. The code's cargo-sharing provisions, vague as they are, would restrict the shipper's choice of operators, delay shipments, inhibit cost-saving innovations, protect and indeed spawn inefficient carriers, and hinder efficient multistop routings, all with the result of increasing transportation costs.

Second, the closed conference system. The developing countries, which formerly attacked this system, now sanction it. United States law opposes closed conferences as an excessive restraint of trade. By closing both trades and conferences at the same time, the code virtually eliminates the element of competition in international shipping.

And third, the freight rate freeze. The provisions on freezing freight rates for 15 months, an unduly long period, could well strangle the liner industry, particularly in this era of rapid inflation, fuel price increases, fluctuating exchange rates, and other cost factors, such as port charges.

The U.S. position, developed in 1974, and maintained since that time, followed intense consultation with agency and industry officials. The U.S. delegation attending the United Nations Conference of Plenipotentiaries in Geneva in 1973, and at the final plenipotentiary session in the spring of 1974, represented a wide spectrum of government and maritime industry officials. Representatives from State, Commerce, Transportation, the Federal Maritime Commission, and congressional staff, as well as senior industry and maritime association executives, participated in the development of U.S. policy toward the code.

The list of countries, all in the developing world, that have acceded to the UNCTAD Code has grown slowly. Eleven in 1975, six in 1976, six in 1977, 10 in 1978, and one in 1979. The principal development since the April 1974 conference has been the development by the European Economic Community (the EEC) of a compromise proposal on accession by its members to the Code, to which I referred earlier. After nearly 4 years, in February 1979 the EEC Council of Ministers approved a draft compromise proposal, with a caveat by the Danish Government that the EEC consulted with the United States and Japan on the compromise.

As this committee is aware, these were held, at least preliminarily, a few weeks ago. In anticipatory response to testimony which the committee will hear this afternoon, I would like to emphasize that every industry representative who has made inquiry to the Department of State concerning those consultations was given a full and complete report.

Mr. JONES. The Chair would observe, if you would like to, you may paraphrase the rest of your statement. The entire statement will be included in the record.

[The following was received for the record.]

DEPARTMENT OF STATE,
Washington, D.C., September 1, 1978.

Mr. RUSSELL F. STRYKER,
Assistant Administrator for Policy and Administration, Department of Commerce,
Maritime Administration, Washington, D.C.

DEAR MR. STRYKER: In the absence from the office today of Assistant Secretary Katz, I am forwarding the enclosed comments of the Department of State on volumes II and IV of the Interagency Maritime Study which you circulated August

18. I apologize that our comments on volume III(1) are delayed, but we should have them for you early next week.

Your letter to Mr. Katz asked whether the Department's comments could be made available to interested persons outside the government. In our view, any decision to release papers of the interagency group should be made by the White House Domestic Policy Staff and the Office of Management and Budget, the coordinators of this project.

If you have any questions on our comments, please call me at (202) 632-3724.

Sincerely

JAMES R. ATWOOD,
Deputy Assistant Secretary
for Transportation Affairs.

DEPARTMENT OF STATE,
Washington, D.C., September 1, 1978.

DEPARTMENT OF STATE'S COMMENTS ON INTERAGENCY MARITIME STUDY,
VOLUME II

PRESENT CONDITION OF U.S. MARITIME INDUSTRIES

PART I—OPERATING INDUSTRIES

General comments

We have found this discussion of the present condition of the operating industries to be excellent.

Specific comments

1. *U.S.-flag liner fleet—Overview.* In the opening description (p. II-1-3), it would be more precise to identify the percentages of U.S. carriage in terms of both tonnage and value. Tonnage and value in the liner trades are frequently almost identical, but in some instances the differences are important.

2. *Description of liner trades.* Section II(B), describing the U.S. liner trades, gives figures and percentages for the U.S.-flag share of cargo (p. II-1-5 et seq.). It would be helpful if figures could also be provided for tonnage carried by U.S.-owned carriers flying foreign flags, ships of the other bilateral partner, and third flag ships. This would help identify the significance of cross-traders in the trades, as well as the extent of U.S.-ownership of foreign-flag participants in our trades. (The data could be provided in an annex.)

On a related point, on p. II-1-8, it is stated that "Foreign-flag competition is intense on all of the trade routes, . . . as evidenced by the modest share carried by U.S.-flag companies." This may be too sweeping. In certain trades (for example, U.S.-Latin American and the North Atlantic trade), U.S.-flag operators may carry as much as half the liner tonnage. In addition, the elements that go into an evaluation of why the U.S.-flag share is modest in some trades run beyond the intensity of foreign-flag competition. The analysis must be done almost trade-by-trade.

3. *Japanese operators.* We wonder if it is accurate to suggest that Japanese liner operators engage in significant non-conference competition in the Pacific/Far East trade (p. II-1-22). The major Japanese operators in that trade are, of course, conference members. And among the non-conference operators, those that are Japanese are out-carried by Seatrain, OOCL, Evergreen, and Zim.

4. *Sea-Land in Brazil.* We question the statement (p. II-1-35) that the recent pooling agreement "includes abandonment of Sea/Land's transshipment system for direct U.S. East Coast/Brazil cargo movements." This might be checked with Sea-Land representatives, who recently informed us that the above conclusion is not the case.

DEPARTMENT OF STATE,
Washington, D.C., September 1, 1978.

DEPARTMENT OF STATE'S COMMENTS ON INTERAGENCY MARITIME STUDY,
VOLUME IV

COMMERCIAL AND INTERNATIONAL TRADE OBJECTIVES

General comments

The scope of this volume strikes us as too narrow. The volume is based on a single policy objective, stated in the introduction (p. IV-1), that U.S.-flag carriers should

carry a "substantial portion" of U.S. foreign trade and all of U.S. domestic trade. This policy objective is based upon Section 101 of the Merchant Marine Act of 1936, but a major purpose of the present interagency review is to reassess existing statutes affecting maritime policy. If we accept as immutable all existing provisions of the United States Code, the present exercise will be a hollow one.¹

The relevant commercial and international trade objectives bearing on maritime policy clearly go beyond the promotion of the U.S. merchant marine. It is at least as important to consider whether our existing maritime policy should be adjusted to serve such objectives as (a) facilitating U.S. international trade, and particularly U.S. export commerce, by improving service and reducing the costs of ocean carriage; (b) combating inflation within the United States by lowering both domestic and international freight costs and providing additional service options to shippers; (c) promoting abroad the virtues of the free enterprise system by minimizing the role of governments in shipping; (d) minimizing the expense to U.S. taxpayers of our shipping policies, including the size of the government bureaucracy and the direct costs of subsidies; and (e) minimizing conflicts with foreign governments. If we are correct that volume IV was intended to serve as a general policy introduction to the rest of the study, some discussion of these objectives—and the inevitable tradeoffs among them—should be included. The volume should not at the outset seize upon one policy objective at the expense of all others.²

Specific comments

1. *The 50 Percent Test.* Pages IV-2 through IV-10 of the present draft argue that Congress intended that the phrase "substantial portion" in Section 101 of the 1936 Act be construed as meaning at least 50 percent. Thus it is argued that the goal of U.S. maritime policy should be to ensure that 50 percent of the U.S. foreign commerce is carried on U.S.-flag ships.

The Department of State is not convinced that the legislative history of Section 101 compels the 50-percent interpretation of "substantial portion," or that this phrase in Section 101 should be construed as an exclusive and overriding policy objective. The phrase "substantial portion" has been construed in many different ways in the world of maritime affairs (for example, "substantial share" is defined as one-third in Article 7 and Annex III of the U.S.-U.S.S.R. Maritime Agreement of 1972), and if Congress as a whole had intended a more rigid formula it would have so stated in the statute. Nor is it plausible to think that Congress intended the "substantial portion" test to be the exclusive policy goal in the field of maritime affairs. In this regard, the phrase appears in the introductory portion of Section 101, whereas the subsequent explicitly stated "policy of the United States" is more flexible—"to foster the development and encourage the maintenance of [a U.S.] merchant marine."

In any event, as stated in part A of these comments, it is our understanding that the role of the interagency group is to reassess maritime policy, and not to start by assuming that existing policies are correct. And, at least at this early stage of the policy review, the Department of State would caution against a 50-percent rule for U.S.-flag carriers. Such a rule would inevitably push us, via emulation abroad, into rigid bilateralism in international shipping, an abrupt and dangerous change from the general international policy of open seas among developed countries. The costs to the U.S. economy could be enormous. Either subsidies would have to be increased dramatically, or the rates charged by U.S. carriers would have to be increased to cover unsubsidized costs. Most likely both would occur. Moreover, there would be no reason for our bilateral partners, whose costs might be lower than ours, to retain lower rates. They would increase their rates, driving the costs of world trade even higher. There would also be substantial risks that the long-run competitiveness of U.S. carriers would worsen, since the protection of a 50-percent rule would lessen concern over cost controls.

A move to strict 50-50 bilateralism would also intensify existing difficulties in our shipping relations with our major trading and treaty partners, many of whom are NATO allies. In this regard, it must be remembered that an expansion of the U.S. fleet at the expense of the fleets of our NATO allies does not necessarily represent an improvement in our defense preparedness.

The foregoing is, of course, only a brief statement of our concerns over a regime of strict 50-50 bilateralism, an issue that will require increased attention by the

¹ This is not to say we agree with the MARAD position (p. IV-1) that the 1936 Act "requires" that U.S.-flag ships carry a substantial portion of our foreign trade. See comment (1) below.

² Subpart II(E) of the volume broadens the discussion somewhat by addressing the economic benefits generated by the maritime industry. But that subpart looks at only one side of the equation; for example, the benefits of subsidies are discussed but not the costs. Specific comments on that section are given below.

interagency group in the coming months. We want at this point only to emphasize that it is inappropriate, in our view, to assume the desirability of a 50-percent rule and then to use that rule as a basis for analyzing all other aspects of U.S. shipping policy.

2. *Domestic trades.* The discussion of domestic trades (pp. IV-1, IV-16 to IV-21) is almost entirely descriptive. There is no discussion of appropriate commercial objectives, other than to repeat the current statutory requirement that U.S. flags be used exclusively (p. IV-1) and to state that the principal issue is the availability of vessels (p. IV-16). It is not acknowledged, for example, that lower costs in our domestic trades would be a desirable objective. Yet it is well known that the Jones Act adds significantly to domestic shipping costs, with direct impact on such problems as inflation and the cost of energy.³ To cite one example, ocean shipping costs for West Coast-East Coast service have become prohibitive for some shippers, causing them to shift to railroads or to abandon entirely markets in which they traditionally have been competitors.

Of course, under the Outline for Interagency Maritime Study, the wisdom of our Jones Act policies is to be assessed in a subsequent volume. But also under the Outline that later assessment is to focus on the "relationship of current policies to objectives," and volume IV is to discuss objectives. That discussion is lacking.

3. *Price competitiveness of U.S.-flag carriers.* In assessing the adequacy of U.S.-flag carriers on the question of price, the volume notes that generally U.S.-flag liner operators are members of conferences charging common freight rates, and thus U.S.-flag and foreign-flag rates are generally identical (p. IV-41). It should be noted, however, that this does not necessarily mean that the issue of the price competitiveness of U.S.-flag carriers is irrelevant. Conference pricing is generally designed to ensure that all conference members will earn at least an adequate return in the trade in question.

As a result, the presence of one or two high-cost carriers will cause the whole conference rate structure to rise, so that even the relatively inefficient operators will survive. Thus it is relevant to know whether U.S. operators—even after subsidy—tend to have higher costs than their foreign competitors. If this is the case, their inability to price compete will adversely affect rates for the entire trade.

4. *Dry bulk carriers.* The volume appropriately focuses on the question of the poor performance of U.S.-flag carriers in the dry bulk trades. We note that the various volumes mention several different objectives: in this volume, 50-percent of the trade (p. IV-2-10) and/or five bulk ships per year (p. IV-55); in other volumes, 37 ships between 1978-1983 (vol. II, p. II-2-4 and 5) and/or 61 bulk ships (vol. III, p. III-1-8).

In regard to the proposed legislation (p. IV-54 et seq.) we see this as a preferable alternative to the creation of an artificial market confined to the exclusive use of our higher-cost U.S.-flag fleet (i.e., cargo preference). Although the main elements of the legislative proposal have the merit of permitting the vessel operator to gain flexibility in operation and control, a greater examination of the national economic return expected from the \$100 million per year subsidy investment would be helpful.

5. *Domestic employment benefits.* We have no quarrel with the discussion (pp. IV-57 to IV-59) so far as it goes, but there are other factors that should be taken into account. Government policies, whether in the nature of subsidies or preference/protection, that benefit the U.S. shipping industry will undoubtedly improve employment in that industry, but they also impose costs which may adversely affect employment elsewhere. For example, if U.S. policies have the effect of increasing the expense of ocean shipping, this can reduce the level of domestic trade and, by damaging the competitiveness of U.S.-made exports abroad, the level of U.S. exports and thus employment. Similarly, government subsidy dollars will help employment in the shipping industry, but those dollars may have a greater impact on employment if spent elsewhere by the Government or if kept in the hands of taxpayers-consumers. Thus it cannot be assumed that policies benefiting maritime employment provide a net benefit to overall U.S. employment. Perhaps the Commerce and Labor Departments can contribute an analysis that will take the broader view on this important question.

6. *Tax revenues and capital investment.* The same can be said here as in item 5: While the points about the contribution of the maritime industry are valid, countervailing factors may be more important. For example, while capital investments in U.S. shipyards are a good thing, perhaps the same capital could be used more productively elsewhere. In this regard, should we not encourage U.S. capital to be

³ On page IV-49, it is pointed out that tanker rates in the protected trades for Alaska-lower forty-eight shipments and for Strategic Petroleum Reserve Program are markedly higher than in world markets.

invested in industries where we are cost-competitive and where there is a demonstrated need for new investment, rather than in shipyards where there is a worldwide oversupply and where we are not cost-competitive?⁴

7. *Balance of payments.* Again, the discussion here appears to address only one side of the equation. If we were to conclude that our present efforts to promote the U.S.-flag fleet increased the costs of ocean transport, it would be necessary to explore whether, as a result, U.S. exports were inhibited. (For example, cargo-preference schemes for export products could make those U.S. exports non-competitive in world markets.) Additionally, for the reasons stated in items 1 and 3 above, increased rates charged by U.S.-flag carriers will inevitably cause increases in the rates charged by U.S.-flag participants in the same trades; consequently, both U.S. exporters and importers will be paying additional dollars to foreign carriers. In light of these considerations, we question whether promotion of the U.S.-flag fleet will necessarily result in a positive contribution to the U.S. balance of payments.

Mr. ATWOOD. To conclude that one point that I was going to make, every individual who has asked for information has been given a full and complete report, and we have received no requests from industry for any public meetings on the EC consultations. So it is difficult for us to understand, hearing for the first time today, the charge that we have not kept the industry informed on developments.

I will summarize, very quickly, the EC compromise, since it is very important to the committee's deliberations.

The proposed EC regulation sets forth three categories of trade: First, that between member states and other OECD states on a reciprocal basis; second, between member states, and other OECD states on a reciprocal basis, and developing countries; and third, that between developing countries.

In the first category, the EC would disapply certain key articles of the code, that is trade between member states and with other OECD countries.

In the second category of trade, essentially between the developed and the developing world, the developing countries would, under the EC compromise, receive 40 percent of the liner trade, but the remaining 60 percent would be available to all carriers on a reciprocal basis.

Finally, with regard to trade between developing countries, as a result of the EC proposal, if adopted, the code would be fully applied.

We recognize that the EC compromise represents a good faith effort to accommodate the desires of the developing countries, but we believe that it is questionable under the code that the compromise conforms with international law, given the fact that it imposes major reservations on the basic elements of the code.

Additionally, we are concerned that the UNCTAD Code will give impetus to others. While we continue to consider what the EC proposal's full effects may be, we anticipate that if the UNCTAD Code comes into effect due to EC states' accession, impetus will be given to other anticompetitive and uneconomic proposals in the international trade and maritime field, such as bulk cargo sharing, which would be detrimental to U.S. shipping and trade interests.

Briefly, what is the impact on U.S. carriers if the code comes into effect? This is hard to predict, because we see a patchwork of

⁴ This does not deny that there may be valid national defense arguments for further investment in U.S. shipyards, particularly those building high-technology ships. We assume these arguments will be made in the forthcoming Volume III, part 2.

accessions and nonaccessions, conflicting reservations by members, and questions as to the legality of certain reservations.

As a result of these differing approaches to the code, which seem to be going into place internationally, and the code's very vague provisions in the first place, it is very difficult to make generalizations.

Nevertheless, we can expect little impact on our carriers in the bilateral trades between developed countries, including, of course, our bilateral trade with other developing countries. This is essentially because the EC compromise largely exempts those trades from its application of the code and, of course, the code would not apply at all to the U.S. trades if the U.S. did not accede.

As for our bilateral trades with developing countries, again, our nonaccession would simply mean that the code would not apply to those trades. Of course, many developing countries have adopted or are adopting code-like sharing laws, and this trend seems to be persisting, unfortunately.

We have to address those situations in a case-by-case basis, to assure a reasonably effective and open shipping regime, in which U.S. carriers can effectively compete.

Finally, if the code does come into force, it will affect U.S. carriers in trades between developing countries, because our ability to participate in those trades would be limited to 20 percent of the cargo.

I would like to close with one comment on the UNCTAD V meeting in Manila next month. Contrary to popular belief, this is not a session to renegotiate the code. Indeed, shipping is only 1 of 24 items on the agenda for that meeting, and the shipping item itself is broken into six subissues, only one of which deals with the code.

We anticipate, at Manila, a discussion of the status of the code, but little more than that.

Thank you, Mr. Chairman.

Mr. Bank and I will be pleased to answer any questions which the committee might have.

Mr. JONES. The Chair is going to forego any questions, and yield to the majority counsel.

Mr. KYROS. Thank you, Mr. Chairman.

Mr. Atwood, I can understand your reservation when you dealt with the remarks, apparently, of Mr. Peter Finnerty, from Sea-Land, one of the largest unsubsidized operators in our liner trades, in which he says in his statement if this committee had not scheduled these hearings:

Our industry would still be depending upon the trade press and contacts overseas, to learn of what other governments in full and close cooperation with their national lines have done with respect to the liner Code.

I think you were referring to those remarks?

Mr. ATWOOD. Yes, I did not read his testimony, but I heard it this morning.

Mr. KYROS. Who brought that to your attention?

Mr. ATWOOD. A representative of Sea-Land.

Mr. KYROS. I just told you that.

Mr. ATWOOD. Yes.

Mr. KYROS. And you are saying it is not true?

Mr. ATWOOD. What I am saying is that whenever Sea-Land has approached us, we provided them a full report. I am not aware of any request that was made to the State Department for information which we have turned down. We have never received directly any complaints from Sea-Land on this subject.

Mr. KYROS. Do American shipping companies have to request information from you on subjects such as the forthcoming Manila meetings, your positions on the code, and matters that affect them so vitally?

Mr. ATWOOD. We are in continuing dialog with those companies. They request information, and we provide it. We have had no problem with the—

Mr. KYROS. Were you at the Geneva meeting where the code was being enacted in 1974?

Mr. ATWOOD. No, I was not.

Mr. KYROS. Do you know, of your own knowledge, whether indeed private shipping companies were consulted day by day?

Mr. ATWOOD. Yes, they were.

Mr. KYROS. They were in your judgment?

Mr. ATWOOD. Yes.

Mr. KYROS. Now, you are aware that the State Department made a submission to the interagency task force concerning the proposed new scheme of regulation for liners, is that correct?

Mr. ATWOOD. That is correct.

Mr. KYROS. And as I understand, you had a thorough criticism of the submission by the Federal Maritime Commission?

Mr. ATWOOD. I am not sure, Mr. Kyros, that it is really appropriate for us to address in this forum recommendations that we have made to the White House. I think the President's task force report is coming out soon. I would prefer to allow that report to speak for itself.

Mr. KYROS. Did you include anything in the code in your submission to the White House?

Mr. ATWOOD. No.

Mr. KYROS. No other codes in the task force?

Mr. ATWOOD. The issues discussed in the task force include many of the substantive issues addressed in the code.

Mr. KYROS. Well, if the code—I think your statement says, and many statements here today say if the code should go into effect with the EC reservations, it will have an effect on the U.S. liner trades throughout the world.

Mr. ATWOOD. It will have an impact, yes, sir.

Mr. KYROS. Did you discuss that with the White House?

Mr. ATWOOD. Not with the White House, no.

Mr. KYROS. No discussion at all?

Mr. ATWOOD. No.

Mr. JONES. The Chair has to interrupt and declare a 15-minute recess. There is a quorum call on the House floor and most of us try to keep our attendance record in the best possible way.

[Short recess.]

Mr. JONES. The subcommittee will come to order.

The majority counsel is again recognized for questions.

Mr. KYROS. Mr. Atwood, just before we recessed for the quorum, I was asking you a short time ago whether the Department of State

had discussed with U.S. shipping companies the ones most imminently concerned, the code and the EC attempts to accede to the code. Now, at that time, I think it was your testimony that you either had discussed or you were always there to discuss and no one had asked you about the code?

Mr. ATWOOD. There were some people who did come in and discussed it, and those that asked for discussions got them.

Mr. KYROS. And those that did write you or ask you anything about the code, you discussed it with them immediately?

Mr. ATWOOD. Immediately, to the extent that there were no legal requirements that had to be adhered to. Mr. Bank can respond to this point more fully.

Mr. KYROS. A few weeks ago, United States Lines wrote you a letter, it was addressed not to you but to your Department, directly to Mr. Bank, and in it they include a copy of a press release, apparently they do get their information that way, concerning an EC reservation to the code. That letter asks for information or the possibility of a meeting with Mr. Bank. The United States Lines, the second largest unsubsidized carrier in the United States, did not get a reply from Mr. Bank but from an assistant which said that Mr. Bank was out of town, perhaps in Europe. That was the only response they got.

They got no further letter. Now, is that accurate? Just those simple facts.

Mr. BANK. Yes, that is accurate. And I had spoken to Mr. Agman, who had written the letter, and I said we would be getting together to discuss this.

Mr. KYROS. When did you speak to him?

Mr. BANK. After the time he wrote the letter. I do not know exactly what date.

Mr. KYROS. You spoke to him before the reply went out from your assistant saying that you were absent and out of town?

Mr. BANK. I received the letter obviously before I had left, and I believe I had spoken to Mr. Agman on this subject before that, before I had left. I, as a matter of courtesy, had asked my associate to write Mr. Agman saying that I am out of town and I will be speaking to him further about it.

Mr. KYROS. So it is your position that you did reply to his letter?

Mr. BANK. Not in substance. Not fully in substance. I do not claim that we discussed the subject matter raised by Mr. Agman fully.

Let me just raise one point, Mr. Kyros, that Mr. Atwood was referring to. Since 1974 and before, in regard to the code and other matters, we have from time to time discussed this, not only individually with shipping lines, with labor organizations and with others, in the course of other discussions on general maritime policy. We had from time to time meetings with these organizations where the code was discussed, and the status of the code was discussed.

As you are aware, Mr. Kyros, the code of 1974 until now has not been the subject of negotiation, and it has not been the subject of renegotiation in any international organization. In fact, as Mr. Atwood pointed out, the upcoming meeting in Manila does not involve negotiation, but only a report on the status of the code. But we have kept every single—let me put it this way, not only did we

have meetings on your own initiative to include the code as well as other subjects, but we have, whenever asked, tried to respond as fully as possible to the status of the code.

Mr. KYROS. Has the State Department made its own study of the potential economic impact of the nonmarket allocation of cargoes in the code on U.S. trades?

Mr. ATWOOD. Mr. Kyros, if you will give me 1 minute.

As I mentioned during the break, I would like to clear up one erroneous thing that I stated before. You asked the extent to which we consulted with the White House on the compromise of the code. I was, in answering that question, focusing on the task force deliberations with the White House in which that was not an issue. We did, prior to the visit by the EC delegation some weeks ago, have discussions with the Domestic Policy Staff of the White House on the nature of the proposal within the EC and the White House was involved in those consultations. It did meet with Mr. Burke when he was here in Washington.

Mr. KYROS. But, of course, my question was directed, as you already pointed out, to when you made your submission to the Interagency Task Force study, did you take up the code and at that time you said no.

Mr. ATWOOD. That is right. No.

Mr. KYROS. Has the Department of State undertaken a study of the economic impacts of the cargo sharing provisions of the code? Yes or no?

Mr. ATWOOD. The Department of State has not. We relied on the studies done principally by the Department of Transportation.

Mr. KYROS. You relied on the DOT study, and I talked to you about 2 days ago, and you said you were not aware of that study.

Mr. ATWOOD. I personally was not aware of it.

Mr. KYROS. Who was aware of it?

Mr. ATWOOD. The Office of Maritime Affairs.

Mr. KYROS. Had they given you an analysis based on that study?

Mr. ATWOOD. We discussed it in general, not specifically that study. I have since read the study.

Mr. KYROS. Did you discuss the application of the code and its possible impact in the manner it may go into effect with the EC regulation, did you discuss that with the FMC?

Mr. ATWOOD. Yes, we did.

Mr. KYROS. Did you discuss it, Mr. Atwood?

Mr. ATWOOD. Me personally, no.

Mr. KYROS. Did you discuss it with MarAd?

Mr. ATWOOD. Yes.

Mr. KYROS. You did?

Mr. ATWOOD. The Department did. I did not personally.

Mr. KYROS. Do you know exactly their position?

Mr. ATWOOD. Yes, I think so.

Mr. KYROS. Did they give you data or trade route by trade route as what effect would occur on U.S. trades if there was accession by the EC to the code and the developing countries in Manila?

Mr. ATWOOD. No, they have not.

Mr. KYROS. You did not discuss what the impact would be in our trade?

Mr. BANK. If I may, Mr. Kyros.

We have had extensive discussions with other agencies concerning the EC compromise. We have distributed among every agency, including congressional staff on both sides of the aisle, a full packet of updated material of the code for those who did not have the copy of the code handy as well as information that has been obtained since 1974, including full background in anticipation of Mr. Burke's visit. Not only have we distributed that but we had a meeting to which we invited all interagency representatives, including congressional staff, where they were able to discuss the matter of the EC compromise not only with us, but with members of the staff of the EC Commission.

Mr. KYROS. Are you stating for the record, Mr. Bank, that the State Department and the Federal agencies have one policy on the EC reservation to the code?

Mr. BANK. No, I am not.

Mr. KYROS. But you say you have had discussions about the impact on U.S. trade?

Mr. BANK. Yes, not in specific trades. But, yes, we have had sessions, informal, formal. We worked together quite regularly.

Mr. KYROS. What is the impact on Trade Route No. 5, if the EC accession to the code goes into effect?

Mr. ATWOOD. I am not competent to answer that question, Mr. Kyros.

Mr. KYROS. But you are making the policy here now.

Mr. ATWOOD. The policy I am reflecting is that which the U.S. Government has studied for many years. I am not aware of, for example, any request by the U.S. carrier that we move toward the code either in the EC version or otherwise.

Mr. KYROS. It is not a case of whether we move toward the code. It is, what is the United States going to do to defend itself?

I am asking you again now who does make the policy now on what the U.S. position is on the EC accession that will possibly occur in Manila?

Mr. ATWOOD. Well, the Department of State speaks for the U.S. Government in international relations of this sort.

Mr. KYROS. I did not mean that. I mean here in the United States. Who is going to make that policy?

Mr. ATWOOD. The position which the United States has developed for the UNCTAD Conference in Manila has been cleared by all the relevant agencies and the Department of State will be speaking at that conference on behalf of the United States.

Mr. KYROS. And you just formed that policy in the last several weeks or what?

Mr. ATWOOD. It has been continuous development since 1974.

Mr. KYROS. But did you consult with the FMC?

Mr. ATWOOD. Yes.

Mr. KYROS. And they—have they advised you about what their attitude was on the EC session?

Mr. ATWOOD. On the EC compromise, I understand the Commission is still studying it.

Mr. KYROS. The Federal Maritime Commission?

Mr. ATWOOD. That is right.

Mr. KYROS. Do you know the Federal Maritime Commission says it is not equipped to catalog the effects of the entry of the code into force? Are you aware of that?

Mr. ATWOOD. No, I have seen their testimony.

Mr. KYROS. So they could not have given you any impact of what would be the effect of the code going into force, could they?

Mr. ATWOOD. I like to emphasize my testimony, Mr. Kyros, that this is very speculative necessarily for the following reasons.

First of all, the code provisions are very vague. No one knows what they mean or how they will be implemented if the code goes into force.

Additionally, the EC compromise may not proceed in the present version. It is still subject to discussion within the EC.

Third, we have a situation where we have countries who are moving toward accession of the code with very different and conflicting reservations. Even to the extent that some of the reservations do throw into question the full force and effect of the accessions that may be coming forward, and then you have a patchwork of accessions and nonaccession.

Mr. KYROS. Yes. But let us stick to policy statements.

One of the matters that seems to be of incredible inconsistency or apparently it is to me is that the State Department in discussions about a new maritime policy has talked about going almost as far as the closed conference or even a closed conference system, with shippers' councils, nonfiling of rates, a system in effect that would be largely like the European model.

Yet in your present statement you indicate that your policy back in 1974 was against closed conference systems. I just cannot understand how you go back and forth with a system that you claim was noncompetitive at that time because it envisaged cargo allocation, and was also based on a closed conference system, and yet you yourself say we ought to go to a more rationalized system.

Mr. ATWOOD. My statement today is based on U.S. law and it is so phrased.

I also stated, and we firmly believe this, that the action of the code of closing conferences and closing trades at the same time totally eliminates any element of competition and develops tremendous inefficiencies in world trade in general, and will spawn inefficient carriers, many of them from developed countries. And they are going to slow down trade in general.

Mr. KYROS. Although you do not like closed cargo systems or artificial allocation methods, the President's task force statements issued favored bilateral—

Mr. ATWOOD. No. There has been no decision by the task force.

Mr. KYROS. You have not seen preliminary remarks that they favor bilateral—

Mr. ATWOOD. I have seen remarks.

Mr. KYROS. Have you seen remarks by the Federal Maritime Commission that they favor bilaterals?

Mr. ATWOOD. Yes, I have.

Mr. KYROS. Is it not inconsistent to say that you do not favor market allocation under the code, and yet you favor bilaterals?

Mr. ATWOOD. I do not deny that the position that the United States has taken on the code is always consistent with every speech you read in the newspapers. There is no doubt about that.

Mr. KYROS. Thank you, Mr. Atwood.

Mr. JONES. Does that conclude your questions?

Mr. KYROS. Yes.

Mr. JONES. At this point, again, I suppose we will have to declare a 15-minute recess. We have a vote on the funding of the committees on the House floor. We will resume in 15 minutes.

[Short recess.]

Mr. JONES. The subcommittee will come to order, please.

It is the Chair's intention, without objection on the part of any member, to run until 1 o'clock and then recess for lunch.

The Chair now recognizes the gentleman from Kentucky.

Mr. SNYDER. Thank you, Mr. Chairman.

I have a couple of questions. First, I would just observe, Mr. Atwood, and this question is not really apropos to our hearing, but the litany of objections which you lay out on page 7, restrictions put upon operator by virtue of the code, resemble very much what this country does to our operators. Maybe some who have imposed restrictions should observe your criticism. Will you be heading the delegation in Manila?

Mr. ATWOOD. No. As I mentioned in the testimony, the discussions in Manila cover a wide range of north-south issues of which shipping is only one. The delegation, I believe, is going to be chaired by Ambassador Andrew Young and Under Secretary Cooper.

Mr. SNYDER. Has the 5 years since the negotiation of the code expired or it is about to expire?

Mr. ATWOOD. In June.

Mr. SNYDER. In June. I have a document here which indicates that it was negotiated May 9.

What are you doing to try to get together the necessary 28 members to call for a review conference?

Mr. BANK. May I answer that?

In, I believe it was January of 1977, in an informal meeting held in one of the embassies in Geneva, during the course of an international conference, approximately 30 countries got together to determine where the code was, approximately 2½ years after 1974. At that time and since then, it has been the opinion of the developing countries, the majority of the countries involved, plus a good number of the developed countries, the group B countries, and as we have determined from the group D countries, the Socialist countries, as you understand in UNCTAD, the discussions are held en bloc rather than by individual nations, that no review conference should be held. There has been insignificant support for such a conference.

We made it clear——

Mr. SNYDER. That was 2½ years ago?

Mr. BANK. I said continuously since that time we have been in contact with all the groups and we have made it clear for 1977 onward that we would be very willing to participate in a revision conference on the code. It has been the opinion of the—I should say the position of the UNCTAD Secretariat, that a revision conference

should not be held, and I can say that without the support of the developing countries, group D, a majority of group B, the developed countries as well as the UNCTAD Secretariat, we see very little chance for review conference.

We have, however, continued our support for one.

Mr. SNYDER. Well, expressing a willingness to participate and expressing your support for it does not indicate that you are taking much overt action. Maybe I am misreading your testimony?

Mr. BANK. We have taken, I believe, the overt action necessary based on the facts. We would also not be—we do not know exactly what would come out of a revision conference.

Mr. SNYDER. It could not be much worse, could it?

Mr. BANK. Yes, it would.

Mr. SNYDER. It could?

Mr. BANK. Yes. In fact, there are those, as Mr. Capone pointed out in his testimony, who see this code as a tremendous compromise from that originally sought by the developing countries. It is considered a compromise by most of the developing countries or a good number of them, to even permit any cross trade activity in the liner conferences. Most countries which have become parties to the code up until now, except for India which, for certain reasons, has accepted, the major developing countries which had led the fight for the code have not yet become parties, and the major reason—

Mr. SNYDER. Maybe that is because as Mr. Atwood observed, they agreed to something, which at the time, they did not understand.

Mr. BANK. I think that is exactly the reason. The reason why is it does not give them as much as they want. The code became too much of a compromise in the developed world. We would seriously consider it a problem at a revision conference that, in fact, the code that we have now would be seriously injured and become worse under revision conference.

Again this is something that we would have to consider. But we would be willing to participate in such a revision conference to see what would occur.

Most of the developing countries, Congressman, have indicated that the only way that they would have a revision conference is under the first provision for revision conference under the code, that is after the code comes into force. They are asking the developing countries who opposed the code to buy the code as it is now, and then maybe would see about revising it.

Mr. SNYDER. But the provision I was referring to requires a review if the code has not gone into force in 5 years.

Mr. ATWOOD. That is right. I think the prospects for a revision conference increase if come June the code is not yet enforced.

Mr. SNYDER. You had seven noes and five abstentions. There are 12 countries that you ought to be able to get to urge a review. You should also have the nine European countries who apparently are going to agree to the code with reservations.

Mr. ATWOOD. Assuming that we get past the next few months, the prospects for a revision conference are much greater.

Mr. SNYDER. What are the reservations that the European countries are going to make?

Mr. ATWOOD. Well, of course, there has been no final decision by the Community.

Mr. SNYDER. I understand, but I understand there is information to allow you to anticipate what is going to happen.

Mr. ATWOOD. That is correct. There are several important reservations.

First, article II, the key provision on conference and cargo sharing arrangements, would not—

Mr. SNYDER. That would be 40-40-20?

Mr. ATWOOD. That is correct. That would not be applied in conference trades between the members of the EC and on a reciprocal basis between the member states of the EC and other OECD countries which are contracting parties to the code. That phrase "on a reciprocal basis" is still a little unclear, but essentially the principal cargo-sharing provisions would not apply within Europe or between Europe and other OECD countries if those OECD countries adopt the code on a similar basis.

Additionally, the provision for a 15-month freeze on rate increases would also be disappplied in the same trades. Additionally, the national veto provisions would be disappplied in the same trade; that is the provision which gives one nation absolute veto in changes in freight rates, for example. And another important reservation is that in the trades between members of the community and developing countries with respect to cargo sharing, 40 percent would be given to the developing country, but the remaining trades would not be reserved 40 percent to the EC country involved but would instead would be thrown back into a pot.

So it is essentially sort of a 40-60 arrangement with 40 reserved for the developing countries and with some qualifications 60 percent for other countries to participate in on commercial, competitive basis.

One other point: in the OECD trades, the disputes resolution mechanisms would be largely disappplied. I think those are the major reservations.

Mr. SNYDER. Do those reservations address the same concerns that this country has?

Mr. ATWOOD. Yes, I think there is some feeling in Europe for a relatively open commerical maritime system, and those are reflected in these reservations.

Mr. SNYDER. If those reservations were uniformly applied to other countries or made a part of the code would it be more palatable—

Mr. ATWOOD. Clearly those reservations do make the code more palatable. We still feel that the code is an unworkable document, nevertheless, and it is more sensible to try to either get something very different in a review conference or proceed, not necessarily through bilateral agreement, but on the basis of reciprocity and operate our principal trades without formal international agreements governing them.

Mr. SNYDER. Would it be possible for this country to agree to the code with reservations that would be workable and still—

Mr. ATWOOD. Well, there would still be a requirement of significant change in U.S. law, such as the closed conference system. We would also have to change our law with respect to shippers' coun-

cils. It would require a major change in our shipping policy. It would involve a significant change in the relationship of our anti-trust laws to shipping. It would have to be studied very carefully.

Mr. SNYDER. Have you proposed any initiatives to move in that direction?

Mr. ATWOOD. To the companies?

Mr. SNYDER. No, to the Congress, so we can begin to take action with regard to changing our maritime policy, our shipping policy, our antitrust laws, and whatever else is necessary before we are forced to.

Mr. ATWOOD. Well, many of these same substantive issues are being addressed by the task force report, so the administration will be addressing many of these issues in that context.

Mr. SNYDER. When will we get that?

Mr. ATWOOD. It is in the White House. I do not know precisely the status of it.

Mr. SNYDER. There are a lot of things in the White House.

Mr. ATWOOD. I hope it will be very soon.

Mr. SNYDER. I am never amazed at what happens at the White House. Billy is drinking his water straight. Jimmy is parting his hair on the other side.

Mr. ATWOOD. I think at this point it is premature to think what legislation would make sense if the EC is adopted. Then it will require some careful analysis.

Mr. SNYDER. We are going to be way behind time, are we not?

Mr. ATWOOD. Oh, no. There is no rush, sir.

Mr. SNYDER. There has not been any rush on the task force report?

Mr. ATWOOD. What I mean is there is no action forcing event if the EC compromise is put into force. It is going to take a year and a half—

Mr. SNYDER. It takes that long to get a task force report out of the White House, were you not aware of that?

Mr. ATWOOD. Yes, sir, I am aware of that.

Mr. SNYDER. And you cannot tell us when we could expect that? Do not tell me February 28, because I heard that.

Mr. ATWOOD. It is my understanding it is close to the final stages, but I cannot be more precise than that.

Mr. SNYDER. It has been there a long time.

Mr. ATWOOD. I understand your point.

Mr. SNYDER. Thank you.

Mr. JONES. The Chair recognizes the gentleman from California.

Mr. McCLOSKEY. Thank you, Mr. Chairman.

Mr. Secretary, who will be the lead voice in the U.S. delegation on shipping matters at Manila?

Mr. ATWOOD. On shipping matters, the United States is, of course, a member of group B.

Mr. McCLOSKEY. What member of our delegation, from what department will be the lead voice in coordinating our position on shipping matters at Manila?

Mr. ATWOOD. Within group B, Mr. Bank will be the principal official whose responsibilities deal specifically with shipping. There, of course, is going to be Under Secretary Cooper as a member of the delegation, and he will be involved in these matters as well.

Mr. McCLOSKEY. Will there be a Justice Department representative on that delegation?

Mr. ATWOOD. No, sir.

Mr. McCLOSKEY. Are there, at the present time, instructions to the delegation covering all aspects of shipping?

Mr. ATWOOD. Yes. Well, we have one prepared and it has been clear, it is going to be subject to further discussion and review in the coming weeks.

Mr. McCLOSKEY. Now, last year we enacted two laws under the impression that at least three of four executive branch agencies approved of what was in those laws. They were subsequently vetoed. Are the disagreements that were represented in those laws last year still unresolved by the U.S. delegation as you go to Manila?

Mr. ATWOOD. They are not issues in Manila, sir. So there are no disagreements concerning the U.S. position in Manila at this point.

Mr. McCLOSKEY. Now, has the task force report, which has been under study for so many months, resolved the question as to whether the Justice Department position, or the FMC position, or the Maritime Administration position, on changes in the antitrust law, will be adopted?

Mr. ATWOOD. That is one of the principal issues, of course, and it is one decision that will be made by the President.

Mr. McCLOSKEY. And that has not yet been resolved?

Mr. ATWOOD. That is right.

Mr. McCLOSKEY. Well, will it be resolved prior to the time you go to Manila?

Mr. ATWOOD. I hope so, but again, I do not think it is relevant really to what is going to be discussed in Manila. But my hope is it will be resolved by that date, yes.

Mr. McCLOSKEY. Has there been any change in the recommendations of any of the participants in the Interagency Task Force since learning of the impending ratification, or potential ratification of the Code of Conduct?

Mr. ATWOOD. Well, the agency positions are constantly under discussion, and therefore, to a degree, constantly being revised.

Mr. McCLOSKEY. Well—

Mr. ATWOOD. But the EC proposed compromise has not, to my knowledge, contributed to any changes in positions, but I would have to let each of the agencies speak for themselves on that issue. It has not been a factor.

Mr. SNYDER. Would the gentleman yield?

Mr. McCLOSKEY. I will be glad to yield.

Mr. SNYDER. You responded to several of my colleague's questions by saying they are not issues in Manila. I assume that you mean that they are not issues for the record. But is it customary at these conferences to have a lot of discussion from time to time among your colleagues who you have been dealing with there at these conferences on other related matters, and resolve a lot of things informally, discussions that do not go on the record?

Mr. ATWOOD. Well, things are not resolved—

Mr. SNYDER. Discussed?

Mr. ATWOOD. Yes, believe me, in UNCTAD there is a lot of discussion.

Mr. SNYDER. Do you not think that the issues that my colleague referred to, ought to be resolved within this administration, so that you do not have to go over there, and your every response be, "I do not know"?

Mr. ATWOOD. Well, we do not intend to negotiate these matters.

Mr. SNYDER. I understand that, but you are almost bound to discuss them. Issues upon which the administration position ought to be known before you can discuss them.

Mr. ATWOOD. Mr. Snyder, there are almost monthly meetings of our shipping officials and their foreign counterparts. Certainly the task force is a subject of great interest, and there are discussions at those international meetings of the status of the task force.

So I do not think the situation in Manila is really going to change that.

Mr. McCLOSKEY. Mr. Secretary, essentially then, the issue being discussed at Manila involves the Group of 77's demand to put this code into effect for the reasons that you have described, which is compounded by the fact that now the European nations appear to have mustered sufficient strength to bring the code into effect.

Now, ordinarily, in that kind of a confrontation, in confrontation with the Group of 77, it would be helpful if the position of the U.S. Government and the other maritime nations' governments were in accord, would it not?

Mr. ATWOOD. Yes. A common group B position is very important.

Mr. McCLOSKEY. And it is a particular concern here, because in addition to the Group of 77's position, we have the new confrontation with the Soviets over shipping. That Soviet confrontation has played a part in the European nations' determination to change their policies, has it not?

Mr. ATWOOD. I am not sure it really bears on their policies on the Code. It may or may not. It will depend on the nature of the Soviet action on the Code.

Remember that the EC compromise, in principle, gives the developing countries 40 percent, and leaves open the rest of the trades to a large degree. But I think it is true that the Soviet action has certainly contributed to the development of the EC position.

Mr. McCLOSKEY. Ideally then, the State Department, speaking for the Government of the United States, would like to explore all possibilities with the other maritime nations in advance of going to Manila in order to be in accord with our maritime allies; would we not?

Mr. ATWOOD. Yes, sir, and we have.

Mr. McCLOSKEY. But in this particular case, you are not able to tell the European nations that you have resolved the internal conflicts within the administration that would enable us to go to Manila with a position in accord, or at least in cooperation with the European position?

Mr. ATWOOD. The Europeans have not been able to tell us yet whether they have resolved their internal dispute.

Mr. McCLOSKEY. I know that, but you have reached a judgment conclusion, have you not, in the last several weeks, that it is highly likely, that the Europeans will ratify the code by the time Manila commences?

Mr. ATWOOD. I think that overstates it, Congressman.

Mr. McCLOSKEY. You have not reached that conclusion?

Mr. ATWOOD. I have not reached that conclusion.

Mr. McCLOSKEY. But the Europeans tell you that it is fairly likely, do they not?

Mr. ATWOOD. No.

Mr. McCLOSKEY. Who was this gentleman who came through town 2 weeks ago?

Mr. ATWOOD. Mr. Burke.

Mr. McCLOSKEY. Pardon?

Mr. ATWOOD. Mr. Burke.

Mr. McCLOSKEY. Mr. Burke came to my office, and said he thought it 90 percent likely that by the time Manila commenced, the European nations would have sufficient strength to ratify, did he not tell you that?

Mr. ATWOOD. Yes, his view is that it is very likely. But I would like to point out that—

Mr. McCLOSKEY. Let me ask your judgment then, what odds, just so that we can test you in 2, 3, or 4 weeks, what are the odds, in your judgment, that Mr. Burke's statement will be proven out?

Mr. ATWOOD. It is impossible to quantify.

Mr. McCLOSKEY. Ninety percent, fifty percent, ten percent?

Mr. ATWOOD. I really would not want to speculate, if you will forgive me for avoiding the question, because it depends on decisions that have to be made by sovereign governments. The Danes imposed a reservation, they have not withdrawn that reservation, they are actively considering it, and will make a decision within the next week, perhaps. I know the Danes still have serious concerns about the impact of the proposed EC compromise.

It would be really highly speculative for me to try to look inside the decisionmaking process of European governments, and predict with precision how they are going to resolve that issue.

Mr. McCLOSKEY. Are the State Department's efforts to try to present the U.S. position, in any way, in conflict with any actions being taken, or positions espoused by the Justice Department?

Mr. ATWOOD. In Manila?

Mr. McCLOSKEY. No, here. Wherever the Justice Department may operate.

Mr. ATWOOD. Well—

Mr. McCLOSKEY. Do you understand my question?

Would the reporter read it back?

[The pending question, as recorded, was read by the reporter.]

Mr. ATWOOD. You are not referring to our position in any particular forum? I guess I do not really quite understand the question yet, Mr. McCloskey.

Mr. McCLOSKEY. Are you going to take a position at Manila, have you got your instructions?

Mr. ATWOOD. Yes.

Mr. McCLOSKEY. Will carrying out those instructions, or being successful in that position, be in any way, inhibited by any actions being taken by the Justice Department, or any position that is espoused by the Justice Department?

Mr. ATWOOD. Well, the Justice Department has cleared on our position in Manila, as it has been presently formulated. That does not fully answer your question, I realize.

Mr. McCLOSKEY. I would be glad to let you explain any answer, but I would like to have you answer my question.

Mr. ATWOOD. I understand. Certainly the Justice Department, like many other elements of the U.S. Government, from time to time, takes or proposes action which is an irritant to our allies in shipping, and so I think I would have to say that yes, they like, for example, the Federal Maritime Commission from time to time, take the Commerce Department from time to time, the State Department from time to time.

Mr. McCLOSKEY. I take it then your answer is yes?

Mr. ATWOOD. Yes, sir.

Mr. McCLOSKEY. Are there positions espoused, or actions being taken by the Justice Department which inhibit your potential success in representing the U.S. point of view at Manila?

Mr. ATWOOD. I would not want to overplay the importance of that, but it is undoubtedly true, just as it is true of other actions of the U.S. Government, including sometimes Congress.

Mr. McCLOSKEY. Well, when there is this confusion between the Justice Department acting under the law as it views it, and the State Department's constitutional responsibility to conduct foreign affairs at the President's direction, the ordinary way to resolve that confusion is by an act of Congress, is it not?

Mr. ATWOOD. No. I think that would overdo it.

Mr. McCLOSKEY. With regard to the positions espoused by the State Department, are not the actions taken by the Justice Department, inhibiting your ability to represent the United States? Are not those positions matters which could be changed by a change in the law of the United States?

Mr. ATWOOD. Obviously, yes.

Mr. McCLOSKEY. And those recommended changes in the law of the United States are presently awaiting action from the White House. Does not this committee, need recommendations as to how to change the 1916 Shipping Act, so that those confusions between the Justice Department responsibilities, as they see them, and your ability to represent this country in foreign affairs, can be resolved?

Mr. ATWOOD. I cannot dispute what you say. But I think it is a matter of how profound a statement that is.

Mr. McCLOSKEY. Well, I am wondering whether at the White House they realize that you cannot do your job at Manila until they decide how to change the law.

Mr. ATWOOD. I did not say that we cannot do our job in Manila.

Mr. McCLOSKEY. Let us say, do it effectively.

Mr. ATWOOD. I think the degree——

Mr. McCLOSKEY. Am I right in that? I am not saying you cannot do your job, however I am saying that your earlier testimony indicated that you might be inhibited somewhat.

Mr. ATWOOD. Somewhat.

Mr. McCLOSKEY. In representing the United States because of what the Justice Department is doing somewhere else.

Mr. ATWOOD. I could point to other agencies where it is more of a problem, Mr. McCloskey.

Mr. McCLOSKEY. But this is an international negotiation.

Mr. ATWOOD. It is not a negotiation. It is a meeting, a conference. The code is not going to be negotiated in Manila.

Mr. McCLOSKEY. Would it be fair to say that it would be helpful to you at Manila, if the White House resolved these policy conflicts with the Justice Department before you go there?

Mr. ATWOOD. I think the impact would be minor, I honestly do, Mr. McCloskey.

In other words, Mr. McCloskey, if the White House task force report coincides precisely with what most of the European countries would like to see with respect to the role of the Justice Department in shipping, I do not think it is going to impact what happens in Manila.

First of all, they would wonder whether or not Congress would follow through on the White House recommendation, and in any event, the issues are peripheral to what is being discussed in Manila.

Mr. McCLOSKEY. You do not feel there is any need for speed in resolving these interagency conflicts before conducting its negotiations?

Mr. ATWOOD. I believe there is a need for speed, but it does not relate to the meeting in Manila. I think it is important for us to try to get the report out, get congressional reaction to it, develop the kind of revisions in the law that have been discussed within Washington, and within this committee for many months, but I do not see Manila as an action forcing event in that regard.

Mr. McCLOSKEY. Are there any recent actions by the Federal Maritime Commission, or its members, which have in any way inhibited the ability of the State Department to conduct foreign policy in the area of shipping?

Mr. ATWOOD. Yes.

Mr. McCLOSKEY. Would you describe them, please?

Mr. ATWOOD. If I could first preface this by saying that I think the Federal Maritime Commission should do its job, and should not take orders from the State Department.

Mr. McCLOSKEY. I appreciate that. We will not take this as criticism. I am just asking you to factually define those actions taken by the Commission or its members, which have inhibited your ability to represent the United States in foreign policy.

Mr. ATWOOD. Well, another problem, of course, is what the Commission does.

Mr. McCLOSKEY. Just describe them first. I really want to avoid the embarrassment of putting you in a position of making editorial comments on the actions of another agency, but I would like you to describe those actions of the FMC, or any of its individual members.

Mr. ATWOOD. A principal irritant in our shipping relations continues to be the administrative delays within the Commission on reviewing section 15 agreements. The record is improving. Chairman Daschbach is making, I know, a tremendous effort to try to improve that process within the Commission. But it is still a problem, and it is still one constantly cited to us by foreign governments. If we could eliminate that problem, I think our ability to coordinate effectively with other countries would be improved.

Mr. McCLOSKEY. What is the second example?

Mr. ATWOOD. We currently have been thrown into litigation with the Commission concerning pool arrangements to and from Argen-

tina. It is a complicated story, but the Commission action originally—approving certain pooling arrangements in the Argentine trades—gave rise to complaints by third-flag carriers that they had been improperly excluded from the pool, and from the foreign government involved, and it was our judgment at that time that the Commission should have held a hearing on the complaints of these third-flag carriers. The matter was thrown into litigation, and it went to the court of appeals and it is now back before the Commission.

This is another example where——

Mr. McCLOSKEY. Did you present your view to the Commission before it acted?

Mr. ATWOOD. Yes, we did.

Mr. McCLOSKEY. What is the third situation?

Mr. ATWOOD. We could stay here a long time, Mr. McCloskey.

Mr. McCLOSKEY. Would you rather submit for the record a detailed accounting of each action of the Commission or its members, which in your judgment have inhibited the State Department's ability to represent the country?

Mr. ATWOOD. I really do not think it is a constructive exercise.

Mr. McCLOSKEY. Mr. Secretary, let me just beg to disagree with you. If the Congress is to resolve the conflicts to which you refer, the Congress must be aware of those conflicts. We waited nearly 2 years to get your recommendations. If the administration is not going to make its recommendations to resolve these conflicts in a timely manner, to allow you to go to Manila in the middle of May, with these things resolved, then I think there is an obligation on our part, to ask that you outline in detail, and meticulously, what these problems are. Then it is our judgment whether or not it will be constructive or not.

I do not question what is constructive on your part, but I resent a little that you might suggest what is constructive for us to ask for, in the way of facts.

Mr. ATWOOD. I am just offering that view for your consideration.

Mr. McCLOSKEY. I am glad to have your view, but I am wondering for what reason it would not be constructive, to have you fully advise this Congress of the problems that our existing law provides for you in conducting foreign affairs.

Mr. ATWOOD. Well, the question in its general framework is certainly a legitimate one, and it is one of the issues that is carefully being considered within the task force. We are trying to work out in that forum an administrative proposal to try to eliminate some of the inconsistencies where they arise.

Mr. McCLOSKEY. Mr. Secretary, let me go a little further.

There is nothing about this of a classified nature. There are none of these differences of opinions among the agencies of the U.S. Government that if known to our allies, are going to prejudice our position, are there?

Mr. ATWOOD. Well, in some circles. For example, discussion, or disagreements within the U.S. Government relating to pending negotiations would, if disclosed, prejudice the U.S. negotiating position.

Mr. McCLOSKEY. What I am asking you for is this: What has the FMC done, or what positions has it taken, or what has the Justice

Department done, or will do or what positions it is espousing, that are not known to the very people we are negotiating with?

Mr. ATWOOD. No, I do not think so.

Mr. McCLOSKEY. So there would be no danger, internationally, if they also became known to the Congress through your setting them out meticulously in a written communication to this committee, would there be?

Mr. ATWOOD. No, that is not why I am suggesting—

Mr. McCLOSKEY. I understand it may not be why you are suggesting it, but you believe it might be less than constructive. Why would it not be constructive?

Mr. ATWOOD. Well, it would be a lengthy exercise, it would consume several manweeks at least of limited resources within the administration, of course.

Mr. McCLOSKEY. You are not suggesting that the resources of this five-man office, headed by Mr. Bank, are inadequate to protect the shipping industry in international negotiations?

Mr. ATWOOD. It is a very busy office.

Mr. SNYDER. He suggested that they are inadequate to list all of them.

Mr. McCLOSKEY. That is correct.

Mr. ATWOOD. It is a very busy office, Mr. McCloskey, no doubt about it.

Mr. McCLOSKEY. I have seen it, and it works very hard, but I cannot believe that in the course of the last several years of confronting these difficulties that they have not been cataloged somewhere.

Mr. ATWOOD. It is not the kind of list we keep in the ordinary course of events.

Mr. McCLOSKEY. But you are not suggesting that it would take 2 manweeks for that office to submit that list?

Mr. ATWOOD. It all depends how detailed you want it. We can set out the basic parameters in shorter time. Another example is the rebating of the commissions. I am not saying that the Commission should not be rebating—

Mr. McCLOSKEY. Did you recommend that the President veto the rebating law?

Mr. ATWOOD. Yes, we did.

Mr. McCLOSKEY. Why?

Mr. ATWOOD. Well, I think the President's veto message speaks for itself. We support that message.

Mr. McCLOSKEY. Then I can assume that you helped write that message. So you oppose both the bill passed by the Congress, and the present actions of the Commission under the present law?

Mr. ATWOOD. No, I did not say I oppose the present action of the Commission.

Mr. McCLOSKEY. What manner does it prejudice your ability?

Mr. ATWOOD. This is not a criticism of the Commission. However, foreign governments do not like having the Federal Maritime Commission seek documents within their territory. They do not like seeing the Federal Maritime Commission impose regulatory law on what they regard to be international commerce, not subject to the jurisdiction of any particular country. Because the Commission is doing these things, which foreign governments do not like, is a

general irritant in our relationship, and from time to time may cause them to be less cooperative on matters that are important to us.

Mr. McCLOSKEY. That is also true of the Justice Department, is it not?

Mr. ATWOOD. Yes.

Mr. McCLOSKEY. Now, I would like to ask you, Mr. Atwood, and I want to frame this question in a way that can be answered without 2 manweeks of work. But perhaps it can be done in 1 day by one individual in your office.

I would like to ask that you submit, in writing, to this committee, a specific list of those actions, or positions taken by each of the other agencies of Government, outside of the State Department, that are either a source of irritation, or in some way inhibit your ability to represent this country in matters relating to shipping, such as UNCTAD.

Mr. ATWOOD. All right. We will try to do that.

I take it from your question you are talking about actions of the executive branch, or regulatory agencies?

Mr. McCLOSKEY. Both.

Mr. ATWOOD. But not the Congress?

Mr. McCLOSKEY. You know the Congress would like to help, we would love to do it, however, it is a problem when we have four differing testimonial positions represented by four different agencies of Government. And, when we pass laws, as we did this last year, with the assumption that they are approved by the majority of Government agencies, we find that they are vetoed.

Mr. ATWOOD. These things are not always done by vote.

[The following was received for the record.]

DEPARTMENT OF STATE,
Washington, D.C.

Mr. PETER KYROS,

Counsel, Subcommittee on Merchant Marine, Committee on Merchant Marine and Fisheries, Longworth House Office Building, Washington, D.C.

DEAR Mr. KYROS: In the course of my testimony before the Committee on Merchant Marine and Fisheries' Subcommittee on Merchant Marine on April 26, 1979, a request was made by Congressman McCloskey for the submission to the Committee of a list of those actions or positions taken by those agencies of the U.S. Government other than the Department of State which are either a source of irritation or in some way inhibit the Department's ability to represent the United States Government in shipping negotiations, such as those relating to the UNCTAD Liner Code.

As the Committee is aware, many foreign governments have substantial objection to the fact that the United States has undertaken regulation of the ocean shipping trades touching our shores. Those governments consider unilateral regulation of ocean shipping to be inappropriate, given the inherently international nature of that industry. The United States view, to the contrary, has been that reasonable regulatory actions by individual governments are fully consistent with the doctrines of sovereignty, national jurisdiction, and comity. This subject continues to be one of continuing debate.

Consistent with the United States position, several agencies of the U.S. Government have regulatory of similar functions concerning international ocean shipping. The two agencies whose activities in this area are most frequently the subject of foreign comment are the Federal Maritime Commission and the Department of Justice. There are frequent complaints concerning the law-enforcement and implementation functions of those agencies, and to varying degrees objections are taken to their activities. At certain times the activities of these agencies are thus a source of friction in our relations with other states. Among the particular activities involved are enforcement of the antitrust and antirebating laws, FMC consideration of intercarrier agreement, and FMC implementation of the new Controlled Carrier Law.

Having said the foregoing, I wish to emphasize a point I made in the course of my testimony on this subject. Disagreements among nations is unavoidable in international affairs, and in shipping policy as in other areas we cannot expect to avoid all friction. The United States must adopt that shipping policy which is best in its national interest, taking into account international factors but not necessarily permitting those factors to preclude steps which we conclude are in fact in our national interest. In other words, I believe the State Department is and will be able to represent adequately U.S. interests in international negotiations and otherwise carry out its statutory responsibilities, even given the existence of some U.S. laws or policies that do not coincide precisely with the views of all our trading partners.

Sincerely,

JAMES R. ATWOOD,
*Deputy Assistant Secretary
for Transportation Affairs.*

Mr. McCLOSKEY. I have no further questions.

Mr. JONES. The Chair recognizes the majority counsel for one question.

Mr. KYROS. Thank you, Mr. Chairman.

Jim, one last question then.

In your statement on page 11 you describe the impact on U.S. trades and on U.S. carriers if the code comes into effect. Then you conclude by stating that the nature of the code makes any meaningful assessment of impact difficult.

I asked you before if you consulted with the other departments, and other shipping companies.

Now, Mr. Peter Finnerty is testifying this morning, and is apparently going to say,—

Mr. ATWOOD. Who is this?

Mr. KYROS. Mr. Peter Finnerty of Sea-Land Service. His statement reveals that, "Any honest appraisal of the impact on the U.S. trades of the UNCTAD Code entering into force with Europe and Japan as ratifying nations must conclude that considerable harm will accrue to U.S. interests."

It then goes on to define the impact in detail. The Department of Commerce, in their testimony, state that, "to the extent that U.S.-flag vessels operate as cross-traders within the developed world, there could be an adverse impact, although its severity is difficult to forecast."

They also said they are concerned about displacement of other vessels from other trades, all dumping into our over-tonnaged trades.

Finally, the Department of Transportation, whose testimony we just received, believes that as a result of the impact of the code, overall shipping costs might rise within the established conferences, et cetera.

In other words, there are Federal agencies and operators, other than State, who feel that there would be a significant impact just from the very nature of what would happen if the accession by the EC is finalized, and the code does go into effect in that form.

Are you aware of that?

Mr. ATWOOD. Mr. Kyros, I am very sorry if my testimony left the impression that I do not agree with that analysis. I do. What I was pointing out here is that to know precisely the sort of impact involved, one would have to know more precisely what sort of regime it is that we are talking about, and this combination of accessions and nonaccessions, conflicting regulations, the vague provisions of the code, makes precise assessments difficult.

Mr. KYROS. Thank you, Mr. Atwood.

Thank you, Mr. Chairman.

Mr. JONES. It is 10 minutes to 1. I am going to defer to Mr. Daschbach to see whether he would prefer waiting until 2 o'clock or prefer testifying at this time.

TESTIMONY OF HON. RICHARD J. DASCHBACH, CHAIRMAN, FEDERAL MARITIME COMMISSION, ACCOMPANIED BY BRIEN KEHOE, FEDERAL MARITIME COMMISSION INTERNATIONAL AFFAIRS OFFICER

Chairman DASCHBACH. I am prepared to do whatever the Chair requests.

Mr. JONES. The Chair recognizes you. We have 10 minutes.

Chairman DASCHBACH. I would anticipate that I would be here at the committee's choice more than 10 minutes.

Mr. JONES. Your testimony runs more than 10 minutes?

Chairman DASCHBACH. Yes.

Mr. JONES. All right. The Chair recognizes you. Let us do that before lunch.

[Mr. Daschbach read his statement which follows:]

STATEMENT OF HON. RICHARD J. DASCHBACH, CHAIRMAN, FEDERAL MARITIME COMMISSION

MR. CHAIRMAN: I am accompanied today by the Commission's International Affairs Officer, Mr. Brien Kehoe.

Let me say at the outset, Mr. Chairman, that I welcome these hearings as a valuable opportunity for a broad public discussion of the proposed Convention for a Code of Conduct for Liner Conferences. This Code is neither more nor less than a codification of the shipping issues which have faced this government for several years. The questions of closed conferences, bilateral agreements, resolution of disputes as to rates and conditions of carriage, shippers' councils, deferred rebates; all are treated and resolved within the four corners of this document. I believe this Code should not be thought of as a radical departure from law but rather as the crystallization of issues we must grapple with and decide.

At the Federal Maritime Commission, our interest in this document is twofold. First, we believe the Code of Conduct should be examined carefully and its implications for U.S. shipping and trade interests should be weighed both inside and outside of government circles. Second, we are concerned over the potential impact on U.S. carriers and shippers of the Code, assuming it will come into force with the effect of an international convention.

Regardless of the actions of the United States Government, such a legal convention is bound to have side effects in our own ocean trades. Not only can we expect changes in supply and demand for shipping services, we also face the prospect of placing carriers and shippers between two conflicting regulatory systems: the Code with its reliance on commercial negotiation between the parties, and our own system which provides for greater direct government intervention due to the role of our antitrust laws and our historic reliance on regulation.

The Commission views the implementation of the Code of Conduct for Liner Conferences as practically a foregone conclusion at this time. The compromise within the European Community makes final ratification by those countries very likely. Likewise, from Japan, the Commission has had clear indications that statutory changes are being considered to allow for ratification on terms similar to those announced by the European Community. As a result, the tonnage prerequisites will be met and, of course, the requirement for 24 national ratifications has been met since early last year. Since the Code will take effect, by its terms, six months following the fulfillment of these conditions, implementations as soon as the end of 1979 is a possibility.

The Maritime Commission is not equipped to catalog the practical effects of entry of the Code into force. However, it would be naive to assume that this new regimen of liner behavior involving over one quarter of the world's conference tonnage will have no effect on the supply or demand for shipping space. I would like to address supply first, because I am particularly concerned that the Code may tend to create a short term artificial market for ships. Prior to the drafting of the Code a common

complaint among less developed countries was that their national flag lines, typically government owned, were not granted conference membership in their own trades. As a result, the Code provides nearly an automatic right of conference membership to these carriers and clearly envisages establishment of less-developed country steamship lines. When such carriers enter world commerce, they may acquire ships in three ways: 1) purchase of existing tonnage; 2) charter of existing tonnage; 3) new construction. The first two methods will have no effect on world tonnage since the ships are already in service. Purchase or charter in fact would tend to absorb some of the current excess capacity. These methods are now being used most prominently by the People's Republic of China. New construction, however, which would exacerbate the current surplus, could be accomplished either in foreign or national shipyards. We must understand that many world nations have adopted the policy that a nationally owned, nationally built merchant marine is in their economic interest. Thus, in strict economic terms, while it may appear far more advantageous to buy existing tonnage on the current market, shipbuilding will be pursued as a long term economic goal. Some countries, such as Algeria, for example, have recently decided to establish national shipyards. As to foreign shipbuilding, in Europe and parts of Asia, the tendency has been to increase demand by easing the terms of purchase for export orders. Within the O.E.C.D., for example, suggestions are currently being made for decreases in downpayments from 30 percent to 20 percent and a lengthening of terms of financing from 7 to 8½ years. In particular cases terms have been relaxed even further. In one instance, for example, the terms of payment for a vessel built in Western Europe were extended over 50 years with a 20 year grace period at an annual rate of interest of .75 percent.

There is no need to dwell on the current excess capacity in all sectors of shipping, including liner operations. However, we must be aware that the Code of Conduct could exert pressures which would exacerbate the current problem. This is particularly serious in the United States because our laws mandate an open conference system; one that permits entry to all into the richest single-nation foreign trade in the world. Since the United States is therefore so vulnerable to dumping of excess tonnage, we must remain alert to world conditions as they may affect the U.S. shipping community.

The other aspect of the problem is the mandatory restraints on cross-trading through the strict implementation of the 40/40/20 ratio. In the immediate past, U.S. carriers have not participated actively as third flag carriers, except where way cargoes were picked up or discharged between major ports of calls. Larger U.S.-flag carriers, such as Sea-Land, and U.S. Lines, have been contemplating round the world container services, and could be harmed where transshipped cargoes are held within the 20 percent share likely to be reserved for third flag carriers. A related problem deals with independent carriage. A superficial reading of the Code could give the impression that, should third flag carriers find a 20 percent conference share inadequate, they need only compete as independents outside the conference. This view is bolstered by the annex to Resolution I which notes the Code should not be construed "so as to deny shippers . . . the choice between conference . . . and non-conference shipping lines." However, it appears the entire Code is drafted so as to encourage the use and dominance of conference carriage at conference rates. The Code therefore frames an issue which has not previously been considered in the national shipping dialogue. The role of independent carriage in our foreign commerce is too important to be left to chance interpretations in the future. I believe we should articulate a policy in this regard and make it clear to all of our trading partners, whether or not they ratify the Code.

Having said these things, let me proceed to a discussion of the Code insofar as it compares with current U.S. law. There should be no mistake that, from our standpoint, the Code embodies the traditional "European" approach to conference organization. It relies principally upon commercial concepts with limited government intervention. The conferences are closed, shippers' councils are made mandatory, tying devices are permitted, deferred rebates are specifically noted and consultation between shippers and carriers is required. Malpractices are determined by the conference which also must maintain "self-policing machinery" to deal with violations. As in most European countries, neither agreements nor tariffs are required to be filed, but may be made available to shippers or councils. Finally, a system akin to voluntary arbitration of disputes is established.

Since the Code is comprised of 145 paragraphs, time will not permit a line by line comparison with our statutes. However, main policy distinctions must be addressed.

Beginning in the definitions of Chapter I and running throughout, the Code is silent as to the concept of discrimination which is central to our Shipping Act. Carriers in fact, face discrimination by definition: the rights of a "national shipping line" are clearly superior to those of a "third country shipping line." Discrimination

between shippers, insofar as it is addressed, is prohibited in Article 13, paragraph 1: "tariffs shall not unfairly differentiate between shippers similarly situated." This language affords shippers the same extensive protection as the Shipping Act.

Article I of the Code effectively closes conferences. It is noteworthy that in addition to according national and third flag lines different rights, it is the conference which determines its own membership. Since a regulatory apparatus is not envisioned by the Code, there are no formal requirements for exemption from antitrust or approval of pools, joint services, or other concerted activity.

To many, the concept of cargo sharing in a 40/40/20 ratio is the Code. In fact, however, the document is far more flexible than this. It provides only that national flag lines will be accorded "equal rights to participate in the trade" and that third country trades shall have the right to acquire "a significant part, such as 20 percent." By adjusting the third flag share, the bilateral partners share is thus adjusted. The actual shares are thus by no means fixed at 40/40/20. Nor is this provision contrary to Commission precedent. As you know, we currently have bilateral cargo sharing agreements with eight countries, most with these exact shares.

Article 5, however, is a substantial departure from the Shipping Act. All malpractices are defined by the conference—which could include defining no malpractices at all. Likewise, self-policing—or the lack of it—is a determination made by the conference. Self-policing reports, when made, may be furnished "the appropriate authorities . . . on a basis of anonymity." Likewise, conference agreements are to be made available to the governments, presumably for information only.

Loyalty arrangements, such as dual rate contracts and deferred rebates are principally contractual in nature. Disputes are to be settled as provided under the dual rate contract. Also, the notice provision for increases under dual rates is 150 days which is at variance with the Shipping Act requirement of 90 days.

Under Article 9, tariffs are to be made available to parties concerned. While no specific provision is made for filing of tariffs, it does not appear the Code prohibits such requirements.

Central to the philosophy of the Liner Code is shipper-carrier consultation. The document presumes the existence of a shippers' council. While I believe it would be stretching a point, the argument could be made that the Code's definition of "shippers' organization" could include an existing governmental body, such as the Federal Maritime Commission. I would oppose such a designation since I believe it does violence to the concept of consultation, but would favor, as I have said previously before this Committee, the establishment of a shipper founded and managed council which could consult with carriers over the topics enumerated in Article 11; general tariff rates or conditions, special rates, surcharges, tying devices, etc.

Article 14 substantially departs from current U.S. law. It provides for the so-called 15 month freeze on freight rates. A minimum five month waiting period is provided, but the language here provides for this period or "according to regional practice or agreement." More specific, however, is "minimum period of time . . . between the effective date . . . and the next (notice) . . . is 10 months." Inasmuch as deviations from this period must be approved through consultation, it appears unlikely that shippers would favor or allow more frequent increases. This could be regarded as an unreasonably long period of time in view of current rates of inflation. Increases would be substantial under this formula due to the required delay, nearly one full year. This could seriously disrupt the financial posture of carriers and would certainly lead to irregularities toward the end of pricing cycles and at the beginning of new ones. While the Code exhorts carriers to avoid "bunching and gapping of sailings," (Article 19) this is precisely the effect strait-jacketing rates would achieve.

Finally, I am concerned over substitution of the current Commission role as a forum for shipper/carrier or carrier/carrier disputes. Again, however, under Article 37, the final recommendation under Code procedures in settlement of a dispute is not binding unless agreed to by the parties. I believe the Commission has served as a fair and effective forum for the settlement of private disputes.

These areas form the principal differences I have with the Code. Nonetheless, adequate reservations to the document could be drafted so as to harmonize our statutes with the Code. We must recall that whatever its deficiencies, the aims of the Code of Conduct are those which we all seek: international comity, predictability and uniformity in regulatory policy and fair regard for the rights of both carriers and shippers. We must examine it carefully, for, as I indicated at the outset, it will soon be a legal reality.

The Commission is concerned that its entry into force will place carriers and/or shippers between competing regulatory systems. In the near future, we will be considering a notice of inquiry in an effort to seek public comment on this issue. In

the interim, however, I welcome this hearing as the beginning of important national dialogue on a vital question which could determine the future of liner shipping.

I would be happy to answer any questions you may have.

Mr. JONES. Thank you.

The Chair now declares the Subcommittee on Merchant Marine in recess until 2 o'clock.

[Whereupon, at 1 p.m., the subcommittee recessed, to reconvene at 2 p.m., the same day.]

AFTERNOON SESSION

Mr. DONNELLY. The subcommittee will come to order. We will now continue with the questioning of Mr. Daschbach.

Mr. KYROS. Before lunch, you testified in your statement, on page 3, "The Maritime Commission is not equipped to catalog the practical effects of entry of the code into force."

Frankly, if the Federal Maritime Commission is not equipped to do that, I wonder what agency is? Why did you make that statement?

Mr. DASCHBACH. What my reference to was, that practical effects of entry of the code are on carriers and shippers. We have no data base, statistics, from the carriers and shippers. As a matter of fact, that is one reason why the Commission has on its agenda for possible consideration, I believe next week—it was originally scheduled for 2 weeks ago, but was requested that it be laid over—a docket of inquiry in which we essentially are seeking public comment on three—in three principal areas:

The transportation and economic consequences of an implied line carrier code on U.S. foreign commerce; current U.S. law with conflicting law provisions; and the merits and disadvantages of the United States implementation of the code.

But, in addition, it is difficult to speculate since the code is not in force, and if it were to come into force, on what terms?

Mr. KYROS. That is interesting. We heard Mr. Atwood say the same thing.

In 1976, the Department of Transportation made a study which has a data base analyzing the economic impacts of the nonmarket cargo allocation provided in the code. You are aware of that study?

Mr. DASCHBACH. I believe the study which was done by Franklin at the Department of Transportation was limited to impact on shippers.

Mr. KYROS. The study was done by Robert Schisler and David Spiller. Have you read the study?

Mr. DASCHBACH. No, I have not. Back in 1976, when I was on the staff of the U.S. Senate, Committee on Commerce, I saw the study and attended a meeting at the Department of Transportation. I thought it was Dr. Franklin's study.

Mr. KYROS. There may have been another study. Recently I had a discussion with Commissioner Bakke, on your Commission. He had not been aware of this particular study, when I brought it to his attention. So, I am not sure the FMC has been aware of this study.

Mr. DASCHBACH. I cannot speak to what Mr. Bakke knows or does not know. He was Chairman of the Commission when the study was completed.

Mr. KYROS. This study analyzes both the effect on U.S. carriers and U.S. shippers, it does it by trade route and specific carriage. In light of that study, and in light of the EC accession to the code and the provisions by which the EC would enter into the code, the reservations, in light of that, is the Federal Maritime Commission still not equipped to catalog the impact of the entry of that Code into effect?

Mr. DASCHBACH. I think the context or the intent of what—the statement was intended to convey, I believe, only shippers and carriers can really document the practical impact, and frankly, to me, that is why I applaud this committee on holding these hearings, to get this information, to solicit this information, to solicit this kind of data, because it has never been done in the past by any agency in the executive branch.

Mr. KYROS. Do I understand you to say that, as Chairman of the Federal Maritime Commission, that you would rely on U.S. shippers and carriers to tell you about the practical impact of the code going into effect? That is who we are supposed to rely on?

Mr. DASCHBACH. Rely on in part because it is a data base that we would need to have at our disposal. It would not be something on which we would rely to make a decision.

Mr. KYROS. Did you hear the testimony this morning, that the State Department, according to two of the largest lines, namely, Sea-Land and United States Lines, according to their point of view they were not even consulted by the State Department as to the practical effects of the code. Did you hear that testimony?

Mr. DASCHBACH. Yes, I did. I can believe it.

Mr. KYROS. Has anyone called on all of the U.S. lines and all of the shippers, to give information as to the code?

Mr. DASCHBACH. Not to my knowledge.

Mr. KYROS. Were you ever called in, was your Commission ever called in by the State Department, and asked as to the practical effects of the code going into effect?

Mr. DASCHBACH. I never was.

Mr. KYROS. You head the Commission?

Mr. DASCHBACH. That is correct.

Mr. KYROS. So the State Department never consulted you?

Mr. DASCHBACH. The State Department never consulted with me. I am certain that the response from the State Department would be that they have consulted with Mr. Kehoe, and would perhaps want to draw a large picture from that, and perhaps Mr. Kehoe ought to respond. But as a member of the Commission, the answer is, no, I was never consulted. I am not aware of any interagency meeting that was ever held with respect to the liners Code since 1974, or since the vote was taken in April of 1974.

Mr. KYROS. Recently Commissioner Burke, I think the transportation commissioner of the EC, visited and talked with the chairman of the committee here, and also met with staff members and discussed provisions of the code, namely, the EC accession. At that time, were you asked to talk to Mr. Burk by the State Department?

Mr. DASCHBACH. No. As a matter of fact, we called the European Community's office here in Washington to make certain that I would have the opportunity to talk with Mr. Burk.

Mr. KYROS. Have you discussed the code with the other Commissioners on your Commission?

Mr. DASCHBACH. Yes, we had a briefing of the Commission, for the full Commission, on the code.

Mr. KYROS. When was that?

Mr. DASCHBACH. That was last Thursday.

Mr. KYROS. Last Thursday?

Mr. DASCHBACH. Yes.

Mr. KYROS. In the last 2 years, was that the only meeting you have ever had on the code?

Mr. DASCHBACH. I can not speak for 2 years. I have not been on the Commission for 2 full years, but since I have been the Chairman of the Commission, that is the first meeting we have had to discuss the code.

Mr. KYROS. Do the other Commissioners agree with the testimony that you have testified here to today?

Mr. DASCHBACH. I don't know.

Mr. KYROS. Did you convey the testimony to them?

Mr. DASCHBACH. We only finished preparing the testimony last evening, and we gave it to those Commissioners who were in the city, and I received no comment. But, frankly, I believe that based on the briefing that was held last week, that nothing that I have said is contrary to anything that was expressed last week.

Mr. KYROS. Do you know whether all of the Commissioners, Federal Maritime Commissioners, have read the code?

Mr. DASCHBACH. I could not tell you that.

Mr. KYROS. In your testimony, on page 5, Mr. Daschbach, you stated, among other things, "The role of independent carriage in our foreign commerce is too important to be left to chance interpretations in the future." In other words, you are worried that third flags and independents will be squeezed out if the code goes into effect—

Mr. DASCHBACH. Excuse me. I am not sure that that is the implication that I intended.

Mr. KYROS. Just above that, you said, "It appears the entire code is drafted so as to encourage the use and dominance of conference carriage at conference rates." Then you proceed to say that you are concerned about the role of the independent carriers. Is that correct?

Mr. DASCHBACH. Yes.

Mr. KYROS. Then you state, "I believe we should articulate a policy in this regard, and make it clear to all of our trading partners, whether or not they ratify the code."

Do you have such a policy?

Mr. DASCHBACH. When I said, "we," I am talking about the U.S. Government.

Mr. KYROS. Who would that be, in this case?

Mr. DASCHBACH. Frankly, I wish I could tell you.

Mr. KYROS. Did you ever discuss the code provisions, or were you asked to discuss them, with the Interagency Task Force?

Mr. DASCHBACH. No.

Mr. KYROS. In your submissions to the task force, did you submit anything about the code?

Mr. DASCHBACH. Yes, we did.

Mr. KYROS. Was it something in substance?

Mr. DASCHBACH. With reference to the agenda that the task force would undertake, and Mr. Haslup, who is legislative counsel for the Commission, attended the meetings at which the code was discussed, and I would recommend that he be asked to come to the table to respond to the details of what happened.

Mr. KYROS. Do you know what happened? Why don't you just tell us?

Mr. DASCHBACH. As reported to me by Mr. Haslup, the agenda that we suggested for the Interagency Task Force had a reference to the U.N. Code of Conduct for Liner Conferences. It was urged that that be deleted from the agenda, and I think in lieu thereof, placed the words "shares of trade."

Mr. KYROS. Who urged they be deleted?

Mr. DASCHBACH. According to the information given to me, a representative from the Department of State.

Mr. KYROS. Mr. Daschbach, you heard the testimony, I think, this morning, that two of the largest liner companies contended that there is substantial impact on the U.S. trade if the code with the EC accession should go into force, and also I believe you are aware of testimony that is forthcoming, by the Department of Commerce and the Department of Transportation saying something to a similar effect. So there is an impact of the code on our trade. Is there any question in your mind about that?

Mr. DASCHBACH. No question whatsoever. There will be an impact.

Mr. KYROS. So the important question is, What precisely you have done, as the sole and primary repository of international expertise on U.S. liner trade? Have you prepared for such an impact? What have you done?

Mr. DASCHBACH. I would like to comment on the framing of your question, if I may. One of the most important questions, as I would see it, and obviously different people from wherever they come see things in different ways, or their importance in different ways—I think one of the most important questions will be, how will the 40-40-20 cargo sharing affect U.S.-flag liner operators? Will that give them more cargo or less cargo? The Federal Maritime Commission does not have the data with respect to what percent of the cargo trade, on trade route 5, trade route 29, whatever number you would like to select—the Maritime Administration has that data, and I understand is prepared to respond to that question today.

Mr. KYROS. As to precisely the effect on trade routes?

Mr. DASCHBACH. As to the current percentum of carriage by U.S.-flag carriers, and whether 40 percent will be an addition or subtraction from what we are currently carrying. But the Commission did not have the data base, but the Maritime Administration has, by absence of provisions in the statute.

Mr. KYROS. With respect to the remarks you made, on page 10 of your testimony, you say, "Nonetheless, adequate reservations to the document could be drafted so as to harmonize our statutes with the code."

If I understand, you are saying that we could draft reservations and present them to the other nations, to harmonize the provisions of the code with our statutes. As I understand from your testimony

generally, it is to preserve the integrity and the jurisdiction of the Federal Maritime Commission.

Mr. DASCHBACH. I don't believe the preservation of the Federal Maritime Commission is the paramount factor in whether this country adopts the code or not. My point is that adequate reservations could be drafted to harmonize our statutes with the code. Perhaps I was too narrow in saying, "our statutes with the code," but with our national policy objectives with the code.

I have to say, in all candor, responding to a question that was asked, I am aware of no interagency meeting which has been held to discuss possible reservations that the United States may consider.

Mr. KYROS. Is the FMC prepared, if such a meeting were held, to present such reservations?

Mr. DASCHBACH. Yes.

Mr. KYROS. Do you have them drafted now? Would you give them to us?

Mr. DASCHBACH. I have a list of those areas which would have to be given attention. It is not limited to reservations. Frankly, if you take a look at the major areas of the code, as I outlined them this morning, closed conferences, bilateral agreements, resolution of disputes as to weights and conditions of carriage, shippers councils' deferred rebates, if that is a given, that those are the major elements of the code, then we have positions on many of them. The Federal Maritime Commission in its submission to the Interagency Task Force came out in favor of closed conferences. Bilateral agreements, we also have a number of agreements which are bilateral cargo-sharing agreements. Resolution of disputes as to rates and conditions of carriage, as I said in my statement, I think the Maritime Commission is a better forum. As that area is enunciated in the code, it is not binding on the parties unless they agree that it be binding.

Shippers' councils, we have endorsed shippers' councils. Deferred rebates, last year in the one one—

Mr. KYROS. Four two two (H.R. 11422)—

Mr. DASCHBACH. Legislation, we did not espouse deferred rebates. We said that we believe that a stronger, or a strengthened dual rate contract system would be better. It is not our impression that deferred rebate is even a very popular approach taken. But I am not even sure, frankly, that deferred rebate is the most heinous—I think perhaps if you changed the words, if you called it a deferred discount—in fact, I would think if we could get some tax lawyers to help us write that, they could come up with a couple of words that would make it sound quite palatable. As we noted, the word "rebate" is not a palatable term.

The point I am making is that none of those major areas of the Code, other than this nonbinding resolution of the disputes mechanism, is contrary to current commission policy, or what the Commission has submitted to the White House, as what we believe should be U.S. policy.

So, in terms of reservations, I am not sure that major reservations need be made. In terms of conforming the Code to U.S. law, a number of steps need to be taken. Obviously, statutory authority for shippers' councils should be granted immediately. The law has

to be modified to permit closed conferences. The law would have to be modified to permit the distinction and differentiation between treatment of the national-flag carriers and third-flag carriers. I would like to see some guidelines enacted favoring bilateral shipping agreements, so it would appear that they would presumably be in the proper interest, and you did not have years of litigation every time one went before the Commission.

In addition, the statute should define with some clarity a number of areas. As a perfect example, military cargo and Government cargo, which is very hazy in the current code. A number of areas which I do not think are major stumbling blocks: On notice, prior to rate increases; filing requirements for tariffs and agreements; carrier-Commission dispute resolution. I personally do not see any major stumbling blocks to the code.

Mr. KYROS. You certainly differ in your testimony from Mr. Atwood, who indicated that because of the noncompetitive effect of the code, that it was not a policy of the United States to adopt the code, nor did he suggest that we could proceed with reservations to harmonize our shipping policies to the code.

Let me pursue this further, Mr. Daschbach. You have testified here before. You were finishing a statutory review process, whereby you would be presenting to this committee at some time, a package or perhaps even suggestions for legislation. Do I take it from your testimony this morning, that includes closed conferences and shippers' councils, and a system of rewriting the standards so you could swiftly and effectively process a complaint filed with your Commission. Is that the idea?

Mr. DASCHBACH. That is right.

Mr. KYROS. So, you still have closed conferences?

Mr. DASCHBACH. A form thereof.

Mr. KYROS; What form?

Mr. DASCHBACH. The UNCTAD form.

Mr. KYROS. You mean that there would be a cargo allocation scheme—

Mr. DASCHBACH. No, with respect to the nature of conferences. That is a very attractive idea. Make entry or membership eligibility mandatory for a national-flag carrier, and let the conferences decide, based on conditions in the trade, whether it will permit the entry of nonnational carriers. It is not fair trade.

Mr. KYROS. Closed conferences with membership priority for national lines' as the code provides?

Mr. DASCHBACH. That is right. I think that is, frankly a very fair compromise between absolute closed conferences in which the lines get together and decide who they want to let in, and an open conference system.

Mr. KYROS. In other words, a full competitive closed conference system, where they would compete without any restrictions as to flag. You think that would not be an effective way to do it?

Mr. DASCHBACH. I am sorry?

Mr. KYROS. You want to adopt provisions of the code which provide priority for national lines, for any nation's particular trade?

Mr. DASCHBACH. That is correct. Let me say, this is just something that I am expressing personally. it has not been endorsed by

members of the Commission, and I am sure that what is on your mind is, when you are going to have your statutory review committee product available to present to the committee. We are in the absolutely final throes of this effort, and I would hope that 2 or 3 weeks maximum time—

Mr. KYROS. You mean by May 15?

Mr. DASCHBACH. That is 2 or 3 weeks. But I am not saying May 15. I would not like to be too precise. My reservation with respect to being pinned down to specific times, is that I believe the other four members of the Commission—

Mr. KYROS. You and the others have discussed this every single day for almost a year.

Mr. DASCHBACH. No, we have not.

Mr. KYROS. You have had the statutory review process committee for an entire year.

Mr. DASCHBACH. That is right, more than a year.

Mr. KYROS. Haven't the other members of the Commission had time to discuss what—

Mr. DASCHBACH. No, we have not been operating the statutory review committee with staff—as you know, we have a number of committees and task groups within the Commission, each of which is chaired by a member of the Commission, and in order to get the work done and in order not to get bogged down, that member of that Commission does his or her work and makes a presentation of its findings to the other members of the Commission.

Mr. KYROS. Do I understand your testimony to be, you have not discussed with all of the other members the work of the statutory review committee? Is that what you are saying?

Mr. DASCHBACH. That is correct. I suppose it is somewhat simpler that a member of this committee, in drafting a bill, would not consult with all of the members of the committee before he introduced a bill.

Mr. KYROS. May 15, you said would be the date?

Mr. DASCHBACH. No, I didn't.

Mr. KYROS. May 20?

Mr. DASCHBACH. You said that date. Mr. Kyros, I would like to be able to say tomorrow but I—you will be the first—second person to know. I will tell Chairman Murphy first, and then Mr. Donnelly second, and Mr. Wyatt third, and any other member.

Mr. KYROS. Mr. Daschbach, you have referred to bilaterals. If you have a Government bilateral, as the code does not affect that government-to-government bilaterals, the code going into force—

Mr. DASCHBACH. That is right.

Mr. KYROS. You said in your testimony, besides closed conferences, that you also liked bilaterals. Does that mean the kinds of agreements that are struck with South American countries, government-to-government?

Mr. DASCHBACH. I think those perhaps proved to be very beneficial to the national needs of both parties of the trade.

Mr. KYROS. Then within the bilaterals, you would have closed conferences plus pools operating?

Mr. DASCHBACH. If you had an effective bilateral and an effective pool scheme, you don't have to close the conference. The other carriers cannot get any cargo. It is interesting to note, on that

subject, the Antitrust Division's study in 1976 on ocean shipping industry, according to figures supplied to the Department by the FMC, that in U.S. Atlantic and gulf coast trade with Central America, trade over a 10-year period, the rates increased by 13 percent a year and in the North Atlantic to Belgium, Netherlands to Germany, the rate increased by 24 percent a year in that wide open trade. The rates increased by significantly higher percentages than they did in a bilateral trade.

Mr. KYROS. So, this confirms your view on the rationalization?

Mr. DASCHBACH. I think it makes a strong case. I don't know of any predatory rate problems or practical problems in those trades.

Mr. KYROS. Thank you, Mr. Daschbach.

Mr. LOSCH. This morning, Mr. McCloskey asked the State Department questions regarding interference in their activities by other agencies of the Government. Would you provide, for the record, a brief description of each instance in the last several years where actions of other agencies of the executive branch have interfered with actions taken by your agency in furtherance of your statutory responsibilities. Instances where one agency may have given you an ex parte communication, or have taken a policy position which has interfered with actions taken pursuant to your statutory responsibilities.

Mr. DASCHBACH. If we can find any such instances, we shall communicate them to you.

Mr. LOSCH. For a starter you might look at the *Blue Seas* case.

Mr. DASCHBACH. Thank you for that suggestion.

Mr. LOSCH. Thank you, Mr. Chairman.

The Chairman. Thank you.

[The following was submitted:]

FEDERAL MARITIME COMMISSION,
OFFICE OF THE CHAIRMAN,
Washington, D.C., May 10, 1979.

Hon. John M. Murphy,
Chairman, House Committee on Merchant Marine and Fisheries,
U.S. House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: Towards the conclusion of my testimony at the Committee's hearing on the UNCTAD Code of Conduct for Liner Conferences, Mr. Losch, Counsel of the Minority asked of instances of interference by other agencies which made it difficult for the Commission to discharge its responsibilities.

As I indicated at the time, I recognize that the policy directives and statutes which guide the various agencies are not always consistent with one another. In general each agency attempts to comply with its particular statute. Actual "interference," however, appears rarely.

By way of illustration, in 1960 the Commission sought documents in an investigation into Mitsui Steamship Company pursuant to a Commission Order. No documents were produced in that matter, nor were penalties ever collected because the Department of Justice concluded its litigation "would likely prove unavailing" and since the State Department believes that such litigation "would disturb this government's relations with Japan . . ."

Mr. Losch asked specifically about the "Blue Sea case."

I have reviewed the decision in *U.S. v. Blue Sea Line* and fail to see any evidence of "interference" between Federal agencies in that litigation.

Sincerely,

RICHARD J. DASCHBACH,
Chairman.

The CHAIRMAN. Next witness will be Mr. Sam Nemirow, Acting Assistant Secretary for Maritime Affairs of the Maritime Administration, Department of Commerce.

STATEMENT OF SAMUEL B. NEMIROW, ACTING ASSISTANT SECRETARY FOR MARITIME AFFAIRS, MARITIME ADMINISTRATION, DEPARTMENT OF COMMERCE

Mr. NEMIROW. Thank you, Mr. Chairman. As always, it is a pleasure to appear here today to discuss the important issues before this committee. I have submitted this morning, and I apologize a bit for its tardiness' a seven-page statement—or an eight-page statement, and with the chairman's indulgence, I would like to go through portions of that and leave out some of the details that were covered earlier today.

The possible accession to the code, with certain reservations, by the countries of the EEC and Japan would bring the number of countries party to the code to 43, representing 49.6 percent of the world's liner tonnage. Thus, it is largely irrelevant whether or not one sympathizes with the motives of countries adhering to the code, or shares the political and economic arguments advanced in its favor. We will shortly be faced with a shipping world in which the Code is a fact of life, and we must adjust ourselves and our policies to take that fact into account.

Although the code is a long and complex document, three of its provisions have, at least for the United States, rightly been the subject of debate. Those provisions relate to cargo sharing; the sanctioning of closed conferences; and, 15-month interim between general freight rate increases.

The code suggests that, within the context of a closed conference system, cargoes could be allocated as follows: 40 percent to each of the trading partners in any given bilateral trade, and 20 percent to cross-traders. Advocates of the code are always quick to point out that this 40-40-20 formula is only a suggested guideline for allocation. It is not a governmentally mandated reservation of cargo shares; rather, it is up to conference members, using pooling arrangements, to negotiate their respective shares of cargo. Generally, the United States has opposed cargo allocation schemes of the type contemplated by the code. On the other hand, however, this country has, for a number of years, unilaterally reserved for U.S.-flag carriage certain "government controlled" cargo. Hence, the idea of some form of cargo reservation is not totally alien to our national shipping policy. Furthermore, when faced with the unilateral cargo reservation practices of other countries, notably Argentina and Brazil, the Maritime Administration, on behalf of the United States, has negotiated bilateral maritime agreements which contemplate cargo-sharing arrangements arrived at through commercial negotiation by the national flag lines of the countries involved. In the case of the Soviet Union, the United States has entered into an outright cargo sharing program negotiated by the governments themselves.

Operation of the code's 40-40-20 formula in U.S. trades would obviously have the greatest adverse impact on the fleets of countries which are heavily employed as cross-traders. The fleets of the United Kingdom and Denmark come readily to mind in this connection. In several of our trades, U.S. operators presently enjoy the carriage of more than 40 percent of the cargo moving. In many more, however, they do not.

From a legal standpoint, the most troublesome aspect for this Government is the code's endorsement of a conference organization which permits the exclusion of an otherwise qualified carriers, typically called the closed conference system. At least since the enactment of the Shipping Act of 1916, the United States has required that conferences serving U.S. trades be open to qualified carriers wishing to join, regardless of flag. I need not reiterate for you or the committee the well-known arguments for and against closed conferences. Suffice it to say that without a change of government policy on this subject, the United States would not adhere to the code as it stands.

The question of shippers' councils has been discussed, and the question has come up as to whether they can legitimately be organized, under our antitrust laws. That issue has not been resolved, and therefore we have no shippers' councils in the United States. This would create a difficult situation for us if the code were to be applied in the United States.

Another difficulty which has been raised in the context of U.S. discussion of the code, has been the freeze on the general freight rate increases for periods of 15 months. In this environment of rapid inflation such a provision seems unrealistic and unacceptable.

It appears now that the code will have enough adherents to come into force in the near future. One of the important things for us to do is to consider what the EEC proposes in the reservations. The specifics of the EEC reservation were discussed in great detail during Mr. Atwood's testimony, and I would be glad to comment on any issues that the committee would like me to comment on. But I will not take your time by discussing each of the reservations of the European Community, unless you would like me to.

The question is, what will be the effect upon the United States of a code with the EEC accession? It does not appear that U.S. shipping operating in bilateral trades within the developed world would be significantly affected. To the extent that U.S.-flag vessels operate as cross-traders within the developed world, there could be an adverse impact, although its severity is difficult to forecast.

It is important to note that the cargo sharing provisions of the code would necessarily reduce the opportunities for other developed country fleets to engage in cross-trading with developing countries. We think it is likely that vessels displaced by the phenomenon I just mentioned would seek employment in the relatively open U.S. trades, thus even further overtonnaging some of our most lucrative trades.

The adoption of the code with or without the EEC reservations is likely to have the greatest effect on our trade with developing countries. Most developing states have already adopted cargo reservation measures, which we respond to as the need arises. With the imprimatur of an international agreement favoring cargo sharing, the impetus for developing countries to introduce cargo reservation schemes in their trades with the United States will no doubt increase.

This concludes my prepared statement. I will be pleased to attempt to answer any questions you may have.

Thank you.

The CHAIRMAN. Thank you. On pages 3 and 4, you state that, "In several of our trades, U.S. operators presently enjoy the carriage of more than 40 percent of the cargo moving." What trades are they?

Mr. NEMIROW. There was some discussion earlier today as to some of the data which might be available on these subjects. I would like to make available to the committee a computer print-out on a trade route basis of the total tons carried and the amount carried by U.S.-vessels.

The CHAIRMAN. U.S.-flag vessels?

Mr. NEMIROW. U.S. flag, foreign flag, total in terms of tonnage and value of cargo. I would only make one comment on that data. I have asked that the data be refined, because it is broken down on a trade route basis, which means that it may incorporate a number of countries because of our trade route definition. I would like to break it down, if we can, through our computer system, to a country-by-country table. Right now, it is on a trade route basis. But I can make this available to the committee today, and hopefully in the near future give you a country-by-country breakdown. [The following information was submitted:]

U.S. OCEANBORNE FOREIGN TRADE VALUE BY COUNTRY—LINER SERVICE—CALENDAR YEAR 1977

Country	Total ¹ value	Percent		Inbound ¹ value	Percent		Outbound ¹ value	Percent	
		U.S.	Foreign		U.S.	Foreign		U.S.	Foreign
Albania	78	0	100	0	.....	.....	78	0	100
Algeria	279,886	60	40	915	10	90	278,971	60	40
Angola	27,694	42	58	12,651	92	8	15,043	(²)	100
Argentina	789,259	42	58	269,027	52	48	520,232	37	63
Australia	2,125,464	22	78	597,173	24	76	1,528,291	21	79
Azores	5,051	52	48	2,817	86	14	2,234	9	91
Bahamas	88,955	2	98	16,421	8	92	72,534	1	99
Bahrain	80,906	7	93	10,626	10	90	70,280	7	93
Bangladesh	85,752	56	44	51,343	52	48	34,409	62	38
Barbados	22,444	2	98	1,492	(²)	100	20,952	3	97
Belgium	2,953,661	18	82	1,417,197	22	78	1,536,464	15	85
Belize	14,519	(²)	100	1,492	(²)	100	13,027	(²)	100
Benin	14,547	24	76	60	100	0	14,487	24	76
Bermuda	54,712	(²)	100	1,300	3	97	53,412	(²)	100
British Pacific Islands	2,790	1	99	2,690	1	99	100	2	98
Brazil	3,181,658	42	58	1,808,731	38	62	1,372,927	47	53
Brunei	548	4	96	0	.....	.....	548	4	96
Bulgaria	24,672	96	4	13,911	100(²)		10,761	91	9
Cambodia	2	100	0	0	.....	.....	2	100	0
Cameroon	56,537	44	56	22,643	50	50	33,463	40	60
Canada	118,488	18	82	70,443	18	82	48,045	18	82
Canal Zone	237,066	77	23	33,289	95	5	203,777	74	26
Canary Islands	70,766	1	99	5,947	0	100	64,819	1	99
Cayman Islands	4,886	1	99	637	0	100	4,249	1	99
Chile	665,617	39	61	261,136	43	57	404,481	37	63
Colombia	899,420	36	64	478,397	38	62	421,023	35	65
Congo	6,469	29	71	766	35	65	5,703	28	72
Costa Rica	266,285	33	67	123,504	47	53	142,781	21	79
Cuba	422	4	96	107	2	98	315	4	96
Cyprus	18,426	8	92	7,332	7	93	11,094	9	91
Denmark	199,392	28	72	113,449	44	56	85,943	8	92
Djibouti	64,688	60	40	53,975	64	36	10,713	41	59
Dominican Republic	502,676	43	57	309,108	38	62	193,568	51	49
Ecuador	544,225	26	74	266,159	23	77	278,066	28	72

U.S. OCEANBORNE FOREIGN TRADE VALUE BY COUNTRY—LINER SERVICE—CALENDAR YEAR 1977—
Continued

Country	Total ¹ value	Percent		Inbound ¹ value	Percent		Outbound ¹ value	Percent	
		U.S. Foreign			U.S. Foreign			U.S. Foreign	
Egypt	400,278	50	50	16,112	10	90	384,166	52	48
El Salvador	281,600	11	89	228,366	7	93	53,234	32	68
Ethiopia	81	100	0	0	.....	.....	81	100	0
Federal Republic of Germany	64,762	52	48	49,809	46	54	14,953	73	27
Finland	6,293,578	21	79	4,234,265	21	79	2,059,313	22	78
France	146,626	18	82	88,827	26	74	57,799	7	93
French Guiana	2,718,325	27	73	1,544,532	34	66	1,173,793	18	82
French Pacific Islands	6,368	(²)	100	4,793	(²)	100	1,575	0	100
.....	58,864	10	90	25,825	(²)	100	33,039	19	81
French West Indies	8,652	13	87	37	3	97	8,615	13	87
Gabon	15,542	33	67	1,038	0	100	14,504	35	65
German Democratic Republic	111	21	79	0	.....	.....	111	21	79
Ghana	212,652	28	72	121,316	28	72	91,336	28	72
Gibraltar	160	32	68	126	24	76	34	65	35
Greece	299,471	27	73	94,948	35	65	204,523	23	77
Greenland	683	5	95	548	0	100	135	25	75
Guatemala	484,017	10	90	262,746	9	91	221,271	12	88
Guinea	13,701	73	27	7	100	0	13,694	73	27
Guyana	39,220	1	99	5,953	(²)	100	33,267	2	98
Haiti	130,252	21	79	56,753	25	75	73,442	19	81
Honduras	195,685	15	85	91,818	14	86	103,867	15	85
Hong Kong	3,336,549	50	50	2,470,620	51	49	865,929	47	53
Iceland	151,823	(²)	100	128,540	0	100	23,283	(²)	100
India	780,686	38	62	462,446	39	61	318,240	36	64
Indonesia	794,025	30	70	427,930	16	84	366,095	45	55
Iran	852,342	22	78	69,029	73	27	783,313	18	82
Iraq	89,751	4	96	500	7	93	89,251	4	96
Ireland	75,610	42	58	30,841	62	38	44,769	29	71
Israel	467,863	43	57	126,944	41	59	340,919	44	56
Italy	2,408,796	24	76	1,478,112	32	68	930,684	12	88
Ivory Coast	343,153	43	57	269,048	42	58	74,105	48	52
Jamaica	184,330	29	71	26,441	38	62	157,889	28	72
Japan	15,525,054	27	73	11,648,573	27	73	3,876,481	27	73
Jordan	59,785	52	48	728	100	0	59,057	52	48
Kenya	425,276	60	40	385,420	58	42	39,856	79	21
Kuwait	362,521	14	86	6,415	10	90	356,106	14	86
Latvia	64	91	9	58	100	0	6	0	100
Lebanon	67,309	6	94	6,249	(²)	100	61,060	7	93
Liberia	98,088	55	45	31,987	56	44	66,101	54	46
Libya	202,900	20	80	703	0	100	202,197	20	80
Macao	7,056	64	36	7,045	64	36	11	0	100
Maderia Islands	2,455	(²)	100	2,340	(²)	100	115	0	100
Malagasy Republic	57,955	2	98	57,438	1	99	517	51	49
Malaysia	595,311	16	84	435,335	18	82	159,976	12	88
Malta/Gozo	9,586	6	94	759	66	34	8,827	1	99
Mauritania	11,195	0	100	3	0	100	11,192	0	100
Mauritius	583	41	59	15	37	63	838	41	59
Mexico	108,800	10	90	72,127	11	89	36,673	10	90
Miquelon Islands	227	0	100	67	0	100	160	0	100
Morocco	111,304	54	46	5,423	72	28	105,881	54	46
Mozambique	84,189	66	34	74,095	64	36	10,094	80	20
Netherlands	4,538,951	41	59	1,423,653	38	62	3,115,298	43	57
Netherlands Antilles	161,522	20	80	45,484	4	96	116,038	26	74
New Zealand	576,732	24	76	335,853	25	75	240,879	22	78
Nicaragua	140,177	5	95	62,045	3	97	78,132	7	93

U.S. OCEANBORNE FOREIGN TRADE VALUE BY COUNTRY—LINER SERVICE—CALENDAR YEAR 1977—
Continued

Country	Total ¹ value	Percent		Inbound ¹ value	Percent		Outbound ¹ value	Percent	
		U.S.	Foreign		U.S.	Foreign		U.S.	Foreign
Nigeria.....	509,747	19	81	58,893	35	65	450,854	17	83
North Korea.....	76	57	43	76	57	43	0	.....	.....
Norway.....	245,474	8	92	116,011	15	85	129,463	2	98
Oman.....	38,721	2	98	1,044	0	100	37,677	2	98
Pakistan.....	154,764	56	44	46,298	73	27	108,466	48	52
Panama.....	112,836	21	79	35,405	5	95	77,431	28	72
Papua New Guinea.....	74,582	51	49	71,125	49	51	3,457	89	11
Paraguay.....	24,040	8	92	6,182	0	100	17,858	11	89
Peoples Rep. of China.....	46,121	21	79	34,477	28	72	11,644	(²)	100
Peru.....	630,651	37	63	348,680	34	66	281,971	41	59
Philippines.....	812,364	37	63	305,965	50	50	506,399	29	71
Poland.....	361,382	18	82	241,026	20	80	120,356	14	86
Portugal.....	147,413	21	79	76,012	25	75	71,401	16	84
Qatar.....	52,157	7	93	367	0	100	51,790	7	93
Republic of China.....	3,578,584	40	60	2,774,013	41	59	804,571	37	63
Republic of Korea.....	2,240,112	44	56	1,418,964	44	56	821,148	44	56
Republic of South Africa.....	890,962	48	52	233,497	59	41	657,465	45	55
Romania.....	85,284	76	24	42,554	77	23	42,730	75	25
Saudi Arabia.....	1,736,042	33	67	4,151	84	16	1,731,891	33	67
Senegal.....	24,306	35	65	637	10	90	23,669	36	64
Seychelles.....	101	11	89	88	0	100	13	91	9
Sierre Leone.....	29,761	68	32	19,144	78	22	10,617	49	51
Singapore.....	1,348,024	25	75	647,904	32	68	700,120	19	81
Somalia.....	74	28	72	20	0	100	54	39	61
South-West Africa.....	19,039	28	72	2,621	45	55	16,418	17	83
Spain.....	1,313,790	39	61	612,437	53	47	701,353	27	73
Spanish Africa.....	121	81	19	0	.....	.....	121	81	19
Sri Lanka.....	85,842	60	40	53,428	51	49	32,414	76	24
Sudan.....	54,375	17	83	17,076	14	86	37,299	19	81
Surinam.....	83,506	(²)	100	24,856	6	94	58,650	(²)	100
Sweden.....	1,354,307	7	93	745,146	11	89	609,161	2	98
Syria.....	89,538	42	58	4,342	2	98	85,196	44	56
Tanzania.....	262,719	61	39	204,380	54	46	58,339	82	18
Thailand.....	516,842	16	84	256,582	22	78	260,260	11	89
The Gambia.....	2,595	12	88	0	.....	.....	2,595	12	88
Togo.....	21,306	49	51	165	0	100	21,141	49	51
Trinidad/Tobago.....	159,318	26	74	28,592	53	47	130,726	20	80
Trust Terr. of Pacific.....	8,579	37	63	852	5	95	7,727	41	59
Tunisia.....	26,836	37	63	2,178	14	86	24,658	39	61
Turkey.....	461,430	53	47	119,422	35	65	342,008	59	41
Turks & Caicos Islands.....	9	11	89	2	0	100	7	14	86
United Arab Emirates.....	363,566	17	83	5,568	68	32	354,498	17	83
United Kingdom.....	4,295,200	22	78	2,358,720	24	76	1,936,480	18	82
Uruguay.....	87,889	70	30	28,625	76	24	59,264	68	32
U.S.S.R.....	496,384	55	45	37,382	48	52	459,002	56	44
Venezuela.....	1,490,738	32	68	59,966	38	62	1,430,772	32	68
Vietnam.....	801	43	57	795	44	56	6	21	79
Virgin Islands (British).....	19,574	5	95	1,638	20	80	17,936	4	96
Western Africa (N.E.C.).....	5,170	53	47	924	63	37	4,246	51	49
Western Samoa.....	3,330	1	99	89	0	100	2,441	1	99
Yemen (Aden).....	3,277	25	75	1,392	(²)	100	1,885	43	57
Yemen (Sana).....	4,994	65	35	161	0	100	4,833	68	32
Yugoslavia.....	346,657	21	79	167,141	4	96	179,516	38	62
Zaire.....	99,608	49	51	29,799	12	88	69,809	65	35

¹ Thousands of dollars.² Less than 0.5 percent.³ Less than 500 dollars.

U.S. OCEANBORNE FOREIGN TRADE—TONNAGE BY COUNTRY—LINER SERVICE, CALENDAR YEAR 1977

Country	Total tons	Percent		Inbound tons	Percent		Outbound tons	Percent	
		U.S. Foreign			U.S. Foreign			U.S. Foreign	
Albania	70	0	100	0	.....	.....	70	0	100
Algeria	92,305	50	50	254	20	80	92,051	51	49
Angola	18,736	15	85	2,891	95	5	15,845	(²)	100
Argentina	570,544	36	64	252,741	45	55	317,803	29	71
Australia	1,292,376	20	80	506,232	23	77	786,144	18	82
Azores	6,017	50	50	2,868	94	6	3,149	10	90
Bahamas	107,496	1	99	9,548	8	92	97,948	(²)	100
Bahrain	37,893	4	96	9,132	5	95	28,761	4	96
Bangladesh	141,261	55	45	94,812	50	50	46,449	63	37
Barbados	26,700	2	98	529	0	100	26,171	2	98
Belgium	1,953,434	22	78	1,220,704	25	75	732,730	16	84
Belize	13,819	(²)	100	879	1	99	12,940	(²)	100
Benin	11,169	31	69	21	100	0	11,148	31	69
Bermuda	46,657	(²)	100	475	19	81	46,182	(²)	100
British Pacific Islands	2,415	1	99	2,373	1	99	42	0	100
Brazil	1,471,041	35	65	793,427	32	68	677,614	38	62
Brunei	83	5	95	0	.....	.....	83	5	95
Bulgaria	6,348	80	20	4,547	100	(²)	1,801	31	69
Cambodia	**	100	0	0	.....	.....	(²)	100	0
Cameroon	54,207	52	48	8,975	49	51	45,232	53	47
Canada	180,670	34	66	116,790	34	66	63,880	35	65
Canal Zone	133,407	67	33	9,122	93	.....	124,285	65	35
Canary Islands	42,980	3	97	1,539	0	100	41,441	3	97
Cayman Islands	5,135	2	98	231	0	100	4,904	2	98
Chile	461,510	39	61	253,994	37	63	270,516	41	59
Colombia	423,305	38	62	142,481	34	66	280,824	40	60
Congo	5,331	52	48	1,467	29	71	3,864	60	40
Costa Rica	167,748	24	76	51,219	33	67	116,529	20	80
Cuba	2,792	(²)	100	2,491	0	100	301	3	97
Cyprus	17,418	33	67	11,480	47	53	5,938	7	93
Denmark	113,908	21	79	45,315	47	53	68,593	4	96
Djibouti	14,752	48	52	9,562	61	39	5,190	24	76
Dominican Republic	316,122	37	63	135,835	34	66	180,287	39	61
Ecuador	497,423	24	76	295,576	24	76	201,847	24	76
Egypt	508,581	67	33	9,740	38	62	498,841	68	32
El Salvador	119,561	21	79	51,661	8	92	67,900	31	69
Estonia	56	100	0	0	.....	.....	56	100	0
Ethiopia	19,962	58	42	10,879	47	53	9,083	72	28
Federal Republic of Germany	2,612,974	25	75	1,443,857	26	74	1,169,117	23	77
Finland	124,283	11	89	85,320	13	87	38,963	6	94
France	1,207,278	30	70	653,553	39	61	553,725	20	80
French Guiana	1,722	(²)	100	931	(²)	100	791	0	100
French Pacific Islands	66,407	9	91	24,138	(²)	100	42,269	14	86
French West Indies	5,884	14	86	38	0	100	5,846	14	86
Gabon	5,639	20	80	303	0	100	5,336	21	79
German Democratic Republic	35	6	94	0	.....	.....	35	6	94
Ghana	232,340	28	72	87,993	35	65	144,347	25	75
Gibraltar	165	30	70	133	5	95	32	53	47
Greece	178,719	30	70	64,780	49	51	113,939	19	81
Greenland	326	14	86	277	0	100	49	96	4
Guatemala	331,880	9	91	92,801	8	92	239,079	9	91
Guinea	18,395	69	31	(²)	100	0	18,395	69	31

U.S. OCEANBORNE FOREIGN TRADE—TONNAGE BY COUNTRY—Liner Service, Calendar Year 1977—
Continued

Country	Total tons	Percent		Inbound tons	Percent		Outbound tons	Percent	
		U.S. Foreign			U.S. Foreign			U.S. Foreign	
Guyana	74,032	1	99	3,145	0	100	70,887	1	99
Haiti	100,196	20	80	20,078	25	75	80,118	19	81
Honduras	186,497	16	84	51,640	15	85	134,857	16	84
Hong Kong	1,533,599	48	52	656,553	49	51	877,046	48	52
Iceland	83,216	(²)	100	62,830	0	100	20,386	(²)	100
India	819,587	41	59	393,097	32	68	426,490	49	51
Indonesia	683,682	30	70	299,687	27	73	383,995	59	41
Iran	391,252	16	84	34,805	58	42	356,447	12	88
Iraq	30,824	6	94	1,528	3	97	29,296	6	94
Ireland	36,211	38	62	17,324	48	52	18,887	28	72
Israel	297,058	34	66	115,351	29	71	181,707	37	63
Italy	1,915,624	22	78	1,015,464	35	65	900,160	9	91
Ivory Coast	151,731	40	60	91,017	40	60	60,714	41	59
Jamaica	297,652	23	77	23,089	49	51	274,563	21	79
Japan	7,553,895	24	76	4,242,419	24	76	3,311,476	23	77
Jordan	35,738	67	33	223	0	100	35,515	67	33
Kenya	134,550	64	36	98,895	60	40	35,655	75	25
Kuwait	124,121	15	85	3,266	8	92	120,855	15	85
Latvia	19	0	100	18	0	100	1	0	100
Lebanon	52,975	16	84	2,659		100	50,316	16	84
Liberia	71,916	39	61	21,383	56	44	50,533	32	68
Libya	55,003	19	81	684	0	100	54,319	20	80
Macao	1,012	66	34	1,002	67	33	10	0	100
Maderia Islands	1,027	(²)	100	992	(²)	100	35	0	100
Malagasy Republic	18,934	3	97	18,678	3	97	256	25	75
Malaysia	474,875	24	76	374,001	28	72	100,874	7	93
Malta/Gozo	9,308	11	89	1,213	83	17	8,095	(²)	100
Mauritania	1,499	0	100	(³)	0	100	1,499	0	100
Mauritius	277	23	77	6	33	67	271	23	77
Mexico	66,700	11	89	24,910	19	81	41,790	7	93
Miquelon Islands	121	0	100	33	0	100	88	0	100
Morocco	87,515	53	47	5,950	67	33	81,565	52	48
Mozambique	86,002	43	57	81,502	41	59	4,500	81	19
Netherlands	3,231,782	41	59	996,434	37	63	2,235,348	43	57
Netherlands Antilles	109,290	21	79	21,076	5	95	88,214	25	75
New Zealand	419,625	28	72	264,169	31	69	155,456	23	77
Nicaragua	124,705	4	96	35,578	1	99	89,127	5	95
Nigeria	372,594	21	79	22,643	37	63	349,951	16	84
North Korea	88	19	81	88	19	81	0	.....	.....
Norway	202,950	4	96	117,577	5	95	85,373	2	98
Oman	13,292	1	99	(³)	0	100	13,292	1	99
Pakistan	115,762	39	61	27,194	65	35	88,568	31	69
Panama	77,224	22	78	27,681	5	95	49,543	32	68
Papua New Guinea	20,985	49	51	19,023	44	56	1,962	92	8
Paraguay	9,515	4	96	2,440	0	100	7,075	5	95
Peoples Rep. of China	28,837	16	84	16,687	28	72	12,150	(²)	100
Peru	482,156	30	70	239,617	23	77	242,539	37	63
Philippines	694,059	43	57	352,330	54	46	341,729	31	69
Poland	274,949	9	91	199,397	12	88	75,552	2	98
Portugal	162,169	26	74	82,796	24	76	79,373	27	73
Qatar	16,406	8	92	90	0	100	16,316	8	92
Republic of China	1,960,842	29	71	1,329,137	32	68	631,705	21	79
Republic of Korea	1,309,039	29	71	580,119	38	62	728,920	25	75
Republic of South Africa	510,201	52	48	211,024	57	43	299,177	48	52
Romania	87,897	78	22	53,934	86	14	33,963	66	34

U.S. OCEANBORNE FOREIGN TRADE—TONNAGE BY COUNTRY—Liner Service, Calendar Year 1977—
Continued

Country	Total tons	Percent		Inbound tons	Percent		Outbound tons	Percent	
		U.S. Foreign			U.S. Foreign			U.S. Foreign	
Saudi Arabia.....	912,285	39	61	285	65	35	912,000	39	61
Senegal.....	34,794	41	59	312	1	99	34,482	42	58
Seychelles.....	142	2	98	139	0	100	3	0	100
Sierra Leone.....	13,108	62	38	4,471	65	35	8,637	60	40
Singapore.....	703,605	29	71	363,438	36	64	340,167	22	78
Somalia.....	95	6	94	79	0	100	16	38	62
South-West Africa.....	12,290	32	68	8,717	42	58	3,573	9	91
Spain.....	810,317	39	61	414,653	50	50	395,664	28	72
Spanish Africa.....	39	62	38	0	.....	.....	39	62	38
Sri Lanka.....	155,482	73	27	36,442	51	49	199,040	80	20
Sudan.....	35,352	31	69	12,235	13	87	23,117	40	60
Surinam.....	85,597	(²)	100	14,281	0	100	71,316	(²)	100
Sweden.....	544,623	6	94	292,551	10	90	252,072	3	97
Syria.....	64,157	68	32	1,767	6	94	62,390	70	30
Tanzania.....	163,008	59	41	98,908	51	49	64,100	72	28
Thailand.....	512,442	14	86	228,091	23	77	284,351	6	94
The Gambia.....	5,592	19	81	0	.....	.....	5,592	19	81
Togo.....	24,913	49	51	375	0	100	24,538	50	50
Trinidad and Tobago.....	127,113	24	76	21,500	32	68	105,613	23	77
Trust Territory of Pacific.....	10,984	31	69	1,365	1	99	9,619	35	65
Tunisia.....	44,350	20	80	2,941	5	95	41,409	21	79
Turkey.....	252,582	38	62	108,981	33	67	143,601	41	59
Turks and Caicos Islands.....	6	0	100	1	0	100	5	0	100
United Arab Emirates.....	137,864	24	76	2,903	29	71	134,961	24	76
United Kingdom.....	2,201,019	32	68	1,147,641	36	64	1,053,378	27	73
Uruguay.....	78,517	41	59	10,790	68	32	67,727	36	64
U.S.S.R.....	228,589	61	39	94,600	66	34	133,989	57	43
Venezuela.....	960,721	28	72	30,616	20	80	930,105	29	71
Vietnam.....	192	60	40	191	61	39	1	0	100
Virgin Islands—British.....	20,287	4	96	518	6	94	19,769	4	96
Western Africa—N.E.C.....	28,456	48	52	8,217	5	95	20,239	65	35
Western Samoa.....	3,911	(²)	100	261	0	100	3,650	(²)	100
Yemen—Aden.....	642	34	66	245	0	100	397	56	44
Yemen—Sana.....	4,086	87	13	66	0	100	4,020	88	12
Yugoslavia.....	215,265	7	93	151,420	2	98	63,845	18	82
Zaire.....	69,838	36	64	25,534	5	95	44,304	54	46

¹ Less than 1 percent.² Less than 1 ton.³ Less than one-half ton.

Mr. NEMIROW. One passing comment: I think we should take note of the fact that the Code, if it does go into effect, will apply on a country-by-country basis. That is why the data does not quite square with the question.

The CHAIRMAN. Offhand, what trade routes do we carry more than 40 percent?

Mr. NEMIROW. The Pacific coast to west coast, Central America, South America, Pacific coast to East coast of South America, Gulf coast to South and East Africa, Atlantic to Pacific Canal Zone, obviously, Gulf to Pacific Canal Zone, and the Pacific to Pacific Canada, Hawaii-foreign, all foreign from Hawaii.

The CHAIRMAN. Not exactly a heavy tonnage.

Mr. NEMIROW. I am not suggesting that they are the heavy trades. When you read some statements, and indicating that the United States is carrying 40 percent in a trade, these are the types of trades.

The CHAIRMAN. We get over 40 percent on the "cat and dog" routes.

Mr. NEMIROW. Is that a question? Frankly, for certain carriers these are definitely not "cat and dog" routes. They are dollars and cents routes. However, they are not major moving trades.

The CHAIRMAN. When you submitted your proposal to the Interagency task force, what consideration was given to the effect the code would have, if adopted, on U.S. maritime policy?

Mr. NEMIROW. By me, or by the Task Force?

The CHAIRMAN. By the Maritime Administration.

Mr. NEMIROW. I asked that the task force consider the question of the UNCTAD code and its impact on U.S. promotional and regulatory policy. I attended the early meetings of the Interagency task force, in which we helped define the course the task force was undertaking. It was agreed in those meetings, over our objection, that the code in and of itself would not be a subject for the task force.

The CHAIRMAN. Why not?

Mr. NEMIROW. Because I could not convince enough people that the code should be a specific issue for consideration in the task force.

The CHAIRMAN. How about within the Department of Commerce. Could you convince anybody?

Mr. NEMIROW. Yes. We have very good relations within the Department of Commerce, and the urgency of this matter for U.S. promotional policy is an issue which we have brought to the attention of the Department of Commerce, and we have no objection there.

Mr. KYROS. You are aware that the Department of Transportation analysis of the code made back in 1976, they had a considerable data base. They must have obtained this material from the Maritime Administration.

Mr. NEMIROW. I am not sure. I believe they had a contractor do the work, and there was a great deal of discussion about whether our data was to be made available to the contractor. Ultimately, they used it. I cannot say how they got it. I do not recall.

Mr. KYROS. Actually, this particular study was done by them. It is their transportation center at Cambridge. They go through trade

route by trade route. But as you were talking to the chairman about the 40 percent of these trade routes, of course you would be including military cargo. That includes military cargo and also Government-generated cargo?

Mr. NEMIROW. In this data, yes, I believe it does. We can break that data out.

Mr. KYROS. The code provisions cover all goods with the exception of equipment for national defense purposes in figuring out the cargo share. It almost sounds like bullets or tanks as compared to sending material to a post exchange, or otherwise supplying our forces throughout the world. Have you considered at all what the effect of carriage of military cargo or other Government-generated cargo would have on the shares, if the code were in effect.

Mr. NEMIROW. No, I cannot say we have. We can produce this data, but with the military cargo and Government cargo. For our purposes the data has been sufficient, because it identified the problem even with the military cargo in. So, the problem could only be aggravated if you take the military cargo out.

Mr. KYROS. What part did the Maritime Administration play, if any, in formulating the policy position which the United States will take to the UNCTAD 5 in Manila?

Mr. NEMIROW. We have had someone attending the meetings that have been held at the State Department. We have made certain comments at those meetings, but I cannot say that we have had a serious impact on the ultimate positions. Mr. Atwood indicated position papers are still being drafted, and are continuing to be circulated, and as I understand his testimony, the final position has not come forward yet.

Mr. KYROS. Your agency does have a data base, according to the Federal Maritime Commission, and of course you do. It just does not seem right that all the figures and data and facts that you have at your disposal would not be transmitted to State, so they could study route-by-route in case of the EEC accession to the code.

Mr. NEMIROW. You are making an assumption that trade route by trade route would be of use to people involved in economic theory and international diplomacy, as the State Department. I am not sure that a trade route by trade route analysis of carriage by U.S.-flag lines will necessarily impact on the ultimate decision. I would certainly make it available to them today, the same way I will make it available to the committee.

Mr. KYROS. I did not mean that. They have not asked you for that kind of analysis?

Mr. NEMIROW. Not to my knowledge.

Mr. KYROS. But actually your concern would be the effect on your subsidized carriers that you have on fixed trade routes, and the impact on their cargoes in case the code with the EEC accession went into force.

Mr. NEMIROW. I would also say we are concerned with the merchant marine in general, and not only the subsidized operators. The accession by the EEC and their reservations on the code are very carefully crafted, and will certainly protect the interests of the countries in the European Community. I don't think they will protect the U.S. merchant marine, subsidized and unsubsidized, to the same effect.

Mr. KYROS. That is right, and as a matter of fact, there are specific impacts that are pointed out in the testimony to calculate what effect the merchant marine, both subsidized and unsubsidized lines——

Mr. NEMIROW. I would have only one comment. I have gone over the proposals of the European Community carefully in the past couple of days, and analyzed them. One must carefully keep in mind the fact that the trades which they are talking about have free competition for 60 percent of the trades; 40 percent goes to the developing countries and 60 percent is open to competition. It says, "in accordance with normal commercial practices," which seems to me in a trade with a closed conference, and with a pool, normal commercial practice would be that you don't create any competition for that cargo. So, to the extent that U.S. carrier lines themselves participate in cross trades, they find very little comfort in the discussion of competitive aspects of the code.

Mr. KYROS. Even more inimical is the fact that the United States has no particular restrictions on any foreign flag coming in as a cross trader, whereas, as you pointed out, that the very system that we are going to adopt will squeeze out U.S.-flag operators as cross traders——

Mr. NEMIROW. Or in certain trades.

Mr. KYROS. Do you know of any activity by State Department or any other maritime agency that would seek from foreign nations some kind of similar treatment or policy, as we treat cross traders?

Mr. NEMIROW. The answer to the question is, no, I do not. It seems to me that the issue before the committee today in which theories are most helpful is, what should be the U.S. interest in this kind of an environment, assuming the code goes into effect. We know what the other countries will do. We know pretty clearly what the European Community is going to do, and the question is, What is the United States going to do? That is the question that has not been answered at this point.

Mr. KYROS. My final question, as it stands with the EEC provision, the EEC accession possibly coming into force, would you oppose our country's entry into the code on that basis?

Mr. NEMIROW. Yes. I would oppose our acceptance of the code on its current terms, and even on the basis proposed by the European Community.

Mr. KYROS. So, your testimony differs somewhat from the Chairman of the Federal Maritime Commission, who indicated that with certain reservations, he could see how we could harmonize and go into the code operation?

Mr. NEMIROW. Not exactly. I say that the code on its current terms should not be accepted by the United States. I think the European Community accession to the code on the terms that are set forth are not adequate to protect the interests of the United States. But I think something could be prepared with purely U.S. interests in mind, and U.S. maritime interests in mind, which would make the code at least more palatable than in its current form.

Mr. KYROS. Is there anything afoot between the agencies to get some such position as we are discussing right now together, or is

the State Department going to simply go there and oppose our entry into the code?

Mr. NEMIROW. I would rather answer the first part, and that is that I don't know of anything which is afoot, as you say, at the moment to define the terms on which the United States might accede to the code.

Mr. KYROS. Thank you. I have no further questions.

Mr. LOSCH. Mr. Nemirow, I would like to give you the opportunity to provide for the record a brief description of each instance in the past several years where actions of another agency of the executive branch have interfered with actions taken by your agency in furtherance of your statutory responsibilities. I recognize that perhaps you may have fewer cases than FMC or State, but if there are any, please provide them for the record.

[The following was received:]

EXECUTIVE BRANCH INTERFERENCE

The Maritime Administration is responsible for administering programs authorized by the Merchant Marine Act, 1936, which are intended to promote the economic interests of the American merchant marine. From time to time the Maritime Administration has had disagreements with other executive branch agencies and departments with respect to proposed legislation and policy. However, I cannot document any instances where actions of an executive branch agency have interfered with the furtherance of our existing statutory responsibilities.

Mr. LOSCH. Another point, in response to a question posed by Senator Inouye to Mr. Caras, your general counsel, he said that, "whether we oppose the UNCTAD Liner Code will soon become academic, assuming it comes into force, which seems likely. We would be better directed to direct our attention to a shipping code in which the code is a fact of life." Specifically, what adjustments to our shipping policy should we make, if the code becomes a fact of life later this year?

Mr. NEMIROW. I don't think I can be specific on that. I think the questions that we now are considering in the interagency task force, and I will not slough the whole answer off on the interagency task force, have to take into consideration the fact that you will have an international convention including cargo sharing, and the question of whether the United States will or will not enter into bilateral agreements. Those are the kinds of decisions I think have to be made, and I think they will be.

Mr. LOSCH. But you said that the interagency task force is not considering the UNCTAD Code. Do you expect any recommendations that will allow us to adjust our shipping policy to this new fact of life?

Mr. NEMIROW. Not on the code itself. The interagency task force is not considering the code as a code. The interagency task force does have in its agenda a discussion of bilateralism.

Mr. LOSCH. Will the task force's recommendations relating to bilateralism bring our shipping policy more into line with a world where the code is a fact of life? Do you think that their recommendations will do that?

Mr. NEMIROW. I think there is a potential for that. The current status of the task force is such that it is very difficult to answer the question. I think they are taking into account the fact that there are code issues and bilateralism in our foreign trade.

Mr. LOSCH. If not, or if the interagency task force recommendations come up short in that regard, will the Maritime Administration take action under the responsibilities enunciated in section 212(g) of the 1936 act to come up with a legislative package?

Mr. NEMIROW. The Maritime Administration frequently comes up with legislative packages, and I certainly think we could do it in that instance. Whether the legislative package would be acceptable to the administration, we would have to see, and whether that would be forwarded to the Congress would be an open question at this point. But I would not want to second-guess or denigrate what might be happening in the interagency task force, and hopefully some of the questions we have been addressing will be answered in that context.

Mr. LOSCH. But if the task force recommendations do not address this issue, will you come up with them?

Mr. NEMIROW. If the results of the task force are such that the U.S. merchant marine can survive and be competitive in a world involving the code, through the various schemes that are available to the U.S. merchant marine, we would not be coming up with a proposal. If, on the other hand, it appears to us that the U.S. merchant marine would be injured as a result of the task force either being silent, or perhaps being negative on some of the aspects that are of interest to it, one would expect, through legislation, to draft something.

Mr. LOSCH. At this time then, you cannot think of any changes to our shipping policy which would be required if the code came into force?

Mr. NEMIROW. No, I can not be specific at this time.

Mr. LOSCH. Could you be more specific if we gave you time to provide those answers for the record? Apparently, that was on Mr. Caras' mind when he wrote that in response to Senator Inouye.

Mr. NEMIROW. I am not sure it was. I am not sure Mr. Caras believes that the only resolution of the problem would be a legislative one. He said we will have to take into account the impact of the code on the U.S. merchant marine environment. The U.S. merchant marine will find itself adjusting policies accordingly. Whether that requires legislation does not seem to be addressed in that statement which you read to me.

Mr. LOSCH. Thank you.

Mr. WYATT [presiding]. Thank you. If there are no further questions at this time, I will now call Mr. Robert Leggett, a distinguished former Member of Congress, and president of the Joint Maritime Congress.

STATEMENT OF ROBERT L. LEGGETT, PRESIDENT, JOINT MARITIME CONGRESS

Mr. LEGGETT. Thank you very much.

I have a statement dated April 26 and I would ask that that statement become a part of our record without my reading every line of it.

[The following was received for the record:]

STATEMENT OF HON. ROBERT L. LEGGETT, PRESIDENT, JOINT MARITIME CONGRESS

Mr. Chairman, and members of the Subcommittee, the industry I am privileged to represent appreciates your work to review the pending United Nations Conference on Trade and Development (UNCTAD) Code of Liner Conduct.

The Joint Maritime Congress, a group of U.S. shipping companies working with labor to redevelop an American-Flag Merchant Marine, of which I am president, also appreciates your providing me the opportunity to express the concerns of JMC's constituent members.

I will be brief, and hope that JMC's observations are of value to the Subcommittee as it moves forward in its consideration of the UNCTAD Liner Code, its effects, and impact upon U.S.-flag and international ocean transport.

As the members of the Subcommittee know, the original impetus for an international agreement to govern liner shipping came from the lesser developed countries (hereinafter LDC's) who were concerned about increasing liner freight rates and the burdens such rates imposed on their external payment problems. Quite reasonably, the LDC's wanted a "piece of the pie" to generate capital and industrial development within their respective countries. The U.S. maritime industry consistently has been aware of the need and justification for each country to develop its maritime industrial base. The 40-40-20 cargo allocation formula—the cornerstone of the UNCTAD Code—offers a reasonable means to this end. This cargo allocation provision would, if standing alone, benefit both LDC and U.S.-flag fleets. As a general matter, we stand foursquare behind such multilateral or bilateral agreements which would have the effect of bringing U.S. maritime industries onto an equal footing with the strong maritime nations of the world. However, we cannot in good conscience, support the UNCTAD Code as drafted, for it is our view that it would create more problems than it would solve.

Before addressing the major inadequacies of the draft proposal, however, I believe it is of the greatest importance that this subcommittee take careful note of the chaos that typifies U.S. maritime policy. Administration spokesmen have uniformly opposed the UNCTAD Liner Code proposal. They have as of today, no well-conceived and defined objectives for meaningful participation in the upcoming Manila conference. It is not enough for the U.S. simply to attend such gatherings. The U.S. does, as a practical matter, generate more international cargo than any other single nation. Our delegation must competently and aggressively represent American interests, just as the Japanese and European Economic Community delegates will undoubtedly represent *their* respective national interests. Our delegation should not be sent to advocate economic theories in vacuo. The delegation should zealously represent the interests of the nation as defined by the President and the Congress. As a statutory matter, the Congress has gone on record, time and time again, declaring that it is vitally necessary to establish and maintain a strong merchant marine as a fundamental component of our foreign commerce and national defense capability. Yet, days before the Manila conference we have yet to see any evidence of a unified, articulated position.

I quote from the Journal of Commerce of April 19:

The Federal Maritime Commission has begun to take its first official notice of the pending cargo-sharing code of line conduct proposed by the United Nations Conference on Trade and Development. The agency decided to wait two weeks—to try to get a clearer idea of the situation surrounding adoption and implementation of the code which may come out next week at a hearing before the House Merchant Marine and Fisheries Committee—before considering whether to solicit views on the code and experience of the shipping industry where the code has been unilaterally put into effect.

The European Economic Community, in this instance more united than we, intends to present a common front at Manila. EEC members have labored hard to devise alternatives which simultaneously fulfill their maritime interests and allow for the legitimate demands of the LDC's. I strongly doubt that the U.S. delegation will offer any changes that will advance American maritime interests. In all likelihood, the U.S. delegation will stand mute, or at best, suggest further study, when the LDC's ask for constructive proposals which will satisfy American objections and their perception of their maritime needs. However, the Merchant Marine Subcommittee is to be commended for its work to generate the considered analysis from the Executive Branch and the industry.

* * * * *

I do not wish to take up valuable hearing time with extended detailed comments on a line-by-line basis. Rather, I wish only to enumerate some of the more glaring problems that the Code, as drafted, presents.

The most obvious problem is that UNCTAD fixes rates for a minimum period of 15 months. Were ship owners' expenses fixed for a similar period, this provision might not be so onerous. As it stands, ship operators will have to absorb any increases in expenses. Their ability to impose surcharges will be severely limited. Consider this provision against the reporting of the April 23 *Baltimore Sun*:

The Council of American Flag Ship Operators reports that in the last seven weeks, the prices of bunker oil—ships fuel—have increased by 50 percent in New York, 53 percent in Kobe, Japan, 45 percent in Hong Kong, and 35 percent in Rotterdam.

Clearly, the Code would severely restrict the market mechanism as the primary allocator of goods and services.

The Code treats market economy and state-owned fleets as equals, and therefore fails to recognize the relative competitive disadvantage under which privately-owned carriers operate. This Committee has expressed in enacted statute its abiding concern with "controlled carriers." Any Code for liner conduct should address this issue. Furthermore, national governments which own and operate fleets are permitted to participate in the UNCTAD mechanisms as would any national flag line, and thereby are able to pursue political as well as economic interests—an option which is foreclosed to countries such as the United States which do not operate their merchant fleets.

Although the Code, at first blush, seems to guarantee national flag line participation in the foreign trade of that national's country, the draft permits the exclusion or "closing" of conferences with no viable appeal mechanism. Third country lines face even greater obstacles in obtaining conference membership to participate in a limited percentage of available cargo. While our national interest is served by guaranteeing a percentage for American flag ships, the Code's "closed" approach unjustifiably stifles competition among American ship operators and therefore eliminates the impetus towards efficiency that competition provides.

The Code offers virtually no guidance on the decision making procedures for implementation of the UNCTAD provisions by the conferences. This is but one of many reflections of the inadequacy of the original draft, a point emphasized by the State Department in 1974.

Admirably, the Code provides for the establishment of self-policing mechanisms, but regretfully fails to define the role of national laws and regulations on the foreign commerce of the UNCTAD signatory nations. Arguably, each nation and/or its courts will impose its own perceptions and interpretations on the scope and effect of national law. The failure to resolve this issue is perhaps the most egregious flaw in the UNCTAD proposal.

The dispute settlement procedure will prove unworkable as its determinations are only binding on those parties who agree to be bound. This lack of finality will only provide an additional and potentially costly step in litigation. Any success achieved through this system is dependent on the good faith participation of, and acceptance by, the participants. In sum, the UNCTAD mechanism fails to establish its own definitive decision-making authority.

As usual, Mr. Chairman, we are faced with a disjointed Administration maritime policy and have much to do in too little time. The UNCTAD proposal and its effects on American liner shipping will be dramatic. I urge the Subcommittee to take a leadership role in organizing the American position to be taken at the Manila conference. I urge the formulation of proposals which advance the interests of our Nation's economy and recognize the legitimate needs of the lesser developed countries.

Mr. LEGGETT. I represent American-flag carriers that have contracts with The MEBA which is most of them. We have asked that we hold these hearings on UNCTAD, because it was our view that the administration did not have their act in order. We had been alerted by some of our members, particularly Sea-Land and Mr. Finnerty, who will be one of your witnesses this afternoon, that perhaps rather substantial and diabolical consequences might follow from a nonposition. I believe that the witnesses that have come before the committee in good faith so far from the administration have substantiated the position that the administration as of this point has no position. We have a clear record as stated by Mr. Burke, that based on probabilities that the Europeans are going to act, that UNCTAD will be an issue out at Manila. The

earlier witness, Mr. Atwood, indicated that there will be a dozen issues at Manila and only one part would relate to maritime. In that part, there are six subparts in which this particular code might only have a very minuscule part.

Well, it would seem to me that considering the fact that the Europeans are targeting toward Manila and targeting toward putting together that 24- or 25-percent cargo coalition necessary to put together this program, that something is going to come about.

This is going to be one of the first international meetings that has occurred and it would seem to me that the State Department, merely being passive and taking what is—what might be termed an international diplomatic view toward world trade ought to be a little bit concerned; they ought to recognize that they are the so-called troop leader. They have indicated that they will be our representative out there. They have not called the industry together. The industry has not called us, they say. They are the ones that are setting the agenda and they are the ones prescribing what will be the U.S. position.

I would call to mind that if Atwood and Banks of State are going to be the ones that will represent the United States at the meetings at Manila, the statement that they submitted on the interagency task force dated September 1 states:

The relevant commercial and international trade objectives bearing on maritime policy clearly go beyond the promotion of the U.S. merchant marine. It is at least as important to consider whether our existing maritime policy should be adjusted to serve such objectives as (a) facilitating U.S. international trade, and particularly U.S. export commerce, by improving service and reducing the cost of ocean carriage; (b) combating inflation within the United States by lowering both domestic and international freight costs and providing additional service options to shippers; (c) promoting abroad the virtues of the free enterprise system by minimizing the role of governments in shipping; (d) minimizing the expense to U.S. taxpayers of our shipping policies, including the size of the government bureaucracy and the direct cost of subsidies; and (e) minimizing conflicts with foreign governments.

It would seem to me at a time that other governments are taking action very formidable with respect to bilaterals and when that action will create problems of cross-trading and the ability to participate in cross trades, as has been explained by Mr. Nemirow and Mr. Daschbach and others, it would seem to me we ought to be prepared to properly reciprocate. That is, if we are going to be cut out of cross trades, if we are going to be prejudiced by action that we cannot precisely support ourselves, certainly we ought to have a retaliatory game plan. We ought to have it thought out.

Much has been said here today about the interagency task force and what is going to come about from that. Everybody is speaking tongue-in-cheek about what will come from that report and when it will be put forward. We all know that that document is not going to be a promotional program. It will modify to a degree some of the regulatory activities but it is not going to accomplish any of the objectives that Mr. Kyros alluded to in testimony that he elicited before this committee almost a year ago from witnesses as to the aspirations of the committee with respect to the interagency task force.

The task force report is going to be a hollow shell. We have to say that. If we are going to redevelop our merchant marine, if we are going to look at our objectives, we have to consider the Presi-

dent's view and some of his agencies. But we have to almost create a program out of the whole cloth.

I would hope this committee would work with industry and labor and get about that task because I think it is a formidable one. I think if the State Department is going to represent the United States and American industry at Manila, they ought to be well prepared before they go out there. They ought to call some meetings. They ought to call meetings with industry and we ought to have a strong plan. We ought to perhaps additionally develop a retaliatory program which would be perhaps formulated by staff working with this committee and others such that we could let industry and perhaps the world know where everybody would get off if the European proposal comes into fruition because we would be prejudiced; and, as has been indicated, there would be problems in creating artificial demands for new ships, as some of the witnesses have indicated.

We have witnesses that are going to testify that the 40-40-20 UNCTAD program may be the precursor to establishing cargo preferences or bilaterals for other kinds of trade other than conference liners.

It is alleged that UNCTAD may go into such things as dry bulk and tankers and that would be truly diabolical because that would frustrate the free-world forces. There are no free-world forces operating here. We have the American cargo program that we lay open to the world. We tie the hands and feet of the American competitors through our own restrictive trade practices that affect mainly our own cargo traders and our own shippers and I believe we ought to untie some of those restrictions and develop a degree of fairness for all of our cargo and shipping operators.

I have not commented specifically on the UNCTAD provisions. I think we are well familiar with those. They are in my printed testimony and I will not repeat them at this point. But the important thing is we have to get some program in and I hope you listen very carefully to the other witnesses that are going to present their testimony and determine if perhaps there may be a thread of a game plan in that testimony.

Mr. WYATT. Thank you.

I have one question. There have been no contacts from the State Department to your organization, the American shippers, in regard to some kind of American position?

Mr. LEGGETT. No, there have not. That is because everybody has been of the view that this whole program would blow away. It is not blowing away. It is blowing right toward us and unless we take an aggressive position, we will be further prejudiced in our trading policy.

Mr. WYATT. On page 2, you said: "Administration spokesmen have unofficially opposed the UNCTAD Liner Code proposal."

Elsewhere in your statement, you find considerable fault with the code itself.

Do you support the administration's opposition to the code?

Mr. LEGGETT. The code cannot be accepted as such. It has too much prejudice. It is a WPA program. It is very much like some of the other items before the law of the sea. You can adopt the basic bottom line, but you cannot adopt all of the infrastructure.

We love the 40-40-20. We hoped we could have had 40-40-20 in liners and cargo and all other things. But we cannot have it with all of these conditions. So we support the structure of a 40-40-20 program that the United States should buy with proper conditions that will comply with what the Congress might approve.

Mr. WYATT. Do you have any set of recommendations that will make the code more acceptable?

Mr. LEGGETT. We can develop some things to make the code more palatable. There are things, obviously, that are unpalatable. It does not do any good to come up with some items unless someone will listen to you.

If the State Department will call hearings and if they want to get together with this committee and your staff and the Senate staff and come up with a strong position, we can certainly help them develop a U.S. maritime program.

But when we start from the position that Atwood, Secretary Atwood has already stated on the interagency task force and when we know that State and Justice have no other intention but to scuttle any formidable maritime program, to have those folks represent us over at Manila—I just do not think that is promotive.

When I say “scuttle,” I say scuttle in a kindly sense. There are at least a dozen things that we had in mind accomplishing a year ago. Now we are down to about two items which is not what I call a comprehensive maritime program.

Mr. WYATT. Could you renumerate one or two of those ideas which you had?

Mr. LEGGETT. I don't think we will come out with a conference program on rebating. I don't think we are coming out with a program on cooperation between various countries—they are not coming out with a bilateral UNCTAD program. They are not coming out with any shipbuilding program.

I believe that a strong American shipbuilding program is required. I don't think we have to break the bank in order to do it. There are lots of ways to work together to develop programs, Mr. McCloskey included.

Many times though the question appears and we all seem to be on different sides of the Atlantic when we approach a problem. It is all because of improper communication.

Mr. WYATT. Thank you.

Mr. KYROS. Is it your impression then, Mr. Leggett, from the advantage of your viewpoint, that the State Department has not conveyed the views of either the other agencies or the shipping companies and the shippers in order to reevaluate its policy position on the code with EC accession?

Mr. LEGGETT. That is exactly correct.

Mr. KYROS. What do you suggest the committee do about that, with your experience both as a Congressman and now in private life?

Mr. LEGGETT. I would suggest as a result of this hearing we just don't light a fire and let it go out. There are all kinds of ways that we can keep fires burning. We can go and make recommendations to the State Department and see if they follow the recommendations of the leadership of the committee. I don't think it takes a resolution out of this committee or a joint resolution of Congress to

get them to act. I think they will take some guidance, but I think that this committee certainly has to make a recommendation. If they don't act, then I think perhaps further and additional consultation called by the committee where we sit around in kind of a roundrobin session and try to formulate an administration would be helpful.

I think we can do that.

Mr. KYROS. In expressing your views today, have you had occasion to discuss the elements of your testimony with various shipping companies, labor?

Does this represent their views?

Mr. LEGGETT. This represents the views of a broad range of companies. I represent all kinds of companies. We did not check with every one of them, but this does represent the broad spectrum of views of the industry.

Mr. KYROS. Thank you.

Mr. LOSCH. Is there anybody going to be monitoring the UNCTAD Conference from the industry, anybody from the JMC?

Mr. LEGGETT. It all depends on how it shapes out. We will watch that very, very carefully.

If it appears that what we fear is going to happen, that is that formidable action is going to be taken, we will certainly see that the industry is represented. They cannot be there the entire time of the conference, so we have to figure out when the issues we are concerned with will be coming up and when people from industry will be out there.

Mr. LOSCH. When you say "formidable action," are you referring to possible expansion of the liner code?

Mr. LEGGETT. As I understand, that will not come up there and if it does, I will say it will probably come up informally.

I understand that informal comments can be significant and that would be helpful if we can have someone at the international conference.

But based on probabilities, the Europeans will have acted by the time Manila comes around at which time we may find a great degree of polarization in favor of the UNCTAD position coming out of that conference or coming about simultaneously with respect to that conference after which time we will be prejudiced.

Mr. LOSCH. Just as a matter of information, reading from UNCTAD TD/221, the agenda items for the conference, contrary to what the State Department believes, they say that the subject of shipping is an "important issue on which major initiatives could be forthcoming at Manila."

They go on to say that beside the code, the main issues relate to the needs of developing countries to build up the merchant marines, increase their participation in world shipping.

Other issues include the role played by the system of open registry, and the availability of finance, training and personnel. It seems that shipping is a very major issue at the conference.

Mr. LEGGETT. Your observation is very, very pertinent. Apparently, that has not been read by some of the administration people.

Mr. LOSCH. I hope that somebody will keep an eye on this.

Mr. CORRADO. Bob, I was interested in one statement you made to the effect that many parties wish this UNCTAD specter would

drift away and not bother us—I would like the record to reflect that from 1974 on, this committee was certainly not any one of those parties. The chief counsel and the minority counsel had large input in Geneva on this matter.

We had hearings at various times on this, and any number of internal memorandums on this subject to the chairman. I raised this point many, many times with people in the industry and especially in the administration to try to find out where we were going and what was going on and was told, let's not discuss this now.

So now we find ourselves facing the problem foursquare. Of course, the very fact that we have a hearing today is a manifestation of the interest of this committee and its recognition of the importance of the UNCTAD Code.

Now however we find ourselves today, and I am afraid we are on the verge of this code being accepted by all the other nations, and us being one of the few nations on the outside. I certainly hope that the one thing we find as a result of this hearing is what the impact will be on our merchant marine and where we are.

Mr. LEGGETT. I would hope that the committee is strongly represented at Manila and I would hope that your input to the agency is felt before you go out there.

I would say on behalf of the industry that many of us look forward to using UNCTAD as a proper and fine vehicle to accomplish proper objectives in trade allocation. There is some argument about that, but I think there is a great opportunity there and it ought to be explored and it has to be looked at by this committee and by the agencies and we have to get the recommendations from the interagency task force at the very earliest time so we can go ahead and move ahead with maritime policy.

Mr. CORRADO. It does not look as though we will ever get them. It has been a year and a half and we are still waiting. I don't think we can wait much longer.

Thank you.

Mr. LEGGETT. Thank you.

The CHAIRMAN. Thank you. Our next witness will be Dick Walsh, Acting Director of the Office of Marine Transportation, Department of Transportation.

STATEMENT OF DICK WALSH, ACTING DIRECTOR, OFFICE OF MARINE TRANSPORTATION, DEPARTMENT OF TRANSPORTATION, ACCOMPANIED BY PETER SCHUMAIER, DIRECTOR, MARINE TRANSPORTATION DIVISION, DEPARTMENT OF TRANSPORTATION

Mr. WALSH. I am accompanied today by Mr. Peter Schumaier who is Director of the Marine Transportation Division in the Department.

Like preceding witnesses, I propose to just summarize my testimony.

Adoption of the UNCTAD Liner Code would have serious implications for U.S. ocean shipping policy, for the U.S.-flag liner industry, for U.S. foreign traders and U.S. consumers, and for overall U.S. foreign policy.

A few years ago, the Department of Transportation commissioned a study on the potential impact of nonmarket cargo allocation in U.S. foreign trade, including an analysis of the possible effects of the UNCTAD code of conduct for liner conferences.

This study, done by the Transportation Systems Center and completed in March 1976, concluded that mandatory cargo sharing would be detrimental to the efficient conduct of international trade.

Although it would appear that the near-term effects are not likely to be significant, we do have to be concerned by the prejudicial influence with respect to the bulk rate.

In addition, the long-term effects of the code adoption could well be substantial and result in generally higher shipping costs in trades governed by the code.

In addition, the open U.S. trade conference system would be particularly vulnerable to the effects of third-flag carriers.

As the world's largest trader, no company has more at stake in insuring a stable, efficient international shipping system than the United States. Any move, therefore, toward greater reliance on nonmarket forms of cargo allocation and the inevitable rigidities and inefficiencies that result therefrom, should be approached with the greatest caution.

That summarizes my statement.

[The following was received for the record:]

STATEMENT OF RICHARD F. WALSH, ACTING DIRECTOR, OFFICE OF MARINE
TRANSPORTATION, U.S. DEPARTMENT OF TRANSPORTATION

Mr. Chairman and Members of the committee, I am pleased to have this opportunity to present the views of the Department of Transportation on the UNCTAD Code of Conduct for Liner Conferences.

Adoption of the UNCTAD Liner Code would have serious implications for U.S. ocean shipping policy, for the U.S. flag liner industry, for U.S. foreign traders and U.S. consumers, and for overall U.S. foreign policy.

Next month in Manila at UNCTAD's fifth session the Code of Conduct for Liner Conferences will be an item of discussion. In the past, UNCTAD's debates on ocean shipping have tended to stress the theme that the developed countries, by virtue of their economic dominance and the conference system, have denied the developing countries opportunities to build up their own merchant shipping capabilities. Inasmuch as nations have, historically, tended to identify their overall national interests closely with the fortunes of their liner fleets, UNCTAD's initial focus was, understandably, directed to this sector. Thus, even though liner traffic accounted for only 20 percent of worldwide shipping, in 1974 UNCTAD adopted the Code of Conduct for Liner Conferences. In essence, the Code would require:

- (1) Closed conferences open to and essentially controlled by the carriers of the trading partners;
- (2) Cargo sharing on the basis of a 40-40-20 percent allocation among the two trading partners and third countries;
- (3) The formation of shipper councils for purposes of counterbalancing the power of the liner conference;
- (4) A mandatory time interval between general rate increases and
- (5) Complex dispute settlement arrangements to resolve differences between the shippers' councils, the conferences, and carriers.

A few years ago, the Department of Transportation commissioned a study on "... the potential impact of nonmarket cargo allocation in U.S. foreign trade, including an analysis of the possible effects of the UNCTAD Code of Conduct for Liner Conferences. . . ." This study, done by the Transportation Systems Center and completed in March, 1976, concluded that mandatory cargo sharing would be detrimental to the efficient conduct of international trade. It also found that U.S. shippers had had unfavorable experiences with pooling and equal access agreements, such as currently exist in some United States-Latin American trades.

Nevertheless, it is clear that the U.S. cannot ignore the portents of recent developments concerning the Code. At this juncture, it appears that the European Eco-

conomic Community (EEC) and Japan may accede to the Code in the near future. If they do, their combined tonnage would be sufficient to bring the Code into force. The EEC's accession would, however, be subject to a reservation which essentially would make the Code's provisions applicable only to trade between the developed and developing countries. Crosstraders of developing countries would be guaranteed access to trade between developed countries. Barring any surprises we should anticipate that the EEC will announce its decision to adopt the Code in May.

The likely near term effects of the Liner Code, once it comes into force, are difficult to predict since it would only apply to those countries which adopt it, subject to their reservations. Currently, about a third of our foreign liner trade is carried in U.S. flag vessels. However, U.S. liners engage in little crosstrading compared to many other developed countries. Our major trading partners are other mature economies rather than developing countries.¹ Assuming that the EEC's reservations are accepted, it appears that the impact of the Code's adoption on U.S. carriers would be substantial, although not necessarily immediate. Overall shipping costs might rise within the established conferences, which are subject to the constraints of the cargo sharing provisions of the Code. Inasmuch as many of the developing countries do not have the shipping capacity to carry 40 percent of their bilateral trades, their share might be sold or auctioned off, either overtly or covertly. Either way, the result could be higher rates.

Were the U.S. ever to decide to accede to the Code, perhaps with certain reservations peculiar to our needs, it might find some advantages along with the detriments. For example, the Code would allow limits to be placed on any third flag carrier penetration of a given U.S. trade. It can also be argued that it would be better to have the world's trade conducted under a reasonably uniform, single regime than a possible hodgepodge of different cargo sharing agreements.

There would also, of course, be some serious potential disadvantages to the U.S. in acceding to the Code, and particularly disadvantages for U.S. flag carriers. The Code strictly limits the preference given to "government" cargoes to military cargo rather than the much broader concept of government impelled cargo as we know it in the U.S. Also, the Code limits general rate increases to one every 15 months. The rigidity of this restriction would likely fuel inflationary pressures by forcing shipping firms to anticipate future inflation in their current rates. Other obvious disadvantages include a more restricted choice of services for shippers and the dampening effect that reduced competition would have on incentives to both technological and service innovations.

For the long term, we will want to examine the implications for U.S. liner policy of the emerging cargo sharing in international ocean shipping that is reflected in the provisions of the Code. The open U.S. trades and conference system would be particularly vulnerable to excess capacity of third flag carriers in an international ocean shipping environment that is otherwise characterized by restrictive cargo sharing arrangements. We will be following these matters very closely.

The UNCTAD Liner Code would apply only to the liner conferences, which in total carry only about a fifth of the world's trade. It would not apply to the carriage of bulk commodities, and its reach could be further limited by reservations regarding government impelled military cargoes.

Despite this apparently narrow coverage, however, the Code could have implications that run far beyond liner trades. One of the most troublesome is created by the principle of mandatory cargo sharing. There is reason for concern that, once it has been widely adopted as part of the Code, the cargo sharing device will find its way into other aspects of international transportation. Thus, for example, one of the issues listed on the agenda for shipping at UNCTAD V in Manila is mandatory cargo sharing in the bulk trades. Demonstrating how far the cargo sharing concept has been extended, moreover, another suggested discussion topic for UNCTAD V is its possible application to air freight.

We do not oppose cargo sharing in all circumstances. There may be circumstances—such as U.S. bilateral agreements involving state-controlled economies—in which such provisions are appropriate. Nevertheless, the extension of a cargo sharing philosophy to all liner shipping, and possibly to all forms of international trade, would run strongly counter to the U.S. free trade philosophy and long standing national transportation policies. In the Department of Transportation we are being made increasingly aware of the need for harmonizing, to the greatest extent possible, our policies towards the several modes of transport and of the increasing importance of intermodal services in both inland and ocean transportation. Any move, therefore, towards greater reliance on non-market forms of cargo allocation

¹ The charts attached to this testimony show major trading patterns and U.S. flag liner participation.

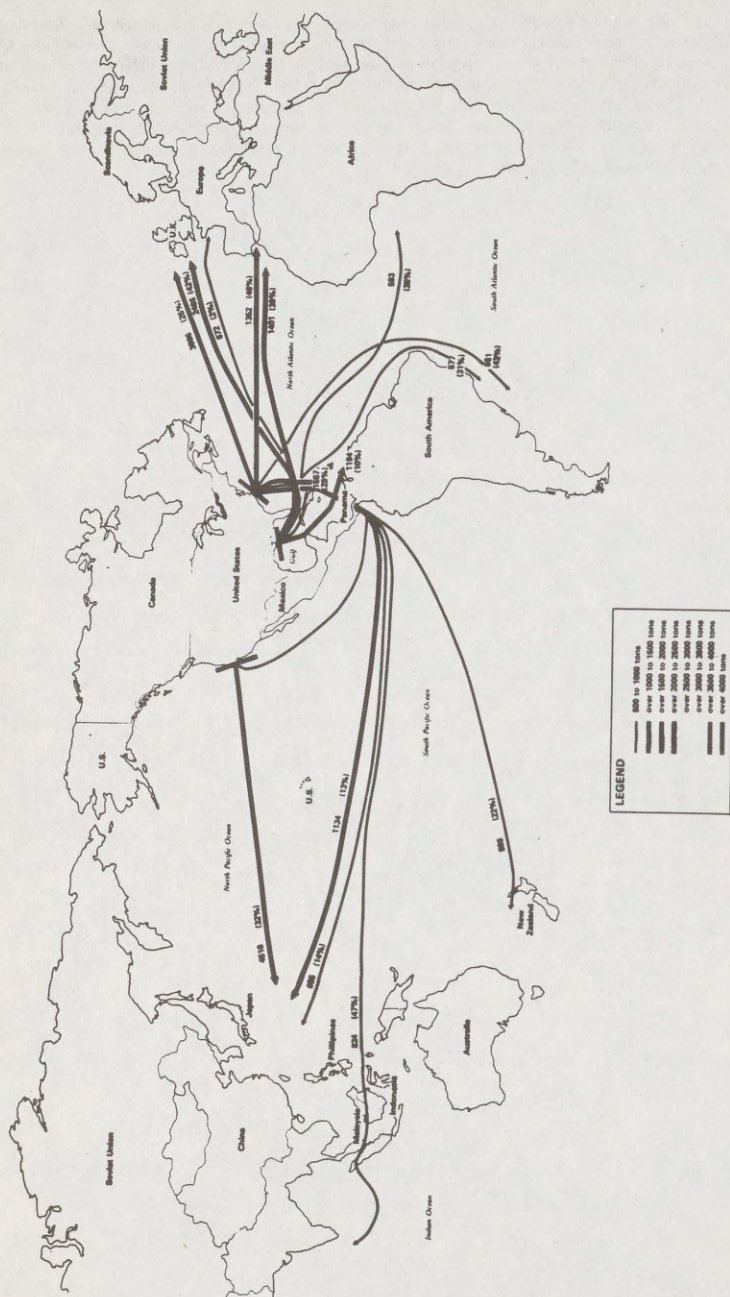
and the inevitable rigidities and inefficiencies that result therefrom, should be approached with the greatest caution.

As the world's largest trader, no country has more at stake in ensuring a stable, efficient international shipping system than the U.S. In this connection the Department of Transportation has been an active participant in the current interagency review of maritime policy. As evidence of this interest, and in an effort to understand and contribute to the resolution of problems in this area, Secretary Adams has created the position of Assistant Secretary for Marine Transportation.

This concludes my prepared statement. I will be pleased to try to answer any questions you may have.

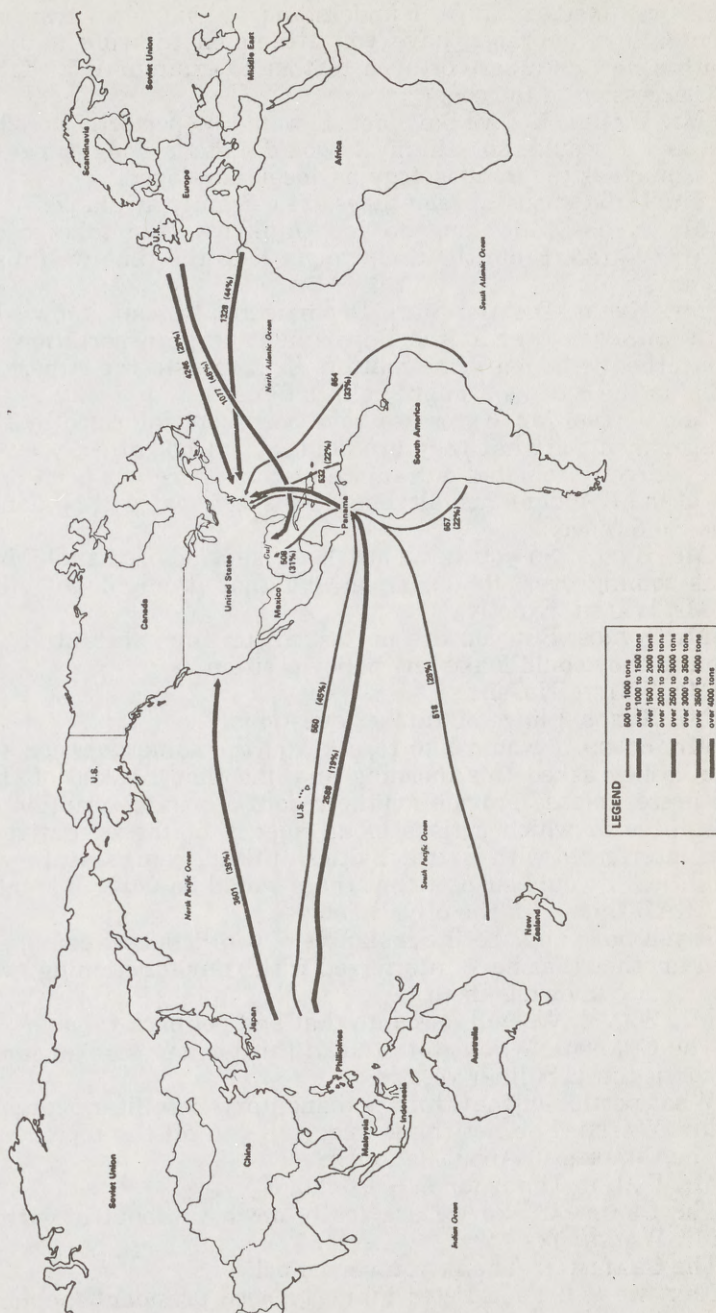
Major Routes of Liner Exports from the U.S. in 1976

Volume in 000 LT's and U.S. flag share in percent of total ()



Major Routes of Liner Imports to the U.S. in 1976

Volume in 000 LT's and U.S. flag share in percent of total ()



Mr. KYROS. Mr. Walsh, has DOT attempted to bring the study, that was made in 1976, I understand by your own transportation center in Cambridge, have you attempted to bring it up to date with a new data base or even further to examine it in light of the EC accession to the code?

Mr. WALSH. No; we have not. It would be perfectly possible to do so and I would not think it would take a long time to do it inasmuch as the methodology has been developed.

The U.S. Census Bureau tapes are certainly available.

Mr. KYROS. How long do you think it would take to do that?

Mr. WALSH. From the time we got it to the time we finish, 60 to 90 days.

Mr. KYROS. Did the State Department, to your knowledge, consult with you over at the Department of Transportation who are concerned with maritime matters in regard to the American position on the code as it might go into force?

Mr. WALSH. Mr. Kyros, we have been kept informed by the State Department of what they are doing. I am not directly aware that they directly solicited our advice or that there has been any effort to formally include us, although I suspect that will be done before the conference.

Mr. KYROS. So you have just been kept advised that Mr. Burke was coming over, for example, and that it might go into effect?

Mr. WALSH. Exactly.

Mr. KYROS. But you are not asked for any substantive information so they could make any policy position?

Mr. WALSH. No, sir.

Mr. KYROS. I have no further questions.

Mr. LOSCH. I would like to ask you the same question that Mr. McCloskey asked this morning and one that I asked of the other witnesses: please provide for the record a brief description of those instances in which actions of an agency of the executive branch has interfered with your activities in filling your statutory responsibilities? I would suspect that there would be fewer instances with MARAD than with the other agencies.

If you have any specific instances of conflicts between one agency and another that have interfered with your functioning, we would appreciate knowing about it.

Mr. WALSH. We will look into that and get back to you.

The CHAIRMAN. You state that a third of our foreign liner trade is carried in U.S.-liner vessels.

What portion of that third is mandatory or military cargo?

Mr. WALSH. I do not think I can tell you off the top of my head.

The CHAIRMAN. About half of it?

Mr. WALSH. That sounds reasonable.

The CHAIRMAN. So we are really down to about a sixth, right?

Mr. WALSH. Yes.

The CHAIRMAN. Thank you very much.

Next we will have Peter Finnerty, vice president, public affairs of Sea-Land Service.

STATEMENT OF PETER FINNERTY, VICE PRESIDENT, PUBLIC AFFAIRS, SEA-LAND SERVICE, INC., ACCOMPANIED BY WILLIAM F. RAGAN, WASHINGTON COUNSEL OF RAGAN & MASON

Mr. FINNERTY. I have with me today Mr. William F. Ragan our Washington counsel of Ragan & Mason.

Sea-Land Service, Inc. is most appreciative of this opportunity to testify on the UNCTAD code of conduct for liner conferences.

We commend the committee for holding this hearing. I will summarize this statement very quickly in light of the fact that it will be included in full in the record.

The CHAIRMAN. You do not have to do it quickly, just do it thoroughly.

[The following was received for the record:]

STATEMENT OF PETER J. FINNERTY, VICE PRESIDENT, PUBLIC AFFAIRS, SEA-LAND SERVICE, INC.

Mr. Chairman and Members of the Subcommittee on Merchant Marine, Sea-Land Service, Inc. is most appreciative of this opportunity to testify on the UNCTAD Code of Conduct for Liner Conferences.

For the record, Sea-Land is the largest U.S.-flag liner shipping company providing container transportation service to about 130 terminals in the United States and over 50 other countries through operation of 56 containerships and about 65,000 containers. Sea-Land operates without federal operating or construction subsidies. In 1978, our gross revenues exceeded \$1 billion and earnings from operations exceeded \$118 million.

We commend the Merchant Marine Subcommittee for scheduling this very timely hearing on the UNCTAD Liner Code. Although this highly influential international shipping activity has been largely ignored by the U.S. government, recent events confirm that is is substantially changing liner shipping worldwide.

It is important, we believe, that the Committee be aware that the motivation for the Code grew out of decades of Developing country frustration and dissatisfaction with closed conferences in their trades. During the nine weeks of discussions in 1973-74, the LDC's made clear that their objection was not U.S. regulation of open conferences, but the exclusionary and unresponsive closed conferences in the European trades.

Those individuals who, like myself, have had a long and first-hand acquaintance with the evaluation of the Liner Code will acknowledge that Sea-Land stated its opposition from the earliest meetings of the U.S. delegation. Sea-Land is not opposed to the concept of effective bilateral liner shipping agreements. We remain, however, strongly opposed to terms and conditions that eliminate effective competition, reduce cross-trading opportunities for U.S.-flag carriers, create new inroads for state-controlled carriers to penetrate free world trade lanes, and impose government regulations to the detriment of traditional private capital investment involving business risk and responsiveness to the marketplace.

The UNCTAD Liner Code, taken with the numerous other initiatives of the UNCTAD secretariat, will move worldwide liner shipping disappointingly in that direction. In fact, since 1974, it has prompted numerous countries to embark on unilateral cargo allocation schemes. This includes Singapore, the Dominican Republic, Thailand, the Philippines, Guatemala, among others. It is critical that our Government end its prolonged debate and study of the liner shipping world changing before our eyes. The industry will present a proposed legislative response within a few weeks to meet this challenge.

As has been explained by the witnesses today, there are numerous flaws in the UNCTAD Lined Code that will be harmful to U.S. interests. These unacceptable provisions include:

1. Imposition of a closed conference system.
2. Restraints against carrier ability to recover costs via surcharges.
3. Inequality of treatment between conference and non-conference carriers.
4. Subjecting present U.S. defense cargoes to cargo sharing with other countries.
5. Restrictions on membership.
6. Imposition of a burdensome and very complex disputes settlement.
7. A prohibition of carrier rate increases at less than 15-month intervals.

What remains to be stated is the inadequate job that the Executive Branch has done with respect to this fundamental shift in world liner shipping. I daresay that had the Merchant Marine Subcommittee not scheduled this hearing, our industry would still be depending upon the trade press and contacts overseas to learn of what other governments in full and close cooperation with their national lines have done with respect to the Liner Code.

While our Departments of Justice and State have preoccupied themselves with undercutting the legislative and regulatory initiatives of the FMC to counter Soviet rate cutting and foreign discriminatory activities against U.S.-flag carriers, their counterparts in the European Common Market have devised a substantial modification of the UNCTAD Liner Code that would, in effect, enhance operating conditions for *their* carriers at the expense of U.S.-flag and other non-European carriers.

In the face of confirmed reports from Japan, Europe and numerous other countries that the Liner Code is rapidly gathering momentum toward entering into force, the Administration has contented itself with assurances that this widespread activity "won't effect the United States."

Mr. Chairman, with due recognition to the pressure of conducting the Nation's foreign affairs, such a situation can only be characterized as an incredible failure to recognize and protect U.S. national interests. Any honest appraisal of the impact on the U.S. trades of the UNCTAD Code entering into force with Europe and Japan as ratifying nations must conclude that considerable harm will accrue to U.S. interests.

First, a large amount of liner tonnage will be displaced from UNCTAD Code regulated trades. The natural "dumping" ground will be the wide-open U.S. trades. Second, the important cross-trading opportunities for U.S.-flag carriers will be curtailed. Third, the United States is being successfully persuaded not to oppose or react to this blatant disruption or world-wide liner shipping and our own State Department is party to the propaganda. Fourth, the governmental framework will have been established to permit other countries to unilaterally impose a range of other discriminatory restrictions on U.S. liner carriers, such as mandatory equipment specifications rather than performance criteria, unnecessary and costly operating requirements and exclusion from present trading privileges.

In the past, many people have expressed surprise to learn that Sea-Land, a U.S.-flag carrier, operates an extensive transportation network in the foreign-to-foreign commerce. Attached to this testimony as Appendix A is a listing of the ports and countries served by Sea-Land, many of which will ratify the UNCTAD Liner Code. This would have a direct and harmful impact on our U.S.-flag operations unless met by an adequate U.S. policy on bilateral shipping agreements.

Please note that Sea-Land's crosstrading activities are conducted despite widespread closed conferences that make participation in those trades difficult. And to cite a strange void of long standing in U.S. policy, our Government does not demand nor even seek comparable market access for U.S.-flag crosstraders in return for the come one-come all access to U.S. crosstrades. Fundamental trading parity would logically exact at least that such opportunity to compete for U.S.-flag carriers, but, instead, the State and Justice Departments have preferred to limit their energies to hindering U.S.-flag carriers, clearly an easier target.

Without further elaboration, we trust the point has been made. It is not our intention to simply pass this problem to the Congress and expect it to develop a remedy. We have just completed extensive negotiations with our colleagues in the National Maritime Council to draft the ingredients of a sorely needed U.S. statutory policy on bilateral liner shipping agreements. It is our intention to work with the Committee in the next several weeks on this important problem. We can say that U.S. liner carriers are agreed that the ability to be responsive to shipper and marketplace needs and to compete among U.S. operators must be preserved.

Mr. Chairman, we are confident that the U.S. approach to bilateral liner shipping agreements will be far superior to the arrangements advanced thus far abroad. And rather than being developed behind closed doors only to be thrust upon the world as a fait accompli, the legislative process will provide all interested parties ample time to express their views.

Again, we wish to express our gratitude for this time to appear and will respond to any questions the Subcommittee may have.

SEA-LAND SERVICE, INC.

COUNTRIES AND TERRITORIES SERVED

North America:

U.S.
Canada
Mexico

Central America and

Panama:
El Salvador
Honduras
Canal Zone
Costa Rica
Guatemala

Caribbean:

Puerto Rico
Netherlands Antilles
U.S. Virgin Islands
The Bahamas
French West Indies
Jamaica
Haiti
Trinidad

Dominican Republic
Bermuda
Windward Islands
Antigua
St. Barthelemy
St. Kitts

South America:

Venezuela

Europe:

Denmark
Spain
The Netherlands
Belgium
France
Germany
Ireland
Poland
Italy
Sweden
Finland

Yugoslavia

Portugal
Norway
Greece
Malta
United Kingdom

Mideast:

Saudi Arabia
Iran
United Arab Emirates
Oman
Qatar

Far East:

Thailand
Philippines
Hong Kong
South Korea
Taiwan
Japan
Singapore

Total

September, 1978

SEA-LAND PORTS

Europe

**Aarhus, Denmark	**Leghorn, Italy
*Algeciras, Spain	**LeHavre, France
***Alicante, Spain	**Leningrad, USSR
***Amsterdam, The Netherlands	**Lisbon, Portugal
***Antwerp, Belgium	***Liverpool, England
Barcelona, Spain	*London, England
***Belfast, Northern Ireland	***Malmo, Sweden
**Bilbao, Spain	**Marseille, France
***Bordeaux, France	**Naples, Italy
***Bremen, Germany	***Norrkoeeping, Sweden
*Bremerhaven, Germany	***Odense, Denmark
***Cadiz, Spain	**Oporto, Portugal
Cagliari, Sardinia	*Oslo, Norway
**Catania, Sicily	**Palermo, Sicily
***Copenhagen, Denmark	**Piraeus, Greece
Dublin, Ireland	*Preston, England
**Felixstowe, England	*Rotterdam, The Netherlands
***Gdynia, Poland	***Stockholm, Sweden
**Genoa, Italy	**Valencia, Spain
**Gothenburg, Sweden	**Valletta, Malta
**Grangemouth, Scotland	
***Hamburg, Germany	
***Helsingborg, Sweden	
***Helsinki, Finland	

United States and Canada

Adak, Alaska	*Mobile, Alabama
*Anchorage, Alaska	***Montreal, Canada
**Baltimore, Maryland	*New Orleans, Louisiana
'**Boston, Massachusetts	'New York, New York
**Captain's Bay, Alaska	'Norfolk, Virginia
'*Charleston, South Carolina	'*Oakland, California
Chignik, Alaska	*Philadelphia, Pennsylvania
**Cordova, Alaska	*Port Everglades, Florida
'Corpus Christi, Texas	'Portland, Oregon
**Dutch Harbor, Alaska	*Portsmouth, Virginia
*Elizabeth, New Jersey	'San Francisco, California
***Homer, Alaska	**Sand Point, Alaska
'Houston, Texas	*Savannah, Georgia
'*Jacksonville, Florida	'Seattle, Washington
'Galveston, Texas	***Seward, Alaska
**King Cove, Alaska	**Squaw Harbor, Alaska
*Kodiak, Alaska	***Toronto, Canada
'Los Angeles, California	***Valdez, Alaska
*Long Beach, California	***Vancouver, Canada
	***Vancouver, Washington

September, 1978

Caribbean

**Basseterre, St. Kitts
 **Castries, St. Lucia, Windward Islands
 **Charlotte Amalie, St. Thomas, V.I.
 **Christiansted, St. Croix, V.I.
 **Freeport, The Bahamas
 **Pointe-A-Pitre, Guadeloupe, French West Indies
 **Gustavia, St. Barthelemy
 *Kingston, Jamaica
 **Fort de France, Martinique, French West Indies
 **Nassau, The Bahamas
 **Philipsburg, St. Maarten, Netherlands Antilles
 **Port-au-Prince, Haiti
 **Port of Spain, Trinidad
 *Rio Haina/Santo Domingo, Dominican Republic
 *St. Georges, Bermuda (Military)
 **St. Johns, Antigua
 *San Juan, Puerto Rico
 **Vieux Fort, St. Lucia, Windward Islands
 **Willemstad, Curacao, Netherlands Antilles

Mexico, Central America, South America

***Acajutla, El Salvador	**Puerto Limon, Costa Rica
**Puerto Cortes, Honduras	**Tuxpan, Mexico
**Balboa, Canal Zone	**Santo Tomas, Guatemala
***Cristobal, Canal Zone	**Puerto Cabello, Venezuela

Far East

Bangkok, Thailand	*Osaka, Japan
**Cebu, Philippines	**Pusan, South Korea
*Hong Kong	***Shimizu, Japan
**Incheon, South Korea	**Singapore
*Kaohsiung, Taiwan	**Subic Bay, Philippines (Military)
***Keelung, Taiwan	**Taipei, Taiwan
*Kobe, Japan	***Tokyo, Japan
Manila, Philippines	*Yokkaichi, Japan
***Mojji, Japan	*Yokohama, Japan
***Nagoya, Japan	

Middle East

*Dammam, Saudi Arabia	***Muscat, Oman
*Bandar Abbas, Iran	*Dubai, United Arab Emirates
***Tehran, Iran	*Jeddah, Saudi Arabia
***Isfahan, Iran	**Doha, Qatar

*	Direct vessel service..... 27	Ports..... 138
**	Feeder vessel service..... 65	Ports served by vessel..... 93
***	Over-the-road service..... 39	Countries & Territories..... 52
'	Landbridge service..... 19	Sales Offices..... 97

Mr. FINNERTY. Sea-Land is not opposed to the UNCTAD code. We remain, however, strongly opposed to terms and conditions that eliminate effective competition and reduce cross trade opportunities for U.S.-flag carriers.

The UNCTAD liner code is detrimental to U.S. interests.

With due recognition, Mr. Chairman, to the pressures of conducting the Nation's foreign affairs, the inadequate job that the executive branch has done in the prior 5 years to head off the UNCTAD code in our opinion can only be characterized as an incredible failure to recognize and protect U.S. national interests.

Sea-Land, a U.S.-flag carrier, operates an extensive transportation system in foreign-to-foreign commerce. To cite a strange void of longstanding in U.S. policy, our Government does not demand nor even seek comparable market access for U.S.-flag cross traders in return for the come one, come all access to U.S. cross trades. Fundamental trading parity would logically exact at least that much opportunity to compete for U.S.-flag carriers, but, instead the State and Justice Departments have preferred to limit their energies to hindering U.S.-flag carriers, clearly an easier target.

Without further elaboration, we trust the point has been made. It is not our intention to simply pass this problem to the Congress and expect it to develop a remedy. We have just completed extensive negotiations with our colleagues in the National Maritime Council to draft the ingredients of a sorely needed U.S. statutory policy on bilateral liner shipping agreements.

It is our intention to work with the committee in the next several weeks on this important problem. We can say that U.S. liner carriers are agreed that the ability to be responsive to shipper and marketplace needs and to compete among the U.S. operators must be preserved.

Mr. Chairman, we are confident that the U.S. approach to bilateral liner shipping agreements will be far superior to the arrangements advanced thus far abroad. And rather than being developed behind closed doors only to be thrust upon the world as a fait accompli, the legislative process will provide all interested parties ample time to express their views.

If I might, Mr. Chairman, I would like to refer to a few points that were raised earlier by Mr. Atwood and offer my opinion.

One point that has cropped up with several witnesses, and I think it is a fundamental point, is the possibility of an amendment being made to the code such that it would become acceptable.

It is my considered opinion and that of my colleagues at Sea-Land, because of the political consequences and the situation with the number of countries involved, that it would be virtually impossible to correct that Code to an extent that it would become acceptable in the sense of benefiting U.S. interest. That is why we are suggesting instead the development of what is needed which is a U.S. statutory policy on liner bilateral agreements.

Mr. Atwood made reference in his statement earlier to the fact that in his opinion the State Department had indeed delivered to industry full and adequate reports.

I must disagree with him. I think that the information that has been made available to us as the code has moved to the point

where it now looks as though it will enter into force have been neither full nor adequate.

For example, it was impossible for us to obtain a copy of the European compromise position in this country from the State Department. They were asked for that information and in order to obtain that data, we had to obtain it overseas.

One other point. Mr. Atwood referred to in his statement on page 12—

The CHAIRMAN. If it is any solace to you, I had to be absent this morning because we were in the Rules Committee getting a rule on the Panama Canal legislation. I wanted to get a copy of the treaty. I had to get it from the Chicago Tribune and not from the State Department.

I didn't mean to interrupt you.

Mr. FINNERTY. On page 12 of Mr. Atwood's prepared text, he makes reference to the fact that various developing countries have unilaterally imposed cargo sharing and states that the State Department dealt with this on a case-by-case basis.

I submit that by definition, handling things on a case-by-case basis is having no policy at all.

The other reference he made was to the use of the words "comity" and "reciprocity" and as we and others here today have tried to point out, there seems to be little, if any, comity or reciprocity as far as the interest of U.S.-flag liner carriers are concerned.

Again, I would like to express my gratitude for this time to appear and I will be happy to respond to any questions the subcommittee may have.

I also have available, for the staff and the record. Mr. Chairman, a pictorial indication of Sea-Land's cross trading involvement.

The CHAIRMAN. On page 3, you state:

The UNCTAD Liner Code, taken with the numerous other initiatives of the UNCTAD secretariat, will move worldwide liner shipping disappointingly in that direction. In fact, since 1974, it has prompted numerous countries to embark on unilateral cargo allocation schemes.

If the code does not go into force, what is the likelihood of a proliferation of unilateral schemes?

Mr. FINNERTY. I think the extent to which this phenomenon is growing to date is an indication that whether or not the code itself comes into force as such, the activities of bilaterals and in many cases ones which would be relatively unacceptable to the United States, is definitely proliferating. Current attention to the code might well increase that trend.

The CHAIRMAN. Do you have any likelihood—any opinion that the Code would encourage more or fewer government-to-government agreements to bilateralized trade?

Mr. FINNERTY. I think that is a very difficult thing to predict except to relate that one of the interests that was keenly concerned about the inclusion of the provision in the code that government-to-government agreements should take precedence over the code was the Soviet Union. I believe that is a concern of ours in the sense that if the code were hypothetically to be put in place on a fairly broad basis, it is no assurance that bilaterals of a sort would not

supersede it in time. Again possibly to the detriment of U.S.-flag operators in the foreign-to-foreign commerce.

The CHAIRMAN. Are you opposed to closed conferences or are you opposed to the UNCTAD code and the fact that it would have a closed conference?

Mr. FINNERTY. We at Sea-Land are not opposed to closed conferences, Mr. Chairman. We have been advocating, and I think you are well aware, alternative systems. It was a position that we arrived at because of our perception that closed conferences would not be achievable in the U.S. trades. We are definitely opposed to the UNCTAD code arrangement. The position that we have been advocating with respect to closed conferences is an alternative of mandatory open conferences for the larger carriers in the U.S. trades, coupled with the right of independent action on due notice.

The CHAIRMAN. If the right of independent action was available to a closed conference scheme, you would be agreeable to it?

Mr. FINNERTY. Yes, sir.

Mr. KYROS. On page 6, you talk about the fact that you as a cross trader in the foreign-to-foreign trade, particularly if we have the UNCTAD code in effect, would be squeezed out whereas in the American trade a foreign cross trader is not discriminated against substantially. Is that correct?

Mr. FINNERTY. That is correct.

Mr. KYROS. At the present time, what could we possibly do to remedy a situation like that, keeping in mind international comity?

Mr. FINNERTY. Mr. Kyros, I think this goes directly to the point of the words comity and reciprocity in trade. In our opinion, our country has for many years now exacted no comity or reciprocity from our trading partners with respect to class trading privileges and indeed overseas it is something that a U.S. flag carrier must go to some difficulty to achieve.

It is a question that has been addressed in the legislation that we will be presenting to the committee in the next several weeks.

Mr. KYROS. Who should act to obtain this kind of parity for our shipping interests against foreign interests, whose role should that be, the special trade representative, Mr. Bank or Mr. Atwood of the State Department? Who do you see performing that task?

Mr. FINNERTY. In the discussions within the National Maritime Council, and I am sure Mr. Morris, who will follow me as a witness, can elaborate, we have considered and suggested in this draft bill that the appropriate party for negotiation of such liner shipping rest with the Maritime Administrator in consultation with the State Department.

The governmental official with the primary responsibility for promotional activities would be the appropriate party—actually, I think that is the way that it looks today without a specific statutory policy, and we would like to strengthen that and clarify it.

Mr. KYROS. You make a point in your statement, and a very strong point, on page 4, that apparently the shipping companies did not have any input in the formalization of an American policy and in regard to what we are talking about today, to the code.

Mr. Atwood, in fairness, stated that they do try to keep in touch with shipping companies and that they are available upon request to provide information.

Mr. FINNERTY. I would like to clarify the point I was trying to make on page 4.

We have had in the past opportunities to offer them our opinions and to make suggestions. We never during the course of negotiations, during the entire 9 weeks that I spent in Geneva with the delegation, at no time until 20 minutes before the vote was passed at approximately 1 a.m. in the morning, did we know what the U.S. position would be, whether they would vote yes or no or abstain.

We had an opportunity to make suggestions but we did not have any idea of what was going on in the cable traffic, et cetera.

With respect to the point about Mr. Atwood that he is available for requests, I think one of the fundamental problems is that no one in the Government seems to have the responsibility of keeping us posted as to what is taking place. I do not think that it is appropriate that he only respond and communicate when contacted by us, although we have contacted them.

I met with Mr. Banks several weeks ago with specific reference to this common market position and while certain comments were made and certain generalities with respect to the position of the European community, they did not provide us with the documentation. In fact, they have not, to my knowledge, made it available to the industry to this date.

Mr. KYROS. Until this day, did you know specifically their position for UNCTAD V in Manila?

Mr. FINNERTY. Yes. I have understood for a long time now that the official position is to oppose the implementation of the code, to oppose its ratification by the United States.

However, what they may be doing, if anything, in advocacy of that position in governmental channels with other nations is a mystery to me, and I don't think that they have made that known to any parties in the liner industry who I might point out are the ones who are primarily impacted by the liner code.

Mr. KYROS. Based on your perception as an executive of a major shipping company in the United States, is it that the State Department does not have sufficient data to rely on in order to answer the questions that an economic shipping policy of our Nation should include?

Mr. FINNERTY. No. I suggest that at least it is my impression that it is more of a procedural matter. It is more of a problem of the structure or lack of structure in the way that the Government and the executive branch have organized this activity.

One of the points we will be suggesting in this draft bill in the National Maritime Council, that we have prepared and is going to be completed will be a more formalized consultative machinery to permit carriers, U.S.-flag carriers a much better dialogue and consultation process with our Government representatives in the formalization and negotiations, and I stress negotiations, of U.S. bilateral maritime agreements.

Mr. KYROS. I think Congressman D'Amours from this committee has introduced a bill to provide for private sector representatives.

Mr. FINNERTY. I am aware of that bill and I think it is an excellent idea.

The CHAIRMAN. Next we will have Edgar Vierengel, director of international logistics, Ingersoll-Rand Co.

**STATEMENT OF EDGAR A. VIERENGEL, DIRECTOR OF
INTERNATIONAL LOGISTICS, INGERSOLL-RAND CO.**

Mr. VIERENGEL. Thank you.

With your permission, I would like to read the statement in its entirety.

Mr. WYATT. We would like to have it paraphrased and it will be entered into the record.

Mr. VIERENGEL. Very well.

My name is Edgar A. Vierengel. I am the director of international logistics for Ingersoll-Rand Co., a multinational manufacturer and marketer of industrial machinery and related products. Our equipment is used in a wide variety of applications, including oil and gas, coal and other extraction processes, roadbuilding and construction of all kinds, automotive assembly and chemical production. Our products include air and gas compressors, drilling apparatus, pneumatic, electric and hand tools, pumps, turbines, locks, a variety of equipment for agriculture, as well as spare parts for maintenance of the entire line.

Over 36 percent of our more than \$2 billion sales is generated outside the United States. We manufacture in 16 countries and export from 8, including in excess of \$250 million from the United States. We market our products in virtually every country in the world and expend over \$20 million per year in ocean freight, predominantly with liner carriers. Approximately three quarters of that bill or \$15 million is spent to transport our U.S. exports. Dependable, efficient service is vital to our interests.

My professional activities include the vice-chairmanship of the international traffic committee of the New York Chamber of Commerce and Industry. I am a member of the executive committee and chairman of the general business committee of the National Committee on International Trade Documentation—NCITD. I am also a shipper advisor to the National Maritime Council and a member of the Maritime Committee of the National Industrial Traffic League.

I appreciate this opportunity to review with the committee my thoughts on the merits of the United Nations code of conduct for liner conferences—the UNCTAD code.

The committee members will recall that I testified on H.R. 11422 on behalf of the New York Chamber of Commerce and Industry in June 1978. In that testimony, we urged the passage of legislation to authorize the formation of a U.S. Shippers Council, with limited antitrust immunity, to consult and negotiate with carriers and conferences of carriers, providing liner services in the U.S. international trade. The chamber felt that with such an organization in place, such devices as closed conferences, revenue sharing, cargo pooling, and deferred rebates might be found by shippers and carriers to be mutually advantageous, in certain trades, to achieve more efficient operations. I continue to subscribe to that view, as well as to the other positions put forth in that testimony.

Before commenting on the UNCTAD code as it now stands for ratification, I think it is appropriate to review some of the background elements in its development.

In May 1970, the UNCTAD Committee on Shipping concluded, based on their review of a report entitled "The Liner Conference System," that improvements in the conference system were necessary.

In 1971, CSG—the consultative shipping group of transport ministers of Europe and Japan—requested their shipowners, in consultation with the National Shippers Councils of Europe, to draw up a code of conduct for liner conferences, to strengthen the system and to avoid allegations of unfair practices. The CENSA code was thus produced and adopted.

In 1972, the CENSA code was offered for adoption by UNCTAD but was rejected by the developing countries because of their concern that it was prepared without their direct participation, and would not fully meet their needs and interests. They then drafted a code which would be a legally binding and legally enforceable multilateral instrument. This document became the basis from which the UNCTAD code evolved through negotiation which continued through April 1974, when it was adopted and offered for ratification.

It was not until 1973 that the U.S. delegation began to take a reactive role in the proceedings. In reviewing the debate which is contained in volume I of the final report, it is evident that the United States, the largest single importer and exporter in the world, was alone in both regulatory philosophy, as well as in approaches to problem-solving in the realm of liner conference operations.

Had the United States had the wisdom to allow the collective voices of its importers and exporters, the primary parties at interest in international transportation matters, to help shape its policy and practice in this area, particularly since 1950, it is my belief that we would today have a stronger, more efficient, merchant marine, a healthier international transportation environment, and a substantially different UNCTAD code of conduct for liner conferences to consider today.

As it is, we are reduced to examining the code, with the modification recently suggested by the CSG, exempting trade between developed countries from the cargo sharing provisions, as an alternative to the welter of ideas expressed in recent legislative proposals, and in the position papers submitted by the several executive agencies attempting to develop maritime policy options for consideration by the President.

This committee, above all other elements of our Government, has exhibited a determination to identify our maritime priorities, examine our approach to regulation and promotion, and to spark a dialog among the parties at interest, including shippers, carriers, and governments which may, in the end, lead to a new era in U.S. international transportation.

What are our maritime priorities, and to what extent would the UNCTAD code move us toward or away from them?

Our first set of priorities must be related to maintaining and expanding our participation in world trade. Our second set is related to military preparedness and defense.

Focusing only on the liner segment and dealing first with the military aspects, I perceive three essential needs:

One: Sufficient tonnage under our control, suited to carry the men and materiel projected by the military to support various types of present and projected military needs.

Two: Capacity to build replacement ships.

Three: Trained officers and crews to operate the ships.

While I have heard numerous speeches and read many articles warning of comparative and/or absolute shortcomings of the U.S. merchant fleet and shipbuilding capacity with respect to these priorities, I have not heard loud alarms from the official spokesmen for the Department of Defense. Whatever the shortcomings are, in fact, they should be clearly identified and funded as part of the defense budget. Commercial interests—neither shipper nor carrier—should be burdened with any of the costs of meeting these needs, except as general taxpayers.

Turning to the priorities related to maintaining and expanding our participation in world trade, and again focusing only on the liner segment, I again perceive three essential needs:

One: A profitable and efficient national fleet adequate to lift a substantial share of the cargo moving in all trades to and from the United States.

Two: Transportation services, including infrastructures in the United States, which enable U.S. shippers to reach their markets at the lowest possible costs, and, minimally, at costs competitive with foreign shippers of competing goods.

Three: Transportation services tailored to the needs of importers and exporters, and not to suit philosophical, regulatory, conference or other constraints.

Would the UNCTAD code help or hinder the achievement of these objectives? On balance, as it stands, I believe it would be more of a hindrance than a help.

A reading of the statements of objectives and principles preceding part 1 indicates that it has a solid foundation. These statements were not easily arrived at, as evidenced from the texts of the debate in volume I of the report.

The definition in part 1, chapter I, particularly the definition of a national shipping line, is instructive. It does not refer to flag, but rather to the country in which effective control resides.

Chapter II, article I, defines criteria for membership in conferences clearly setting out the rights of each national line to participate in the foreign trade of its country. Criteria for membership of nonnational lines are related to needs of the trade and the effect of admission on efficiency. Shippers and shipper organizations have a voice in the admission process, as do governments if they so request.

Article II defines rules for conference member participation in a trade. In addition to the well-known 40-40-20 rule, it sets up provisions for pooling revenue, cargo sharing, and rationalization.

This article is probably the most discussed and, if my level of understanding of it prior to preparing this testimony is representative of shippers at large, the least understood article in the code.

First, as at present, the conference members agree among themselves on the conference territory. They may or may not agree to pool. If they agree to pool, then each country's national line members at one end have a right to equal shares with the national lines of each country at the other end. Third-country line members have the right to acquire up to 20 percent of each country to country trade.

This sounds like bilateral sharing, but, if paragraph 8 is observed, it may be quite different. Paragraph 8 suggests sharing the aggregated cargo at each end of each conference trade among the lines of all participating countries, with up to 20 percent reserved for third country participants. The weakness inherent is bilateral sharing—as in the U.S.-Brazil arrangement—insufficient volume or variety of liner-type cargo to support efficient operations, is overcome if the conference territory is sufficiently broad and paragraph 8 is effective.

The basic weakness in the article is in the provisions of paragraph 13 and 14 which, in effect, enable governments to force pooling or adjustments of sailings to assure equal access.

Paragraph 13 was cited by every country voting against the code as one of their primary reasons for rejection.

I do not believe that the recent recommendation of the CSG exempting developed country trades from the cargo sharing provisions overcomes this fundamental flaw. In addition, the socialist countries, in voting for the code, reserved any bilateral agreements now in effect or negotiated in the future from application of the code. Notably, Brazil did not.

Article 3, while not singled out in the explanation of negative votes or abstentions, would enable a minority in any conference to block any conference decision. This, in my view, is a weakness.

Article 5 provides sensible self-policing procedures.

Chapter III, incorporating articles 7 through 11, provides a reasonable prescription for relations with shippers including a practical outline of consultation machinery. This article virtually requires that subscribers establish national shippers' councils.

Chapter IV, dealing with freight rates, has two basic weaknesses. One, setting the minimum time limit between general increases at what amounts to 15 months, was objected to by all maritime countries. Even as a shipper. I am forced to agree that this is not a reasonable concept.

The other, which was not cited as objectionable, would allow the imposition of surcharges on 15 days' notice with effect after 45 days, if a dispute arises which is not resolved during that period. In my view, this unreasonably short notice to contract shippers.

Chapter VI, dealing with the provisions and machinery for settlement of disputes, is possibly the weakest part of the code. It was objected to for a variety of reasons by all who voted against or abstained. It appears to me to be overdrawn, burdensome and expensive.

On balance, I do not feel that the United States should ratify the code as it stands or with the modifications suggested by the CSG.

At the same time, there is a strong possibility that if the CSG recommendations are accepted, the code will be ratified and we will again become the world's biggest exception.

In this case, being an exception, provided we don't stand still, may work to our advantage. We will undoubtedly see modifications in both article II and article VI as ratifying countries struggle with them. In the meantime, by moving ahead with the legal foundation for a U.S. Shippers Council, we will position ourselves for possible ratification after other countries have taken off the rough edges.

I would like to close this statement with one final thought. In his statement explaining the United States' vote against the Code, our representative said: "We had hoped, however, that others would not attempt to impose principles on us which, going beyond regulatory rules, were contrary to our own economic philosophy, particularly in relation to the role of competition."

It is true that the United States has become the greatest industrial power in the world by achieving efficiency through profitable competition. We must also not lose sight of the fact that throughout the 20th century, we have set up public cartels, and allowed private monopolies, and private oligopolies to develop within this country' substituting regulation for open market competition. Without reference to the merits of these actions, the fact is that we are also among the world's largest regulators. Could it be that we allow non-competitive situations only if we write the rules?

If the evidence collected by the President's Commission on Paperwork is an indication of our regulatory efficiency, we are probably not the world's most efficient regulator.

If our success in regulating conferences is an indication of regulatory effectiveness, we are not the world's most effective regulator.

The code, as it stands, places responsibility for the first level of regulation on shippers and shippers councils; the second level on Government. This concept promises to lead to a higher level of regulatory efficiency and effectiveness than a system of purely governmental regulation. Overall, however: it is too limiting and too complex.

Americans are good at uncomplicating things. Uncomplicating things is one of the fundamental arts of engineering. We are, in many respects, a society of engineers—uncomplicating things and making a profit at it.

We should therefore direct our efforts toward uncomplicating the code. A good start would be passing legislation enabling the formation of a Shippers' Council to bring the collective ingenuity of American international businessmen to bear on the complexities of international transportation.

With the partnership of our national carriers and Government, I, for one, am confident that U.S. international businessmen could help write a code which will work for this nation's benefit, as well as that of our trading partners.

Mr. WYATT. On page 4 of your statement, you say: "We are reduced to examining the code."

Do you mean by that the development of a shipping policy will have to be made on the UNCTAD code?

Mr. VIERENGEL. When I say we are reduced to examining the code, I am really stating that we did not participate in writing it. We simply reacted to it.

Now we are continuing to react to it and I think in the testimony and in the response to questions today that one of the concerns that was expressed particularly was that we don't have a positive program. We seem to wait until somebody else puts forth their program and then we respond to it.

I think we should be in the front.

Mr. WYATT. You think we still have time to take such an approach?

Mr. VIERENGEL. I read that it will take approximately 18 months to implement the code after it becomes effective. I do not think it will be acceded to or that the ECC accession will cause the code to go into effect in less than a year, so I say we probably have 2½ years before the code begins to operate.

I think in that period we should make a concerted effort to look for alternatives. The world has made it clear that they want conferences. They want conferences which are closed. They want participation in them and we have expressed our opinion that we want participation in the conferences, so I think we can, if we go about it the right way. We must first develop a maritime policy that would support our international trade policy. Incidentally, what I have seen of the options that are going before the President, there is no reference to maritime policy as an element of international trade policy. If maritime policy is not part of international trade policy, I don't know what it is based on because today it must primarily support our international trade.

Mr. WYATT. You cite article II, paragraphs 13 and 14 as enabling governments to force pooling.

Do you see it in the language as proposed or does your conclusion come from some understanding of the way national shipping lines would assert their rights?

Mr. VIERENGEL. No. I see it in the language of the code itself in those articles to which I referred.

Mr. WYATT. One further question. Do you see merit in the code's first level of control being with shippers? Do you have any concerns with the motivation for this position in the instance of developing countries that the shippers may very well be, in those countries, the state themselves?

Mr. VIERENGEL. I noticed that throughout the code, as an anomaly. I recognize that in the socialist countries it is extremely difficult to separate authorities or government from industry.

It is a very difficult concept in the code. The socialist countries do not now participate in trade with the Western World as a major trading bloc. As they enter major trading operations in the Western World, I think that if the Western World does have shippers councils in place, then the shippers councils and governments using this form of regulation will be persuasive influences in terms of how maritime operations should proceed.

If we wait too long, and let us say we develop a very substantial two way liner trade with the Soviet Union and, say, the People's Republic of China, then I would be concerned, in the absence of shippers councils, say, in the next 5 years that those countries will

work out bilateral agreements or arrangements with us which may not be in the best interests of industry.

Mr. WYATT. Counsel?

Mr. KYROS. Thank you, Mr. Chairman.

It is nice to see you, again, Mr. Vierengel. During the course of this hearing which you have attended, obviously, the State Department was attempting to indicate that it formed a policy based on broad considerations for America in regard to the code.

You are a member, I understand, of the American Importers' Association, also the New York Chamber of Commerce, and also the National Industrial Traffic League, which is submitting a statement here today.

Now, from your own viewpoint, have you ever had occasion to advise the State Department or have they solicited the views of shippers, exporters and importers, such as yourself in regard to the code?

Mr. VIERENGEL. In my work with the New York Chamber, the International Traffic Committee of the New York Chamber, we come to Washington every year for 3 days. For the last 5 or 6 years, we have invited the State Department. Mr. Banks has been the usual representative of the State Department during that period of time. We have also invited representatives of the Justice Department, of the FMC and so forth, and of course, of your committee.

I do not recall that we had any indepth discussions about the UNCTAD code. My recollection of any discussions of the UNCTAD code was that it is not a likely instrument to come to fruition. So it seemed to me that our attitude for the last several years was: "Let us not worry about it because it is not going to become a reality, but let us worry about things which are more important to us."

Mr. KYROS. So there was no input from the shippers to the State Department in regard to the code?

Mr. VIERENGEL. No, I would say none, not anything substantial.

Mr. KYROS. Did they ever ask you recently about the code with the EC accession or reservation to the code? Has anyone asked you anything about that?

Mr. VIERENGEL. No, sir.

Mr. KYROS. No further question. Thank you, Mr. Vierengel.

Mr. WYATT. Counsel?

Mr. LOSCH. Thank you, Mr. Chairman.

Mr. Vierengel, in your analysis of the code, did you come up with a series of amendments, or do you have any suggestions where the code could be amended to make it, in your estimation, more acceptable?

Mr. VIERENGEL. To answer that question, as I said, I think that the trading interests, the shipper interests, are the key vital interests in the development of maritime policy. I have worked with many organizations of shippers as you see from the first page of the testimony.

I do not trust myself to speak for shippers, and I find in the years that I have worked with international transportation executives, that it takes a great deal of effort to bring about consensus on any issue.

My feeling is that the most important single thing that we can do, and I have said this before, is to allow the formation of a shippers council with limited antitrust immunity to put shippers into an environment in which they have a responsibility as the first level of regulation, if you will, of maritime activities.

And in that position of responsibility, I believe, that shippers will respond very, very well to our needs, both maritime industry and Government needs.

Mr. LOSCH. I recognize that, and I am sure you understand that there are members of this committee who support that position.

Mr. VIERENGEL. Yes, sir.

Mr. LOSCH. I was just wondering if you had any specific amendments to the code that you might be able to let us review. Anything that you have done informally for yourself or for the NIT League or one of the other groups that you are a member of would be interesting to review. There seems to be a vacuum there that needs to be filled.

Mr. VIERENGEL. My feeling is that we have a dearth, really, of thought on what the alternatives should be. Bilateralism is not an acceptable alternative. As a matter of fact, as I researched the development of the code, it appears to have been developed specifically with the concept of excluding bilateralism as a relatively inefficient form of participation by underdeveloped countries in the trades of their nations.

The aggregation concept, which is the concept that I think has been lost sight of here, in paragraph 8 of article 2, the aggregation concept promises to bring about a situation in which, because of the variety of cargo in the trades, given a broad enough conference scope, you could predict the development of efficient operations with participation by the developing countries.

I do not think that we can facilely come up with alternatives to this. I think that we have to work very diligently, as Mr. Finnerty said it, at looking at what our interests are, our trading interests, our maritime interests, over the next couple of years to develop those alternatives, recognizing that it will probably be 2½ years before this code becomes an effective instrument in international trade. I do not think we can waste any time.

Mr. LOSCH. I would agree. Thank you very much.

Thank you, Mr. Chairman.

Mr. WYATT. Thank you very much, sir.

At this time I would call Patrick Morris, legislative director for the National Maritime Council.

STATEMENT OF W. PATRICK MORRIS, LEGISLATIVE DIRECTOR, NATIONAL MARITIME COUNCIL

Mr. MORRIS. Mr. Chairman, I have a rather lengthy statement, but quite frankly, the vast majority of the ground covered in the statement has already been plowed and replowed and replowed once again.

So, what I would like to do is really go almost right to the end of my statement where we talk about and analyze the European Community reservations as they are known in the newspapers.

A key reservation apparently provides that the 40-40-20 cargo allocation formula would not be applicable to the liner trade be-

tween OECD countries. As to the liner trade between OECD countries and the Group of 77 nations, a second reservation provides that the cargo allocation formula would apply to give the developing nations up to a 40-percent share. The remaining 60 percent would be open for carriage on the base of commercial principles by all OECD nations.

The stated purpose of these two reservations is to preserve competition among vessels of OECD countries. However, the second reservation, if put into effect, would place U.S.-flag carriers at a severe disadvantage. This is true because the reservations are based on the fact that all conferences outside of the U.S. trade will remain closed that is, membership will, for the most part, be restricted to historical participants. However, conferences serving the U.S. trades, because of the Shipping Act of 1916, must remain open to all carriers seeking membership.

The effect of this can be illustrated by a rather simple example. The example is a comparison of conference A from the United States to Brazil with a conference B from the EC to Brazil. Conference A would be open, and under the proposal, all vessels of OECD nations would be permitted, at any time, to compete for the 60 percent of cargo not reserved for Brazilian-flag vessels. However, conference B would be a closed conference, and U.S. carriers, while theoretically eligible to join them, would, in fact, be effectively barred by the closed conference limits on conference membership authorized by the European Community reservations.

There are a number of other items, as I said earlier, that we went into in this statement, and as I said earlier, they have really been adequately covered by the other spokesmen here today.

Mr. WYATT. Thank you very much. I have no questions.

Does Counsel have questions?

Mr. KYROS. Just one question, Mr. Chairman. Mr. Morris, what a pleasure to see you at the other end of the table. You say that the cargo-sharing scheme does not seem to be—that is, you do not view it too unfavorably, is that correct?

Mr. MORRIS. In the context of a bilateral shipping bill, basically, we are trying to set up a mechanism which would recognize the fact that our imports are another country's exports, and to the extent that you can have a scheme where you treat our trade fairly and the trade of the reciprocal nation fairly, we tend to approve that idea.

Mr. KYROS. You also asked that the committee direct the administration to insure that the Maritime Administration is the lead agency in addressing the code. What policy developments have you noted in the Maritime Administration which would warrant such an endorsement?

Mr. MORRIS. They at least know how the international shipping industry functions and how it operates, and their responsibility by statute is to promote the U.S.-flag merchant marine.

And quite frankly, my view of the State Department is that historically, they have just viewed shipping as just a small segment of overall U.S. trade policy and where the opportunity suits them, it is traded off for another item.

Mr. KYROS. My understanding, then, is that the National Maritime Council is drafting some legislation to propose to this committee?

Mr. MORRIS. Correct.

Mr. KYROS. When?

Mr. MORRIS. My guess is that you probably would get it in the next few weeks.

Mr. KYROS. Thank you, Mr. Morris.

Thank you, Mr. Chairman.

Mr. WYATT. Are there further questions of Mr. Morris?

[No response.]

Mr. WYATT. Thank you very much, Mr. Morris.

[The following was received for the record.]

STATEMENT OF C. WILLIAM NEUHAUSER, EXECUTIVE SECRETARY, NATIONAL MARITIME COUNCIL

Mr. Chairman and Members of the Subcommittee on Merchant Marine, I appreciate the opportunity to present the views of the National Maritime Council with respect to the United Nations Conference on Trade and Development (UNCTAD) proposed Code of Liner Conduct. In light of the flourish of diplomatic activity by our friends in the European Community and the upcoming fifth session of the UNCTAD in Manila, the timing of these hearings is most appropriate. The NMC would especially like to express the gratitude of the American Maritime Industry to you, Mr. Chairman, for scheduling these hearings because of the impact of the Code on the industry.

It has become readily apparent to most observers that the Code, notwithstanding the adamant opposition of some Executive Branch departments, is going to come into effect. The departments I am referring to are, of course, the Departments of State and Justice with their undue advocacy of free trade at the expense of fair trade principles. At a minimum, adoption of the Liner Code will continue the trend toward bilateralism in international shipping.

We intend to follow these hearings closely so as to better analyze the affect of the Liner Code and we particularly look forward to better understanding of the reservations proposed by the European Community. The reservations are available to us only in part but even these appear to be designed to preserve the status quo of keeping the United States liner trades open so that ever increasing amounts of foreign tonnage can be "dumped" here. A solution is urgently needed to correct this problem if the U.S. industry is to survive. In the near future, we will present a proposal, namely a Bilateral Liner Shipping bill, and urge that it receive your early consideration.

BACKGROUND

In 1973-1974, a Conference of Plenipotentiaries was held in Geneva, Switzerland, pursuant to United Nations General Assembly Resolution 3035 of December 19, 1972. This resolution requested the Secretary-General of the UN to convene, as early as possible in 1973, under the auspices of UNCTAD, a conference of plenipotentiaries to consider and adopt a convention or any other multilateral legally binding instrument on a code of conduct for liner conferences. The first part of the Conference was held from November 12 to December 15, 1973 and the second part from March 11 to April 6, 1974. A total of 79 States participated in both parts of the Conference.

I believe a few words are in order as to how negotiations are conducted at the UNCTAD forum. Nations participate as members of economic groups, namely Group B (the developed or OECD countries), Group D (the Socialist countries of Eastern Europe), and the Group of 77 (the developing countries). This latter group, for internal discussion purposes, is divided into the African, Latin and Asian subgroups. Each of the three main groups work independent of each other. This necessarily detracts from the usual give and take at international conferences, and leads to an abundance of rhetoric and posturing with a corresponding reduction in the quality of the final document emanating from the negotiations.

The impetus for the diplomatic conference was the increasing discontent of the Group of 77 nations with the operation of the ocean liner conference system. They were concerned with the monopoly power exercised by the conferences serving their trades, that is, their belief, the limitations on conference membership and the

authority over rates and practices adversely effected the Group of 77 nations ability to develop their own merchant marines, to increase their international trade, and to assist their national economies. In their eyes the proper remedy was a multilateral treaty governing the conduct of ocean shipping conference which would "take in account the needs and problems of the developing countries with respect to the activities of liner conferences serving their foreign trade."

The stated Code objectives and principles are to improve the efficiency of liner service; to provide a balance between the needs of carriers and consumers; to eliminate discriminatory practices by liner conferences; to establish an effective machinery for consultations among conferences, shippers and public authorities; and to make information about the proceedings of liner conferences available to all interested persons. Frankly, few could quarrel with them. Whether the substantive articles of the Liner Code achieve these objectives and principles is another matter.

Ultimately, the Geneva participants agreed to the UNCTAD Liner Code by the margin of 72 to 7 with 5 abstentions. The United States, the United Kingdom, Norway, Sweden, Denmark, Finland and Switzerland cast negative votes. Notwithstanding the impressive vote, five years later the Code is still not in effect. The reason is, as you are probably aware, because States of sufficient tonnage have not ratified it. Under its terms, the Code must be ratified by at least 24 States with a combined tonnage of 25 percent of the total world liner tonnage as of 1973 before entry into force.

Obviously, if the European Community adopted, *en bloc*, the Liner Code it would become effective. It is for this reason the National Maritime Council has been watching with considerable attention the activities of the European Community over the past few months.

LINER CODE PROVISIONS

The UNCTAD Liner Code is a lengthy complex legal instrument consisting of 54 articles. Articles 1 through 22 concern the principal matters of substance with which the Code seeks to deal, for example, conference membership, trade participation, loyalty arrangements, and shipper councils. Articles 23 through 45 relate to the establishment of machinery for the settlement of disputes between steamship companies and conferences, two or more conferences, and conferences and shipper councils or shippers. The remaining articles pertain to the administrative detail of executing and implementing the Code.

Let me now direct my remarks to a number of areas of major interest and concern to the National Maritime Council.

A. Membership

Article 1 (1) of the Liner Code establishes the right of national shipping lines to be full members of a conference which serves the foreign trade of its country so long as such lines have the ability and intention to operate regular, adequate and efficient service on a longterm basis. However, lines that are not national shipping lines can attain full conference membership only if they satisfy a number of criteria. Among the criteria is the existing and prospective volume of trade, the adequacy of vessel space to traffic, and the probable effect on the efficiency and quality of conference service. This authority of the conference to limit membership of nonnational shipping lines is, of course, in direct conflict with the Shipping Act of 1916. Under the applicable provisions of the Act, conferences serving the United States liner trades are obligated to accept each and every applicant for membership.

As you are aware, the National Maritime Council believes that the major cause of the current disruption and instability in the United States liner trades is the unlimited "dumping" of third flag vessels which leads to ship capacity far in excess of available cargoes. This overcapacity results in low levels of utilization by national carriers and consequent higher average costs and freight rate levels. This article seeks to correct crosstrader overtonnaging and the NMC endorses the need to correct this problem.

We believe solving the overtonnage problem can provide substantial cost reductions both to carriers and to shippers through more efficient utilization of high fixed cost capital assets.

B. Cargo

Of Major concern to the National Maritime Council is the Liner Code definition of those cargoes which would be subject to the cargo allocation formula. In this regard, I draw your attention to Article 2(17) which provides that the trade participation formula apply to "all goods" with the sole exception of "military equipment for national defense purposes." This exemption appears to be much more narrow than existing U.S. law which reserves for U.S.-flag carriers all "supplies bought for the Army, Navy, Air Force, or Marine Corps." It can be argued that the words "military

equipment" include only armaments and weapons of war. Likewise, this definition of cargoes would clearly require that Export-Import Bank and other government impelled or sponsored cargoes to be subject to the cargo allocation formula. Thus, this article not only conflicts with domestic law, Public Resolution 17 and Section 901(b) of the Merchant Marine Act of 1936, but would adversely affect U.S.-flag carriers because those cargoes are presently, in large measure, reserved for U.S. vessels.

C. General rate increases

The National Maritime Council is deeply disturbed by those provisions of the Liner Code governing conference freight rates. Specifically, I am referring to Article 14(9) that prescribes a 150 day prior notice period for general freight rate increases and a 10 month freeze between the previously effected increase and the next notice of such increase. In other words, the Code stipulates that 15 months must pass before a general freight rate increase can be effectuated.

Like it or not, we must face the unpleasant economic fact of life that we are living in an age of inflation. Last year the rate of inflation in the United States was approximately 9 percent. To attempt to predict what it will be this year would be for me to engage in gross speculation. However, we must confront reality, namely the costs of ocean transportation, above all bunker fuel expenditures, are rising dramatically just like the costs of goods and services in other sectors of the economy. Thus, the NMC believes that this article is unrealistic and unworkable because carriers in order to protect themselves from the prospective ravages of inflation would initially tend to raise freight rates very high. This action will, in turn, have an adverse impact on conference/shippers relations.

D. Dispute settlement

The Liner Code, as previously mentioned, contains a number of articles pertaining to the settlement of disputes between shipping lines within conferences, between conferences and shipping lines, between two or more conferences, and between conferences or a member thereof and shipper organizations or shippers. These articles are exceedingly complex and contain a number of textual ambiguities. The thrust of the Code is that there is a mandatory arbitration/conciliation having precedent over remedies available under existing national law. However, the recommendations of the arbitrators/conciliators are not binding, unless accepted by the disputants. Where this leaves one, quite frankly, is in a quandry in the U.S. trades, because under domestic law the Federal Maritime Commission has primary jurisdiction, on its own motion or upon complaint, to determine whether conference activities violate the provisions of the Shipping Act of 1916.

E. Trade participation

Article 2 of the Liner Code is probably the most important and clearly the most controversial of all those in the Code. It is in this article where the Group of 77 nations sought to bolster their merchant marines and assist their national economies through the use of trade participation arrangements, that is, cargo, sailing and berthing agreements. This article establishes the principle that liner trade between two signatory counties is to be shared on an equal basis by the national shippings lines of the respective nations with a provision that cross-traders have the "right to acquire a significant part, such as 20 percent" of the trade. This then is the widely publicized 40-40-20 cargo allocation formula.

I would like to point out, however, that there is some flexibility in this formula. For example, Article 2(8) permits the national shipping lines of a region, members of a conference, at one end of the conference trade, to redistribute among themselves by mutual agreement the shares allocated to them. Likewise, there are provisions for the disposition of shares where the national shipping lines do not carry their respective allocated shares.

This article of the Liner Code is, on its face, somewhat appealing because it would provide a basis for American steamship companies to obtain a specific portion of the cargoes moving on each trade route. However, this appeal is considerably dampened by two matters. First, there are a small number of trade routes where U.S.-flag carriers transport more than 40 percent of the cargo, and in some instances more than 50 percent. Second, the definition of cargoes, as I previously mentioned, includes government controlled and some military cargoes presently, in large measure, reserved by law to U.S.-flag ships.

F. Freight rate determinations

A final area of major concern to the National Maritime Council is the criteria for freight rate determinations. This criteria is found in Article 12(a) of the Liner Code and provides that tariff policy decisions take into account that "freight rates shall

be fixed at as low a level as is feasible from the commercial point of view and shall permit a reasonable profit for shipowners." This standard would, of course, apply should a dispute between the conference and shippers be submitted to non-binding arbitration/conciliation.

The NMC believes this standard of "reasonable profit for shipowners" is unworkable. What is a reasonable profit for one vessel operator may well be unreasonable for another operator. There are a number of reasons for this fact of which not the least is different costs for individual operators. In contrast, we note the wisdom of the Congress in drafting the Shipping Act of 1916. Section 18(b)(5) of the Act authorizes the Federal Maritime Commission to disapprove "a rate or charge * * * so unreasonably high or low as to be detrimental to the commerce of the United States." This more flexible standard has, by-in-large, worked well over the years.

CONCLUSION

My treatment of the UNCTAD Code of Liner Conduct has not been nor was it intended to be by any means exhaustive. As I earlier indicated, the document is a very complex one. I skipped completely over the articles dealing with shipper consultation for the sake of discussing those issues with which we have more familiarity. Moreover, other witnesses are better qualified to address those matters.

The National Maritime Council views the Code as a mixed bag. On the one hand, it represents an effort to solve an international problem in an international manner. On the other hand, it is a flawed document containing some good and many bad provisions. On balance, we believe that the Code would have an adverse impact on the United States-flag liner industry. Accordingly, the NMC does not like the Liner Code in its present form.

If the Review Conference contemplated by Article 52(4) is held, perhaps the Code can be appropriately amended to alleviate our concerns. Hopefully, this Subcommittee will direct the Administration to ensure that the Maritime Administration of the Department of Commerce will be in the forefront in developing a meaningful United States Government policy position which will address the objectionable provisions of the Code at such a conference. We would then have to reexamine our position with respect to that document.

Our problems with the Liner Code should not be construed in any fashion as a negative position on the issue of bilateralism. Quite to the contrary, bilateralism ranks first on the NMC legislative agenda. We firmly believe that the United States must as a part of a new Maritime Policy develop a statutory shipping policy toward any bilateral arrangements. This part of U.S. policy should properly accommodate the cargo allocation policies of other governments. Such a policy would facilitate the evolution of commercial reationalization, while protecting the interests of all U.S. carriers and shippers.

Before concluding my remarks, I believe the National Maritime Council should briefly touch on what are referred to in newspapers as the European Community reservations to the Liner Code. A key reservation apparently provides that the 40-40-20 cargo allocation formula would not be applicable to the liner trade between OECD countries. As to the liner trade between OECD countries and the Group of 77 nations, a second reservation provides that the cargo allocation formula would apply to give the developing nation up to a 40 percent share. The remaining 60 percent would be open for carriage "on the basis of commercial principles" by all OECD nations.

The stated purpose of these two reservations is to preserve competition among vessels of OECD countries. However, the second reservation, if put into effect, would place U.S.-flag carriers at a severe disadvantage. This is true because the reservations are based on the fact that all conferences outside of the U.S. trades will remain closed, that is, membership will for the most part be restricted to historical participants. However, conferences serving the United States liner trades, because of the Shipping Act of 1916, must remain open to all carriers seeking membership.

The effect of all this can be illustrated by comparing the operation of a conference A from the U.S. to Brazil with a conference B from the EC to Brazil. Conference A would be open and under the proposal all vessels of OECD countries would be permitted at any time to compete for the 60 percent of cargo not reserved for the Brazilian-flag ships. However, conference B would be a closed conference and U.S. carriers, while theoretically eligible to join, will in fact be effectively barred by the closed conference limits on conference membership authorized by the European Community reservations.

Again, thank you, Mr. Chairman for giving us the opportunity to present our views on this very important subject.

INTERNATIONAL CHAMBER OF COMMERCE, INC.,
UNITED STATES COUNCIL,
New York, N.Y., April 25, 1979.

HON. JOHN M. MURPHY,
Chairman, Committee on Merchant Marine and Fisheries, U.S. House of Representatives, Longworth House Office Building, Washington, D.C.

DEAR MR. MURPHY: We note with interest that your Subcommittee on Merchant Marine is holding hearings on April 26, 1979, on the UNCTAD Code of Conduct for Liner Conferences. The U.S. Council of the International Chamber of Commerce, at a meeting of its Executive Committee on March 7th, formally adopted a position on the shipping issues to be considered at the UNCTAD V Conference in Manila beginning May 6th, including a position on the Liner Code. A copy of that position is attached, together with a copy of a recent Wall Street Journal editorial on the same subject.

As you will see from the attached document, the U.S. Council is unalterably opposed to the mandatory cargo allocation provision of the proposed Liner Code. The cargo allocations envisioned by the Code would arbitrarily restrict access to cargo by vessels, and would unnecessarily raise transportation costs, to the detriment of international trade and economic growth.

I should add that the U.S. Council recently hosted a reception and dinner for Mr. Richard Burke, Transportation Commissioner of the European Economic Community, who commented at some length on the so-called "EEC compromise" on the Liner Code, which, among other things, would exempt intra-OECD trades from the cargo allocation provision of the Liner Code. From the standpoint of the basic objections of mandatory cargo allocation, we believe that the compromise is no less objectionable than the original Liner Code itself.

I request that a copy of this letter and attachments be included in the record of the hearings.

Respectfully,

DAVID L. GROVE,
President.

More of a Bad Thing

IT NOW SEEMS likely that member countries of the European Community will present a united front on a code of conduct for liner conferences in international shipping at the meeting in May in Manila of the United Nations Conference on Trade and Development. Britain seems to have resolved whatever differences it once may have had with other EC countries. And Italy, which had been concerned that it might lose some of its present cargo share because the proposed agreement does not apply to trade among advanced nations, appears to have been mollified.

The United States has opposed the proposal, which calls for closed conferences, cargo-sharing and a freeze on freight rates, in the past. Because of strong opposition from U.S. shipping companies and the U.S. Council of the International Chamber of Commerce, it seems likely to do so again — joined again by Switzerland and the Scandinavian countries. The question remains: Why have the EC countries been so eager to align what has to be regarded as a costly and trade limiting agreement?

The answer, at least in the minds of some U.S. operators, is that the Europeans have been hopeful that by acceding to the demands of the developing countries with regard to liner shipping they might be able to head off extension of the agreement to the bulk trades.

* * * * *

THIS MAY BE a bad bet. At the meeting of the Group of 77 in Arusha, Tanzania, last month, the developing countries endorsed extension of the key cargo-sharing provision to the tanker and bulk trades as well as to liner conferences. If the proposal is adopted, it would allocate cargoes among importing, exporting and third countries on a 40: 40: 20 percent basis.

Executives of U.S. oil companies, coal carriers and primary metal concerns have decried cargo allocation as applied to the liner trades. Its application to the bulk trades, now more or less a tramp operation, they say, would be disastrous. Because vessels would be restricted large-

ly to traffic between two countries, they would be required often to return from trips empty. This would require more tonnage, lower vessel utilization, and higher freight rates.

T. S. Wyman, maritime relations manager for Chevron, has estimated that cargo allocation could raise petroleum transport costs 40 to 60 percent. Charles G. Kiskaddon, president of Alcoa Shipping, figures that cargo allocation might push up the cost of moving bauxite from Africa to the Gulf of Mexico from the present \$5 a ton to \$9.

* * * * *

THE ANOMALY in the situation lies in the fact that the developing nations, which are seeking greater access for their goods in world markets, have embarked on a course which inevitably will restrict the movement of commerce. In the words of Philip J. Loree, chairman of the Federation of American Controlled Shipping:

"It seems incongruous to me that at the very time that negotiators from 99 nations are drafting more liberal rules for world trade in Geneva, our shipping industry is grappling with protectionist proposals for allocating on the basis of national flag."

Mr. Loree, whose organization speaks for most of the American owners of tankers and bulk cargo ships operating under Panamanian and Liberian flags, says he is not surprised that the UNCTAD secretariat would propose and the Group of 77 endorse the extension of the cargo allocation principle to bulk carriers. He lays their initiative to the "apparent concessions made by some governments and shipowners" with regard to the liner trades.

Our concern is that the UNCTAD agreement may become an accomplished fact before this country rises to the danger. The cost of imported raw materials, particularly oil, already figure importantly in the U.S. inflation rate. This country simply cannot afford to permit the unnecessary and senseless rise in transportation costs the agreement would give rise to.

United States Council of the International Chamber of Commerce Inc. 1212 Avenue of the Americas New York NY 10020

UNITED STATES COUNCIL'S

POSITION ON

INTERNATIONAL SHIPPING POLICY

ADOPTED BY THE

EXECUTIVE COMMITTEE

March 7, 1979

"Reliable, efficient and low cost ocean transportation is indispensable to world trade, ninety percent of which is carried by sea. The U.S. Council believes that this vital transportation need has been well served by the long-standing system of ocean shipping which has operated in a market economy and has been generally characterized by open access to, and open competition among, ship-owners of all nations.

"The U.S. Council further believes that international shipping should not be encumbered by measures grounded on protectionism or economic nationalism. Unilateral and multilateral government controls over ocean shipping should exist only to the extent necessary to provide a basic framework for the support of the market economy mechanisms.

"The U.S. Council is unalterably opposed to the cargo allocation provision in the Convention on a Code of Conduct for Liner Conferences, and to proposals for mandated cargo allocation in the international bulk trades. Such protectionist measures are contrary to the sound economic development of international shipping. They would distort market forces, decrease the efficiency of vessel utilization and greatly increase transportation costs, to the detriment of developed and developing countries alike. The impact, however, would be felt more keenly by developing countries in terms of their Gross National Product or balance of payments, and also in terms of a misallocation of limited resources away from the development of their internal economies.

"The U.S. Council believes that the existence of open registries has enhanced the efficient allocation of shipbuilding, ship operating and seafaring resources throughout the world, and has facilitated fleet expansion and employment opportunities. The U.S. Council further believes that open registries are vitally important to economic and national security interests of the United States. Open registries have enabled American shipowners to compete in international markets which otherwise would be inaccessible to them because of prohibitively high domestic vessel building and operating costs. The large modern open registry fleets controlled by American shipowners are under the effective control of the United States and are available for requisition, use or charter by the government in event of war or national emergency.

"In view of the important shipping issues to be discussed at the forthcoming UNCTAD V Conference in Manila in May, the U.S. Council recommends that the United States delegation to UNCTAD V assume a strong leadership role in opposing the proposals advanced by the UNCTAD Secretariat with respect to cargo allocation and open registries."

AMERICAN MARITIME ASSOCIATION,
Washington, D.C., April 30, 1979.

Hon. JOHN M. MURPHY,
Chairman, Committee on Merchant Marine and Fisheries,
Longworth House Office Building, Washington, D.C.

DEAR MR. CHAIRMAN: The American Maritime Association, as shown by the appended membership list, consists of 37 companies operating 114 American-flag merchant ships in the foreign and domestic commerce of the United States.

Of these 114 vessels, 74 are liners and regularly-scheduled services, and 40 are tankers and dry bulk carriers.

Because of the nature of their operations, the companies comprising AMA have a significant interest in the proceedings of the fifth United Nations Conference on Trade and Development (UNCTAD V) which will convene in Manila on May 7, and which reportedly will consider not only the UN Code of Conduct for Liner Conferences, originally adopted at an UNCTAD meeting in 1974, but the possible extension of concepts embodied in the Liner Code to the dry and liquid bulk ship areas.

Accordingly, we are taking this means of expressing our views on the matter, with the hope that these will be incorporated in the permanent record of the oversight hearings which the Subcommittee on Merchant conducted on April 26.

Essentially, AMA and its members strongly endorse and support the concept of bilateral shipping agreements which will assure to U.S.-flag carriers, in both the liner and bulk areas, at least 40 percent of the cargoes in the foreign trades in which they engage.

A division of cargoes—with 40 percent of the cargoes going to each of the partners in a trade, and the remaining 20 percent available for third-flag ships—is, as you know, a feature of the Liner Code.

But the Liner Code contains many other provisions, a number of which are unacceptable to AMA members.

The Code, for example, would require a closing of U.S. conferences, provided that rates could be increased only once every 15 months, fail to provide an administrative mechanism for commercial interests, count U.S. defense and preference cargoes in the shared cargoes, and subject participants to binding foreign arbitration.

Moreover, the developing countries, which have been the principal proponents of the Code, have declared unacceptable a number of alternatives which we would tend to favor, including preservation of the ability to compete on rates or services or both within each country's cargo share, and the exclusion of U.S. Government impelled cargoes from the 40 percent computation.

As you undoubtedly know, the developing nations making up the "Group of 77" were principally responsible for UNCTAD's adoption of the Liner Code of April of 1974, and have always favored it as an instrument for expanding their liner fleets; and while the Code, at this writing, remains unratified by nations having the requisite 25 percent of the world's liner tonnage, there are growing indications that Japan is likely to ratify the Code while Great Britain and the European Community countries recently have taken a new approach to the Code which appears to pave the way for their approval.

Further, as we have already indicated, the "Group of 77" at a meeting in Tanzania in February, in effect endorsed extension of the Liner Code, including its 40-40-20 cargo-sharing feature, to the dry and liquid bulk area; and there have been reports that the UNCTAD Secretariat will announce a proposal to implement this action at the Manila meeting.

Thus, whatever feelings various parties may have had in the past, regarding the desirability of cargo sharing vs. free trade and unrestricted competition, the realities of today's world of international shipping compel us to take steps which will be effective and responsive.

The negotiation of bilateral shipping arrangements, providing at least 40 percent of the cargoes in U.S. foreign trades to U.S.-flag carriers, as I stated at the outset, has our full support, and is an effort which we believe our Government should pursue with vigor.

But the Code of Conduct for Liner Conferences, flawed as it is with the provisions we have cited, is not, in our view, an acceptable vehicle for enabling U.S.-flag carriers to achieve a fair share of cargo carriage.

It is our understanding that even if a sufficient number of countries, with the requisite tonnage, were to ratify the Code it would not come into effect until six months after ratification, and would then most likely take between a year and a half and two years for the signatory nations to implement it.

In the meantime, we believe, our Government, with the assistance of the maritime industry, should work diligently toward the development of a statutory policy on bilateral agreements which would fully protect U.S. interests in both the liner

and bulk areas, while at the same time continuing to oppose ratification of the Code and to resist its implementation.

Sincerely,

ALFRED MASKIN,
Executive Director,

AMERICAN MARITIME ASSOCIATION MEMBERSHIP LIST

(JANUARY 1, 1979)

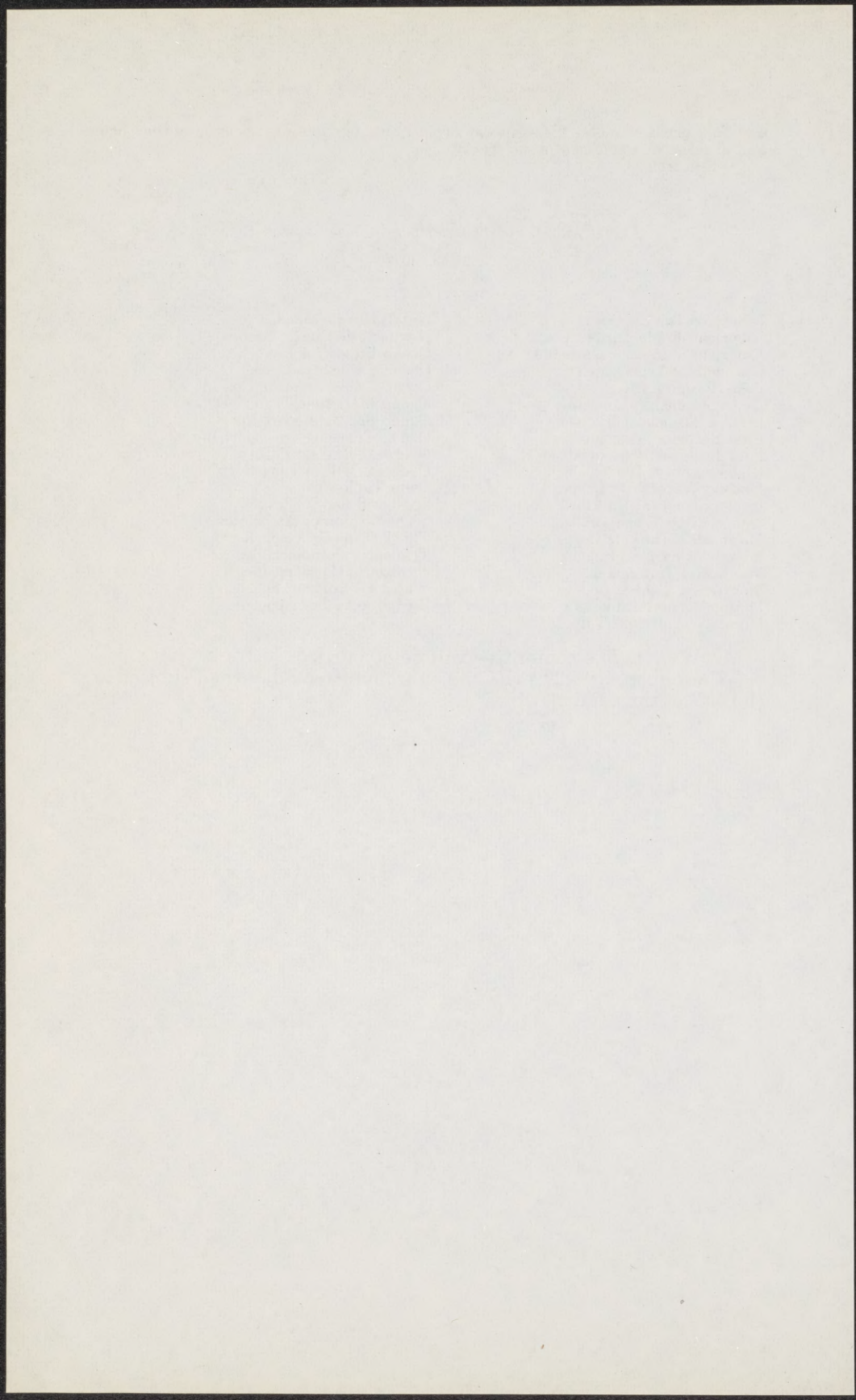
MEMBERS (37)

Albatross Tanker Corp.
American Eagle Tanker Corp.
American Foreign Steamship Corp.
Connecticut Transport Inc.
Cove Shipping Inc.
Delta Steamship Line, Inc.
Empire Transport Inc.
First Shipmor Associates
Fourth Shipmor Associates
Globe Seaways Inc.
Hudson Waterways Corp.
Intercontinental Bulk tank Corp.
James River Transport Inc.
Manhattan Tankers Corp.
Mohawk Shipping Inc.
Monticello Tanker Co.
Montpelier Tanker Co.
Mount Vernon Tanker Co.
Mount Washington Tanker Co.

Natalie Tankships Corp.
Navieras de Puerto Rico
Ocean Bulkships Inc.
Ocean Tankships Corp.
Ocean Transportation Co., Inc.
Ogden Merrimac Transport Inc.
Ogden Sea Transport Inc.
Ogden Traveler Transport Inc.
Overseas Bulk tank Corp.
Overseas Oil Carriers Corp.
Penn Tanker Co.
Sea-Land Service Inc.
Second Shipmor Associates
Third Shipmor Associates
Transport Commercial Co.
Transbulk Carriers, Inc.
Wabash Transport Inc.
Williamette Transport Inc.

Mr. WYATT. The committee will be adjourned.

[Whereupon, at 4:20 p.m., the subcommittee adjourned subject to the call of the Chair.]



REBATING PRACTICE

WEDNESDAY, MAY 16, 1979

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON MERCHANT MARINE,
COMMITTEE ON MERCHANT MARINE AND FISHERIES,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10:35 a.m., in room 1334, Longworth House Office Building, Hon. Les AuCoin (chairman of the subcommittee) presiding.

Present: Representatives AuCoin, Snyder, and Donnelly.

Staff present: Kai Midboe, minority counsel, Peter Kyros, counsel, and Ernest Corrado, counsel.

Mr. AuCoin. The subcommittee will please come to order.

We are meeting this morning to consider H.R. 3055, a bill "To amend the Shipping Act, 1916, to strengthen the provisions prohibiting rebating practices in the United States foreign trade."

In the last session of the 95th Congress, H.R. 9518, a bill to assist the Federal Maritime Commission in clearing our trades of malpractices, was overwhelmingly passed by both Houses and sent to the President too late for congressional reconsideration. The bill, on November 4, 1978, was returned with a veto message.

The President's message assigned two reasons in explanation for rejecting H.R. 9518. One was his direction to the Inter-Agency Maritime Policy Task Force that it.

* * * would provide by an early date, a set of recommendations that will address both the substance of our rebating laws as well as procedures for enforcement * * *

The other reason involved the then in progress talks between the United States and the Consultative Shipping Group (CSG) of European maritime countries and Japan. President Carter expressed hope that those meetings would establish a consultative regime which should be evaluated prior to resort to the remedies provided by H.R. 9518.

On November 8, 1978, Chairman Murphy stated that he had been informed that if the above approaches did not work in the immediate future, the White House would reevaluate the legislation early in the next session of Congress. We are well into the 96th Congress, and the problems which caused us to act as decisively as we did on H.R. 9518 are not in the least lessened. The U.S.-CSG talks were completed in November of 1978, but we see no release of those documents by CSG countries which are so essential to effective enforcement of our prohibition against covert rebating. The Inter-Agency Task Force has not, at this date, addressed the substance or the enforcement procedures of our rebating laws. The Federal Maritime Commission, as the agency responsible for anti-rebating enforcement, must necessarily discriminate against U.S.

operators since it is only against them that they can effectively insist on production of documents. And, we see that rebating is forcibly and convincingly urged as a major reason for the bankruptcy of two subsidized carriers of our diminishing U.S.-flag liner fleet.

The bill before us is necessary immediately. Comprehensive treatment of underlying causes of rebating will not be impeded by our consideration and enactment of H.R. 3055. To the contrary, the hearings we hold today will set forth, in bold relief, the several vital factors which must be included in the comprehensive regulatory scheme which this committee will have before it this session. At the same time, enactment of H.R. 3055 will allow for immediate attention to those immediate problems which plague our merchant marine and which adversely affect our posture in an increasingly competitive international trade arena.

[The bill and departmental reports follow:]

96TH CONGRESS
1ST SESSION

H. R. 3055

To amend the Shipping Act, 1916, to strengthen the provisions prohibiting rebating practices in the United States foreign trades.

IN THE HOUSE OF REPRESENTATIVES

MARCH 19, 1979

Mr. MURPHY of New York (for himself, Mr. JONES of North Carolina, Mr. BIAGGI, Mr. ANDERSON of California, Mr. BREAUX, Mr. BOWEN, Mr. HUBBARD, Mr. BONKER, Mr. AUCOIN, Mr. OBERSTAR, Mr. BONIOR of Michigan, Mr. AKAKA, Mr. MYERS of Pennsylvania, Mr. DONNELLY, Mr. MCCLOSKEY, Mr. SNYDER, and Mr. DAVIS of Michigan) introduced the following bill; which was referred to the Committee on Merchant Marine and Fisheries

A BILL

To amend the Shipping Act, 1916, to strengthen the provisions prohibiting rebating practices in the United States foreign trades.

- 1 *Be it enacted by the Senate and House of Representa-*
- 2 *tives of the United States of America in Congress assembled,*
- 3 That this Act may be cited as the "Shipping Act Amend-
- 4 ments of 1979".

I—E

1 SEC. 2. Section 16 of the Shipping Act, 1916, is
2 amended by striking "\$5,000" in the sixth paragraph, and
3 inserting, in lieu thereof, "\$25,000".

4 SEC. 3. Section 18(b) of the Shipping Act, 1916, is
5 amended by deleting subsection (6) thereof and by adding the
6 following new language in lieu thereof:

7 "(6) Whoever violates any provision of this section,
8 other than subsection (b)(3) hereof involving rebates or re-
9 funds shall be subject to a civil penalty of not more than
10 \$5,000 for each day such violation continues.

11 "(7) Whoever violates subsection (b)(3) hereof by means
12 of rebates or refunds, shall be subject to a civil penalty of not
13 more than \$25,000 for each shipment on which a rebate or
14 refund was paid and to suspension by the Commission of any
15 or all tariffs filed by or on behalf of such carrier, or suspen-
16 sion of that carrier's right to utilize any or all tariffs of con-
17 ferences of which that carrier may be a member, for a period
18 not to exceed twelve months. Any carrier whose tariffs or
19 rights of use thereof have been suspended pursuant to this
20 paragraph and who accepts cargo for carriage during the sus-
21 pension period which cargo otherwise would have been gov-
22 erned by the provisions of the suspended tariff(s) shall be sub-
23 ject to a civil penalty of not more than \$50,000 for each
24 shipment so accepted.

1 "For purposes of this subsection and section 22(c) of
2 this Act, a shipment shall mean all of that cargo, the carriage
3 of which is evidenced by a single bill of lading."

4 SEC. 4. Section 21 of the Shipping Act, 1916, is
5 amended by designating the existing two paragraphs as sub-
6 section "(a)" and by adding a new subsection (b) as follows:

7 "(b) The Commission shall require the chief executive
8 officer of every vessel operating common carrier by water in
9 foreign commerce and to the extent it deems feasible, may
10 require any shipper, consignor, consignee, forwarder, broker,
11 other carrier or other person subject to this Act, to file a
12 periodic, written certification under oath with the Commis-
13 sion attesting to—

14 "(1) a policy prohibiting the payment, solicitation,
15 or receipt of any rebate which is unlawful under the
16 provisions of this Act;

17 "(2) the fact that such policy has been promul-
18 gated recently to each owner, officer, employee, and
19 agent thereof;

20 "(3) the details of the efforts made, within the
21 company or otherwise, to prevent or correct illegal re-
22 bating; and

23 "(4) full cooperation with the Commission in its
24 investigation of illegal rebating or refunds in United

1 States foreign trades, and in its efforts to end such il-
2 legal practices.

3 The Commission may by regulation prescribe the form and
4 content of any certification required under the authority of
5 this subsection. Failure to file any such certification shall
6 result in a civil penalty of not more than \$5,000 for each day
7 such violation continues.”.

8 SEC. 5. Section 22 of the Shipping Act, 1916, is
9 amended as follows:

10 (a) designate the two existing paragraphs as “(a)”
11 and “(b)”, respectively;

12 (b) amend subsection (b), as designated by this
13 Act, by deleting therefrom the phrase “except as to
14 orders for the payment of money,”; and

15 (c) immediately after subsection (c), as designated
16 by this Act, insert the following:

17 “(d)(1) In addition to, and without limiting the authority
18 granted to the Commission by subsections (a), (b), and (c)
19 hereof, the Commission may, on its own motion, institute an
20 adjudicatory investigation into possible violations of section
21 16 (other than paragraphs First and Third) involving rebates
22 or refunds in foreign commerce or violations of section
23 18(b)(3) involving rebates or refunds, with the powers set
24 forth in subsection (d)(2) hereof in addition to those already
25 contained in sections 27, 43, and other sections of this Act.

1 “(2) Failure on the part of any common carrier, re-
2 spondent to a proceeding instituted pursuant to subsection
3 (d)(1), or any other person directly or indirectly controlling,
4 controlled by, or under common control with such respondent
5 carrier, to comply with any subpoena or any duly issued order
6 compelling an answer to interrogatories or to designated
7 questions propounded by deposition or compelling production
8 of documents in relation to any investigation conducted under
9 subsection (d)(1), shall authorize the Commission to issue an
10 order to show cause why any or all tariffs filed pursuant to
11 section 18(b) of this Act, by or on behalf of the respondent
12 carrier, or any or all rights of the respondent carrier to utilize
13 such tariffs in the case of conference tariffs, should not be
14 suspended until that carrier or any person directly or indi-
15 rectly controlling, controlled by, or under common control
16 with such carrier, has fully responded to the pertinent deposi-
17 tion, interrogatory, production request or motion, or subpoena,
18 and after such proceeding, to so suspend those tariffs or the
19 respondent carrier’s rights to utilize such tariffs. Any carrier
20 whose tariff(s) or rights of use thereof have been suspended
21 pursuant to this subparagraph and who accepts cargo for car-
22 riage during the suspension period which cargo otherwise
23 would have been governed by the provisions of the suspended
24 tariff(s) shall be subject to a civil penalty of not more than
25 \$50,000 for each shipment so accepted.

1 “(3) If, in defense of its failure to comply with a subpoena
2 or discovery order issued under subsection (d)(2), a common
3 carrier alleges documents or information are located in a for-
4 eign country and cannot be produced because of the laws of
5 that country, the Commission shall immediately notify the
6 Secretary of State of such failure to comply and of the allega-
7 tion relating to foreign laws. Upon receiving such notifica-
8 tion, the Secretary of State shall promptly consult with the
9 government of the nation within which the documents or in-
10 formation are alleged to be located for the purpose of assist-
11 ing the Commission in obtaining the documents or informa-
12 tion sought.

13 “(4) Before any tariff suspension ordered pursuant to
14 subsection (d)(2), or section 18(b)(7) of this Act, becomes ef-
15 fective, it shall be immediately submitted to the President
16 who may, within ten days after receiving it, disapprove any
17 such order if he finds that disapproval is required for reasons
18 of the national defense or the foreign policy of the United
19 States.”.

20 SEC. 6. Section 23 of the Shipping Act, 1916, is
21 amended by deleting therefrom the language “, other than for
22 the payment of money,”.

23 SEC. 7. Section 27 of the Shipping Act, 1916, is
24 amended by deleting from subsection (b) thereof the phrase
25 “other than for the payment of money”.

1 SEC. 8. Section 29 of the Shipping Act, 1916, is
2 amended by deleting therefrom the phrase "other than an
3 order for the payment of money,".

4 SEC. 9. Section 30 of the Shipping Act, 1916, is
5 amended in the initial and final paragraphs thereof by delet-
6 ing the phrase "for the payment of money" and by inserting,
7 in lieu thereof, the phrase "for the payment of reparation".

8 SEC. 10. Section 32 of the Shipping Act, 1916, is
9 amended by inserting at the end thereof the following new
10 subsections:

11 "(d) No penalty shall be imposed on any person for con-
12 spiracy after August 29, 1972: (1) to rebate or refund in
13 violation of the initial paragraph or paragraph Second of sec-
14 tion 16, or under section 18(b)(3) of this Act; or (2) to defraud
15 the Commission by concealment of such rebates or refunds in
16 any manner.

17 "(e) Notwithstanding any other provision of law, the
18 Commission shall have authority to assess or compromise all
19 civil penalties provided in this Act: *Provided, however, That,*
20 in order to assess such penalties a formal proceeding under
21 section 22 of this Act shall be commenced within five years
22 from the date when the violation occurred."

23 SEC. 11. The provisions of this Act, including the
24 amendments made by this Act, shall become effective imme-
25 diately upon its date of enactment.



FEDERAL MARITIME COMMISSION,
Washington, D.C., April 3, 1979.

Hon. JOHN M. MURPHY,
Chairman, Committee on Merchant Marine and Fisheries,
U.S. House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: This is to acknowledge your March 22, 1979 request for the comments of the Federal Maritime Commission on H.R. 3055, a bill which would amend the Shipping Act, 1916, to strengthen the provisions prohibiting rebating practices in our foreign trades. We are currently preparing specific comments on this legislation and will forward them to you promptly upon completion.

As we testified before your Committee on March 6, 1979, our enforcement program and the various obstacles we face in achieving compliance with our anti-rebating efforts have not changed substantially since we testified on behalf of H.R. 9518 in the 95th Congress. It is still not possible to enforce our anti-rebating laws against foreign-flag carriers in the same manner as we can enforce those laws against U.S.-flag carriers.

Since H.R. 3055 is virtually identical to H.R. 9518, providing a means for equal enforcement of those laws, you may count on our continued strong support for this legislation.

Sincerely,

RICHARD J. DASCHBACH, *Chairman.*

SECURITIES AND EXCHANGE COMMISSION,
Washington, D.C., April 30, 1979.

Re H.R. 3055—"Shipping Act Amendments of 1979."

Hon. JOHN M. MURPHY,
Chairman, Committee on Merchant Marine and Fisheries,
U.S. House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: In the absence of Chairman Williams, I am pleased to respond to your request for the Commission's comments on H.R. 3055, the "Shipping Act Amendments of 1979" (the "Bill"). The Bill is intended to strengthen provisions of the Shipping Act of 1916 which prohibit rebating practices in the United States and foreign trades. The effect of the bill would be to deter rebates by increasing the enforcement powers of the Federal Maritime Commission over both United States and foreign merchant marine carriers.

As you may recall, on October 14, 1977, Harvey L. Pitt, then General Counsel of the Commission, delivered a statement to the Subcommittee on Merchant Marine on H.R. 9518, a similar bill to amend the Shipping Act of 1916. As Mr. Pitt stated at that time, the Commission has no experience with, or responsibility for administering the Shipping Act of 1916. However, in the context of the issues pending before the Subcommittee, the Commission was interested in, and supported legislation that would compel or encourage the disclosure of questionable corporate activity. The Commission was, at that time, concerned about the provisions of Section 3 of H.R. 9518 that would have granted foreign and domestic shipping companies one year of blanket immunity from criminal prosecution under any provision of federal law. We were concerned about the possible impact of Section 3 on the effectiveness of the Commission's ongoing enforcement activities under the federal securities laws.

The Commission is gratified that H.R. 3055 does not contain a provision which would grant foreign and domestic shipping companies the blanket criminal immunity provided by H.R. 9518. Indeed, Section 4 of the Bill, which requires certifications by shipping officials to the Maritime Commission concerning improper rebating practices, would further the purposes which led to the enactment of the Foreign Corrupt Practices Act of 1977. That Act added new Sections 30A and 13(b)(2) to the Securities Exchange Act of 1934. Section 13(b)(2) requires certain publicly-held companies to make and keep accurate books, records, and accounts, and to maintain systems of internal accounting controls. Section 30A prohibits bribery by certain publicly-held companies of foreign officials, political parties and candidates for foreign political office.

In this connection, we note that Section 10 of the Bill would remove criminal penalties for conspiracy to violate the anti-rebating provisions of the Shipping Act or to defraud the Maritime Commission by concealment of rebates. The rationale for this apparently is that the underlying violations carry only civil penalties. It is our understanding that the immunity which would be granted under this Section is limited to violations of the Shipping Act and would not extend to violations of the federal securities laws or of other federal laws. We believe this limitation should be made clear in Section 10 or the legislative history. Subject to this understanding,

and while we take no position on whether the Bill would deal appropriately with the economic problems facing this country's shipping industry, we support the adoption of the Bill, insofar as it would improve the accuracy of corporate records and of financial disclosure based on those records.

The views set forth in this letter are those of the Commission and do not necessarily reflect the views of the Administration. Copies of this correspondence have been forwarded to the Office of Management and Budget. We will, of course, inform you of any advice received from OMB concerning the relationship of our views to the programs of the Administration.

If you require any further information, please let us know.

Sincerely yours,

PHILIP A. LOOMIS, JR., *Commissioner*.

STATEMENT OF HARVEY L. PITT, GENERAL COUNSEL, SECURITIES AND EXCHANGE COMMISSION

Mr. Chairman and members of the subcommittee, I appreciate the opportunity to appear before the Subcommittee today to offer the Commission's views on H.R. 9518, a bill that would amend the Shipping Act of 1916. The bill, which was introduced by the Chairman of the Committee on Merchant Marine and Fisheries, is intended to remedy the serious problems of rebating and other malpractices facing this country's shipping industry. In essence, the bill would amend the Shipping Act by providing for improved hearing, investigatory and enforcement procedures by the Federal Maritime Commission to deal with the improper and illegal payment of rebates, and other malpractices in the United States ocean trades. As the Subcommittee is aware, the Shipping Act of 1916, among other things, already prohibits any carrier subject to the jurisdiction of the Federal Maritime Commission from offering any direct or indirect monetary inducement to attract cargo that departs from the rates contained in the published tariff. These amendments to the Shipping Act of 1916, which the Subcommittee is considering today, are deemed necessary, however, because:

1. the Federal Maritime Commission's efforts have been severely hampered by the lack of a concerted federal effort and the inadequacies of agency resources;
2. existing laws are inadequate to regulate effectively the foreign flag carriers that transport the vast majority of the export-import commerce in this country's ocean lines trades; and
3. usually the enforcement action that has been taken has been confined only to those limited malpractices falling within the purview of existing law that have been engaged in by American flag carriers, creating competitive disparities between American and foreign shippers.

THE PROVISIONS OF H.R. 9518

To remedy these shortcomings in existing law, the bill before the Subcommittee would provide a three-year period within which the federal government could reach a permanent solution for the rebating and other malpractices in the foreign ocean trades. Thus, among other things, H.R. 9518 provides that any shipper or other person subject to the Federal Maritime Commission's jurisdiction must respond fully to an order directing a hearing and investigation into rebating or other malpractice allegations. A carrier's failure to respond fully would carry significant penalties with it, including the possible denial of entry to any United States port.

Similarly, in order to encourage full disclosure of rebative practices and to stimulate Federal Maritime Commission recommendations for corrective action, H.R. 9518 also would grant the effective equivalent of a one-year "amnesty" from criminal prosecution under any federal law to any shipper that voluntarily discloses to the Federal Maritime Commission any practices violative of the Shipping Act of 1916. This "amnesty" provision would apply, however, to rebative acts committed prior to the enactment of H.R. 9518, and only if the disclosure is made prior to the time the person making disclosure had actual notice that it was the subject of an investigation relating to that violation by any agency of the federal government. The bill would also explicitly preclude the abrogation or rescission of civil penalties provided for in any agreement already signed with the United States on the effective date of the bill under the 1972 amendments to the Shipping Act of 1916.

BRIEF STATEMENT OF THE VIEWS OF THE SECURITIES AND EXCHANGE COMMISSION

The Securities and Exchange Commission, of course, has no experience with, or responsibility for administering, the Shipping Act of 1916. In the context of the issues pending before this Subcommittee, our Commission's expertise stems from its responsibilities under the federal securities laws to ensure appropriate disclosures by publicly-held corporations, including those companies engaged in the shipping industry. In administering the disclosure provisions of the federal securities laws, as I will shortly discuss in more detail, the Commission has been aggressive in requiring publicly-owned companies to disclose their questionable or illegal payments. For that reason, the Commission favors legislation, such as H.R. 9518, that would compel or encourage the disclosure of questionable corporate activity. But, despite the salutary goals that may have prompted the provisions of Section 3 of H.R. 9518 that would grant foreign and domestic shipping companies one-year of blanket immunity from criminal prosecution under any provision of federal law, the Commission has serious concerns about the possible impact of that provision on the effectiveness of the Commission's ongoing enforcement activities under the federal securities laws. Accordingly, while the Commission generally endorses the intent of H.R. 9518, we strongly recommend the modification or deletion of Section 3 of that bill.

THE COMMISSION'S DISCLOSURE EXPERIENCES

As the Subcommittee is aware, the disclosure provisions of the federal securities laws are designed to provide the shareholders of publicly-held companies, and the investing public, with truthful and adequate financial and other material information which may be used as a basis for investing in the securities of such companies, or as a basis for corporate shareholders to exercise their voting rights in selecting corporate management. Such information also can be used by the business community and the public to judge the financial condition of such companies for other purposes. The Commission also has authority to enforce statutory provisions and adopt rules prohibiting fraudulent and deceptive practices in connection with securities transactions. In this context, the Commission has, for some time, been very much concerned with the problem of questionable and illegal corporate payments and practices.

In a report submitted to the Senate Banking, Housing and Urban Affairs Committee, on May 12, 1976, the Commission reported that, as of that date, and as a direct consequence of the Commission's vigorous enforcement of the disclosure provisions of the federal securities laws, 95 companies had disclosed questionable or illegal corporate payments, the most common of which involved payments to foreign officials. Twenty-seven companies disclosed activities that involved "foreign matters," and many of the matters disclosed appear to have constituted some form of commercial bribery. Particularly disturbing was the high number of instances in which some members of corporate management were involved in, or had knowledge of, the activities reported, including the falsification, or inadequate maintenance, of corporate records in an attempt to conceal questionable or illegal conduct.

Under the federal securities laws, questionable or illegal payments that are significant in amount or, even if not significant in amount, that relate to a significant amount of business, are material to investors or shareholders, and must be disclosed. And, where these payments involve corporate officers acting without the knowledge of the board of directors, suggesting the improper exercise of corporate authority, such occurrences are relevant to the quality of corporate management, and should be disclosed to shareholders. Even where payments of this nature are expressly approved by a company's board of directors, the resulting impact on the corporation may far exceed the immediate significance of the payment itself, or the business dependent upon it, as, for example, where such payments are effected off the books and records of the company, outside the normal channels of corporate accountability. The existence of false books and records or corporate slush funds, or other practices enabling certain directors or officers to utilize corporate funds without the normal checks of the corporate accountability system, is a matter requiring disclosure under the federal securities laws.

Cognizant of the desirability of broad disclosures of this kind of corporate conduct, the Commission has encouraged publicly-held companies to make disclosures voluntarily, utilizing procedures traditionally open to any company facing a novel disclosure question. As a result, more than 400 companies have come to the Commission's staff, discussed the situation, and made appropriate disclosures in Commission filings. A significant number of these companies have conducted internal investigations. Such voluntary disclosure, however, does not immunize a company against Commission enforcement action, although, in many cases, it may lessen the need for such proceedings. This voluntary procedure supplemented the Commission's enforce-

ment resources and, with companies participating in the program permitting our staff access to their records, it has proven quite effective.

In the process, the Commission also found it appropriate to institute over 30 injunctive actions, which not only resulted in the imposition of injunctions against the offending companies and many of their officers and directors, but also resulted in the imposition of ancillary remedies, including, among other things, the selection of new, and independent, boards of directors, the imposition of new corporate procedures and, in many cases, the appointment of special counsel to investigate the extent of prior improper corporate practices.

Both the Commission's voluntary disclosure program and the Commission's enforcement activities have involved companies engaged in ocean shipping activities. For example, the Commission recently brought a civil injunctive action against United States Lines, Inc., alleging various violations of the antifraud provisions of the securities laws in connection with the making of substantial improper and illegal payments totalling in excess of two and one half million dollars, most of which involved illegal rebates to shippers, together with fictitious entries in corporate books and the maintenance of certain funds off the company's books.¹ In another case, the Commission filed suit against Gamble-Skogmo, Inc. and certain other named defendants in connection with the illegal receipt of rebate payments made to one of its subsidiaries, Gamble Imports Corporation.² Both of these cases resulted in the imposition of civil injunctions prohibiting future violations of the federal securities laws. Similarly, several companies involved in shipping activities have voluntarily disclosed these kinds of activities.

The Commission's involvement with disclosures by ocean carriers and shippers of improper or illegal payments began in May, 1976, with the disclosure by R. J. Reynolds Industries that its ocean carrier subsidiary, Sea Land Services, had engaged in practices, including the payment of rebates, in violation of federal law. The company announced that it was commencing an investigation to uncover the details of these practices. The Commission's staff, at the same time, began informally to investigate both carriers and shippers.

In September of that year, R. J. Reynolds announced that its investigation was completed; it concluded that more than 19 million dollars in "possibly illegal" ocean rebates had been paid by Sea Land. No immunity from civil or criminal prosecution was promised to Reynolds, nor did the company seek such immunity.

Even before the release of Reynolds' disclosure in September, 1976, the Commission's staff commenced a series of inquiries of various publicly-held shippers and carriers, initially utilizing the information contained in Sea Land records, to determine the extent of rebates received from carriers, both domestic and foreign, and in particular the manner in which shippers had treated the receipt of such rebates on their books and records. Many shippers responded to the Commission's inquiries by coming forward with public disclosures. The process of investigation, both formal and informal, and the process of public disclosure, continues, and Commission enforcement actions involving shippers as well as carriers remain a distinct possibility.

As the foregoing discussion evidences, however, promises of immunity have not been necessary in order to promote public disclosure in this area, and the Commission's public files already contain a broad spectrum of information about the kinds of practices of this nature that have been employed in the shipping industry.

THE COMMISSION'S CONCERNS WITH H.R. 9518

In this context, the Commission is concerned about the effect Section 3 might have on its administration of the federal securities laws. Section 3 of the bill, as presently drafted, would not permit the criminal prosecution of individuals for violations of United States laws, (including, by implication, the federal securities laws), where disclosure of the illegal payment activity was made to the Maritime Commission pursuant to the provisions of the bill and prior to the time that those individuals had actual notice that they were the subject of an investigation relating to the act disclosed.

Where potential violations of other United States laws are discovered in the course of Commission investigations, we refer the matter to the appropriate law enforcement agency for action. Section 3 of the bill would effectively prevent the pursuit of criminal investigations by other agencies resulting from information discovered by our staff, by removing the possibility of eventual prosecution in the

¹ *Securities and Exchange Commission v. United States Lines, Inc.*, Civil Action No. 77-2746 (United States District Court for the Southern District of New York).

² *Securities and Exchange Commission v. Gamble-Skogmo, Inc., et al*, Civil Action File No. 77 C 3426 (United States District Court for the Northern District of Illinois, Eastern Division).

area covered by the bill, including prosecutions by the Justice Department for violations of the federal securities laws.

While we recognize the concerns that prompted Section 3 of H.R. 9518, as drafted, this provision could effectively deny public investors and shareholders material corporate information. In this vein, it is important to note that claims of competitive disadvantage—the factor apparently motivating Section 3 of H.R. 9518—have been voiced by many American companies engaged in a variety of occupations, and not just by carriers engaged in ocean shipping. But, improper rebates, kickbacks and bribes are unlawful, whether or not foreign companies also employ such tactics. The answer to the competitive problems raised is not, in our view, to reduce all companies to the lowest common denominator, but rather, is to utilize the legislative process, as H.R. 9518 otherwise seeks to do, to assert the full range of American jurisdiction to alleviate any competitive advantages foreign companies might otherwise obtain as a result of lax foreign legal standards. And, while this section of the bill purports to grant immunity only from criminal prosecutions, it is inherently ambiguous concerning its effect on civil injunctive actions. On balance, we do not believe that the important purposes of the bill would be lost if this immunity provision were deleted.

H.R. 9518 might also have the effect of implying that once disclosure is made to the Federal Maritime Commission under this bill, a corporation is relieved of its obligation to disclose the same information in public filings with the Commission. A case-by-case approach, preserving prosecutorial discretion within the overall objectives of the bill, would achieve the desired result without the adverse consequences resulting from immunity. This same result might also be achieved by providing for increased penalties after the first year rather than the present grace period.

In any event, even if some immunity provision is retained, the present one would make criminal prosecution difficult, even where warranted by H.R. 9518. Thus, the provision that actual notice of investigation have been received by would-be defendants would create serious evidentiary problems, likely vitiating the capacity of the government to prosecute criminally even in appropriate cases. Moreover, the "requirement" that actual notice be given to preclude immunity might prematurely prejudice the government's ultimate prosecution of a criminal case, including a prosecution against persons not entitled to rely on Section 3 of H.R. 9518. Finally, the express preservation of civil liability provided by Section 3(5) of the bill, for Maritime Commission agreements, creates an ambiguity concerning the Commission's capacity to continue to pursue violations of the federal securities laws by civil injunctive actions. At a minimum, therefore, we strongly urge that the bill make clear that the Commission may continue its important activities in the civil forum.

CONCLUSION

In summary, the Commission has been able to obtain adequate disclosure for investors and enforce the statutory provisions and rules prohibiting fraudulent or deceptive practices in connection with securities transactions in this important area. While we endorse the general thrust of H.R. 9518, we believe that the blanket criminal immunity that would be granted in this bill could adversely affect the Commission's ability to carry out its Congressional mandate.

* * * * *

I appreciate the opportunity to participate in these hearings and, of course, I shall be happy to respond to any questions the members of the Subcommittee might have.

Mr. AuCOIN. Our first witness today is Richard J. Daschbach, Chairman of the Federal Maritime Commission. Mr. Daschbach, welcome to the committee.

STATEMENT OF HON. RICHARD J. DASCHBACH, CHAIRMAN, FEDERAL MARITIME COMMISSION, ACCOMPANIED BY MS. MICKEY AND ARTHUR PANKOPF

Mr. DASCHBACH. Good morning, Mr. Chairman, I appreciate this opportunity to appear here today to present the Federal Maritime Commission's views on H.R. 3055, a bill which is directed at solving the problem of rebating in our foreign commerce.

H.R. 3055 is very similar to H.R. 9518, a bill which passed both Houses of the 95th Congress by an overwhelming margin. As you are well aware, the President pocket vetoed the legislation. In his

memorandum of disapproval, President Carter acknowledged the need for "the elimination of any possible disparity in enforcement of our antirebating laws against U.S.-flag carriers as opposed to foreign-flag operators."

There is, in fact, disparity in the enforcement of antirebating laws against United States as opposed to foreign-flag carriers. It is not possible to eliminate this disparity without legislation such as H.R. 3055. The basic problem is that we cannot compel the production of documents of foreign carriers located overseas as easily as we can compel the production of documents of U.S. carriers. We cannot achieve the same extent of disclosure from foreign-flag carriers as from U.S.-flag operators. We cannot overcome foreign blocking statutes as easily as we can overcome a carrier's attempts to avoid discovery or production of documents under our own laws.

Fully aware of this disparity and notwithstanding the accord adopted in November 1978, by the United States and the CSG nations, foreign carriers have remained extremely reluctant to cooperate with the Commission in its rebating investigations. While we have now reached settlements with 10 foreign-flag carriers, none of these carriers have made disclosures to the Commission of the type and magnitude that we can demand from a U.S.-flag carrier. The text of the CSG record itself envisages continued discrepancies in treatment. The provisions of the accord pertain only to conference members, not independent carriers. The scope of the offenses covered by the text does not include many practices prohibited by U.S. law.

The accord covers only rebating against conference tariffs and actions which border on fraud, such as intentional misweighing, miscubing, or misdescribing freight. Perhaps most significantly, it must be remembered that the CSG accord is based almost solely on good faith, and does not have the force of law. Furthermore, the accord merely represents an undertaking by the CSG governments to discuss possible cooperation in investigations of practices occurring "within the jurisdiction of the United States."

In the area of enforcement, our statutory mandate to maintain evenhanded regulation in our foreign commerce remains an ideal, not a reality, and in my judgment, diplomatic assurances are no substitute for the statutory authority we need to eliminate disparity in our enforcement activities.

There are four major aspects of H.R. 3055 which together would facilitate evenhanded enforcement of our laws against rebating.

First, the amendment to section 22 of the Shipping Act, 1916 (46 U.S.C. 821) contained in section 5 of the bill would give the Commission authority to suspend any or all tariffs of a carrier which failed to comply with a subpoena or discovery order in a rebating investigation. This is the cornerstone of the bill since it provides the Commission with a direct and immediate means of requiring the cooperation of a foreign carrier.

Second, the bill substantially increases the monetary penalties and adds a new penalty of tariff suspension for rebating violations. The Commission believes that these penalties will be far more effective as a deterrent to rebating than the rather nominal penalties now in the Shipping Act, 1916.

Third, section 4 of H.R. 3055 requires a certification by vessel operating common carriers and permits the Commission to require a certification by other persons subject to the Shipping Act, 1916, that the carrier or other person is implementing a corporate policy against rebating and will cooperate with the Commission in any rebating investigation.

Fourth, the Commission is empowered by section 10 of the bill to assess all civil penalties under the Shipping Act, and the possibility of imposing criminal penalties for criminal conspiracy to rebate is removed. This should enhance the Commission's ability to compromise and collect appropriate civil penalties since it will eliminate the possibility of the action being tried in a court unfamiliar with rebating problems in our foreign trades. It should also increase with the willingness of carriers and shippers to cooperate with the Commission by removing the cloud of a criminal conspiracy action being brought by the Department of Justice after the carrier has fully cooperated with the FMC.

With respect to the level of penalties for rebating, there are three principal defects in the current law.

First, the amount of \$1,000 prescribed in section 18(b)(6) is extremely low by 1979 standards. This amount was established in 1961 when the value of \$1,000 was far greater.

Second, the penalty is applicable "for each day such violation continues." Since rebating activity is generally characterized by discrete acts and not by ongoing, continuous activity, this standard is difficult to apply to rebating.

Third, the attempted application of section 16, initial paragraph, to rebating is frequently met with the argument that the rebating activity was not implemented through "false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means," which is required for a violation of that section. While the Commission normally prevails in applying section 16 and its higher and more clearly defined penalties in its settlement negotiations despite this argument, it is a reason that calls for adjustment of the penalties for rebating under section 18(b) to the same basis for calculation as those set forth in section 16.

H.R. 3055 does not break any new ground in terms of national policy. The United States has always had a policy prohibiting secret rebating in ocean shipping and in other modes of common carrier transportation. There is also precedent for each of the four principal features of this bill.

The Securities and Exchange Commission, for example, relies heavily upon certification required on financial statements and is authorized by title XIV, section 77(h) of the U.S. Code, to reject a securities registration statement upon failure of a foreign or domestic corporation to furnish information relevant to the statement.

The Commission itself already has this power under Public Law 89-777, relating to financial responsibility of passenger vessels for death or injury to passengers and for nonperformance of voyages.

Similarly, and contrary to many previous allegations, this legislation is not intended to prevent a business practice accepted in other nations. Secret rebating may be difficult to police overseas,

but it is not condoned publicly by any of our major trading partners.

In the meeting which took place between representatives of the United States and the CSG Governments in the fall of 1978, the CSG countries agreed to define secret rebating as a "malpractice" which is not to be condoned. Earlier, the Japanese Ministry of Transport had directed the six Japanese liner carriers to cease all secret rebating activity. In discussions with representatives of foreign carriers in recent months, we have been informed that virtually all foreign-to-foreign closed conferences have internal rules prohibiting secret rebates, and neutral body self-policing organizations for enforcing those rules.

There are those who would set H.R. 3055 and the CSG accord in apposition. Rather than viewing them as mutually exclusive, we believe that the effectiveness of the CSG agreed record as a framework for cooperation between the United States and its trading partners would be enhanced by the enactment of this legislation. Once the Commission is given an effective sanction for failure to produce documents located abroad, the type of cooperation envisioned by the CSG accord could greatly facilitate the production of such documents without undue friction with foreign governments. This will assist the Commission in regulating our foreign commerce fairly and equitably.

The prohibitions against rebating contained in the Shipping Act, 1916, and in other transportation regulation laws are not designed to and do not prevent legitimate price competition. To the contrary, they are intended to insure legitimate competition by preventing secret discounts to favored shippers or forwarders. These secret discounts not only discriminate among shippers, but place honest carriers at a severe disadvantage. The entire philosophy of common carriage is founded on the principle that a common carrier's service will be offered at the same price to all similarly situated customers. Secret, discriminatory discounts in the form of rebates tend to destroy that principle. They permit large powerful shippers and forwarders to obtain lower rates than their smaller competitors solely on the basis of economic muscle and a willingness to cheat the system.

The Commission enthusiastically supports enactment of H.R. 3055.

Mr. AuCOIN. Thank you, Mr. Daschbach.

Tell me, how effective has consultation been as a means of obtaining that information from foreign carriers which would place them on a par with U.S. operators?

Mr. DASCHBACH. With respect to specific requests for the documents of foreign flag carriers, it has been totally ineffective. We have not received documents from any foreign carriers based on the CSG accord.

Mr. AuCOIN. Ever?

Mr. DASCHBACH. Never.

Mr. AuCOIN. I would deem that not very effective, then.

Mr. DASCHBACH. No, sir.

Mr. AuCOIN. Does your inability to obtain the documents from foreign operators, coupled with the ease in which you can require U.S. operators, then place the U.S. operators at what you call an

extreme disadvantage, a modest disadvantage, what kind of disadvantage?

Mr. DASCHBACH. Well, I suppose that U.S. carriers would be the more appropriate people to quantify the extent of this disadvantage, but clearly they have a heavier burden to bear. They have the awareness that the agency policing their activity can and will be more effective with respect to their conduct than with respect to their foreign-flag competitors.

Mr. AuCOIN. Some have said that the provisions of H.R.3055 operate to the disadvantage of U.S. foreign trade.

Do you agree? If so, why? And if you don't agree, also why?

Mr. DASCHBACH. I don't agree with it. I don't see how it injures U.S. foreign trade. I would be curious to know the rationale used.

Mr. AuCOIN. Possibly suspending tariffs?

Mr. DASCHBACH. Yes, the allegation has been made that if we suspended tariffs of carriers operating in our trade, retaliatory steps might be taken against U.S. flag carriers.

Mr. AuCOIN. How do you size up those arguments?

Mr. DASCHBACH. There are no tariff filing requirements anywhere else so I am not sure what retaliation might occur.

Also, U.S. commerce is the largest single commerce in the world, and I would imagine that someone would be willing to step into that market.

I do not think the argument has any merit to it.

Mr. AuCOIN. I want to recognize counsel to ask a couple of questions as well.

Mr. KYROS. Mr. Daschbach, just a few questions.

First, you pointed out the disparity that exists as a result of the unequal treatment against U.S. carriers as compared to foreign carriers when it comes to rebating.

Do you have before you the Presidential memorandum of disapproval where the President stated, in his pocket veto of H.R. 9518 on November 4, 1978, that he shares the concern of all of the agencies that any disparity that exists must be eliminated?

In your judgment as Chairman of the FMC I take it you believe that the disparity has not yet been eliminated?

Mr. DASCHBACH. That is correct.

Mr. KYROS. It states in the second paragraph, the memorandum:

I am also directing the administration's maritime policy task force to provide, by an early date, a set of recommendations that will address both the substance of our rebating laws as well as procedures for enforcement, taking into account the inherently international nature of shipping.

Mr. DASCHBACH. That is correctly read.

Mr. KYROS. Has there been any such set of recommendations from the Inter-Agency Maritime Policy Task Force?

Mr. DASCHBACH. I am not aware of any recommendations that have been made by the task force. I hear stories about what is or is not circulating in the Executive Office Building. But I have not seen any of those recommendations, and, frankly, none of the statements about what does or does not exist, as far as I know, included anything with respect to rebating.

Mr. KYROS. There was one statement that was floated around in January, as I understand, for comments, which indicated that

American carriers might be able to use the fact that other carriers were rebating as a mitigation of any penalties they might incur.

Is that correct?

Mr. DASCHBACH. I don't recall the possibility that they might use foreign carrier rebating as a mitigation or defensive mechanism, and as you say, the idea was "floating around." I neither believe nor hope that got much altitude.

Mr. KYROS. Even in the settlement you make with foreign carriers, were you able to obtain such documents as a result of settlement that would lead to the determination of what other shippers and consignees have been involved in rebating so you could settle other cases?

Mr. DASCHBACH. No.

Mr. KYROS. Were you more successful in obtaining more documents from U.S. carriers than foreign carriers?

Mr. DASCHBACH. Yes.

Mr. KYROS. As a matter of fact, the Justice Department has pursued and indicted and obtained convictions against three U.S. carriers for rebating based on the conspiracy statute, section 371 of title 18 of the United States Code.

Mr. DASCHBACH. Yes.

Mr. KYROS. How many foreign shipping companies have been prosecuted?

Mr. DASCHBACH. None to my knowledge.

Mr. KYROS. Just as a general impression, it would seem to anyone that this is an unequal application of the laws.

Mr. DASCHBACH. Certainly does.

Mr. KYROS. And one of the goals, I understand, of your Commission is to insure that everyone on the high seas is treated equally, as far as regulation is concerned.

Mr. DASCHBACH. Correct.

Mr. KYROS. Thank you, Mr Chairman.

Mr. AUCOIN. Thank you, counsel.

Mr. Snyder?

Mr. SNYDER. Thank you.

Mr. Daschbach, you made some references to the fact that you were not privvy to what was going on with the Inter-Agency task force, but you had heard considerable rumors and grapevine stuff.

Have you heard the last one, that there will be no report?

Mr. DASCHBACH. No, I hadn't. Yours is the first revelation of that to me.

I might say, sir, that the Federal Maritime Commission is an independent regulatory agency. In my judgment, we have the authority to respond and to recommend action to the Congress independent of the normal mechanism within the Executive Branch.

Mr. SNYDER. I understand.

In the veto message which Mr. Kyros referred to, the President indicated that the United States was currently engaged in important discussions with several European countries and Japan to reach agreements involving a number of shipping problems, including rebates, and went on to say that rather than taking immediate, unilateral action, "I have directed the Secretary of State in cooperation with the Federal Maritime Commission and other agencies to pursue this vigorously and report to me on their progress."

What role did the FMC play in these negotiations?

Mr. DASCHBACH. The Vice Chairman of the Commission and I participated in the discussions which took place in London in November of last year, and an agreed record—a record was reached and agreed to by all of the nations.

With respect to rebating, an agreement was reached that before the Commission would take any action against a foreign-flag carrier, we would notify the Department of State 30 days in advance of taking such action as a diplomatic courtesy, that the foreign government might be able to achieve some accommodation between its corporate citizen——

Mr. SNYDER. When was this meeting?

Mr. DASCHBACH. November of 1978.

Mr. SNYDER. Go ahead.

Mr. DASCHBACH. With respect to rebating, an agreement was reached that we would notify Department of State, which in turn would notify the relevant government with respect to carriers against whom we were in a position to take some action.

We have put a program into effect to accommodate that, and in nine instances, I believe, we have communicated to the Department of State, advised them that we were having difficulties with respect to foreign carriers and sought their cooperation.

Mr. SNYDER. Did you make the report to the President?

Mr. DASCHBACH. No, sir. I think that the message States that the Secretary of State would make the report to the President.

Mr. SNYDER. Do you know if they have made a report to the President?

Mr. DASCHBACH. No, I don't.

Mr. SNYDER. Did you assist in the preparation of any report to the President?

Mr. DASCHBACH. I don't recall that we did assist nor that we were asked to. I am not sure whether this may mean to report back to the President progress on the talks which took place in London.

I would imagine that the Department made some communication to the White House when they returned.

Mr. SNYDER. Do you think they called up and said, "Hey, Jimmy, it's all over?"

Mr. DASCHBACH. I'm not sure they were able to reach him that easily.

If they said it that way, that would be an inaccurate report.

Mr. SNYDER. Since he said in the message that they were going to report: "I have directed the Secretary of State, in cooperation with the Federal Maritime Commission, to pursue these talks and report to me." I take that to mean a joint report, but you can reach it just as you did, I confess.

But wouldn't it seem logical that since you were involved in this, that you would be wanting to find out what was in the report, if in fact there is a report?

Mr. DASCHBACH. Thinking about it in retrospect, I would agree with you.

Mr. SNYDER. Would it be too much of an imposition to ask you to make inquiry and let the committee know if there is such a report?

Mr. DASCHBACH. I would be glad to, but I understand a witness from the Department of State is scheduled to follow me, and he may be in a better position to answer than me.

Mr. SNYDER. We have nine witnesses today. I do not want to miss Sunday school.

Mr. DASCHBACH. I will definitely report to you what position we have, if any, in preparation of any such report.

Mr. SNYDER. The nine instances where you have given the State Department 30 days notice, have there been any different result with regard to obtaining documents from foreign carriers?

Mr. DASCHBACH. Not with respect to obtaining documents. We received no documents.

Mr. SNYDER. It seems to me that we had discussions on this matter earlier this year, and that allegations were made that you had not fully utilized the State Department in your attempt to get documents. The complaint in Baltic was that the State Department was only given one week to obtain the documents.

So I guess I am asking you, do you get any better results when you use the State Department than when you do not?

Mr. DASCHBACH. Based on the track record, the answer is no.

Mr. SNYDER. How many rebating investigations did you undertake after Sea-Land?

Since we do have nine witnesses, I ask unanimous consent to submit some more questions to Mr. Daschbach.

Mr. DASCHBACH. The answer is 309.

Mr. SNYDER. I have some more questions about that. How much you have been able to obtain, how many documents you do not have, and how many cases State Department was involved in.

But I prefer to move along.

Mr. AuCOIN. So ordered.

[The following was received for the record:]

FEDERAL MARITIME COMMISSION,
Washington, D.C., May 31, 1979.

Hon. GENE SNYDER,
*Merchant Marine Subcommittee, Committee on Merchant Marine and Fisheries,
House of Representatives, Washington, D.C.*

DEAR MR. SNYDER: In response to your letter of May 21, 1979, the following information is submitted for inclusion in the record of hearings conducted on H.R. 3055.

Question 1. How many rebating investigations did you undertake after the Sea-Land disclosures?

Answer. The Commission's Bureau of Enforcement has initiated 471 rebating investigations since the Sea-Land disclosures in 1976. Of these 471, 278 cases have been completed by that Bureau, leaving 193 cases still under active investigation. Of the 278 completed cases, 161 were transmitted to the Office of General Counsel for settlement or enforcement through the District Court. The remaining 117 were closed by the Bureau of Enforcement for a variety of reasons, including the dissolution of the corporate shipper, consignee or carrier, or insufficient evidence. The absence of a United States agent or other representative for service of process has often served to be an obstacle in our investigations of foreign shippers.

Question 2. In what percentage of those investigations have you been successful in obtaining documents?

Answer. We have predictably been far more successful in obtaining documents from U.S. companies than from foreign companies. Of the 161 cases that were transmitted to the General Counsel's office, 137 (85%) involve subjects who are either U.S. companies or who have U.S. affiliates. In all of these cases, we were either successful in obtaining documents from the subject or already had sufficient documents in our possession from other sources. The remaining 24 cases (15 percent) involve foreign carriers.

Thus far, we have received no documents from any of these 24 foreign carriers. Settlements or enforcement actions in these cases have proceeded strictly on the basis of those violations which could be established by our own investigative efforts or disclosures from other carriers or shippers. The foreign flag carriers involved in our investigations have not been forthcoming in producing documents.

Question 3. In what percentage of those investigations have you sought the assistance of the State Department?

Answer. We have sought the assistance of the Department of State in 13 (8 percent) of the 161 cases transmitted to General Counsel's office for settlement or enforcement. There is no need to request assistance from the Department of State in cases involving U.S. carriers and shippers. We have requested State Department assistance in 54 percent of the 24 foreign flag carrier cases where such assistance is relevant. Moreover we have requested State Department assistance in connection with all claims initiated against foreign flag carriers since the signing of the CSG accords.

Question 4. In those investigations where you have had State Department assistance, what has been your success rate?

Answer. As we have indicated during our appearance on May 16, 1979 before the Subcommittee, no documents have yet been produced as a result of State Department assistance. However, four of the thirteen cases in which State Department assistance was requested are still active, leaving open the possibility that some documents may yet be forthcoming.

During that hearing, you observed that it is less satisfactory for an agency to be compelled to conclude cases without necessary documents. This problem is reflected in the limited scope of disclosure obtained in many of the settlements with foreign flag carriers where, as noted earlier, pertinent documents could not be obtained.

In addition to the questions discussed above, you made reference in your letter to the request concerning the UNCTAD Line Code made during hearings on April 26, 1979. Attached is a copy of our letter of May 10, 1979 to Chairman Murphy on that subject, which should prove responsive to your inquiry.

Let me know if we can be of further assistance.

Sincerely,

RICHARD J. DASCHBACH, *Chairman.*

DEPARTMENT OF STATE
Washington, D.C.

Hon. M. G. SNYDER,
*Ranking Minority Member, Merchant Marine Subcommittee,
House of Representatives, Washington, D.C.*

DEAR MR. SNYDER: I refer to your letter of May 21 to Richard Bank, Director of the Office of Maritime Affairs, in which you raise several points regarding H.R. 3055, a bill to control rebating in the ocean trades. Your letter was received only yesterday and I am responding in Mr. Bank's absence.

As you pointed out in your letter, the present bill differs from H.R. 9518 in that the FMC is not required to consult with the Secretary of State before suspending a carrier's tariffs and the Secretary is not required to negotiate "regimes of cooperation" with foreign governments. We regard the removal of this letter provision as a positive step since it would have required, in effect, that foreign governments commit to providing documents requested by the FMC despite their own legislation prohibiting such action. In respect to the removal of the provision which required FMC consultation with the Department before suspension of tariffs, this eliminated a possible helpful opportunity to avoid disagreement within the U.S. Government, but no doubt informal consultations can be held in any event. Additionally, the new provision in H.R. 3055 regarding State Department assistance in securing foreign cooperation with FMC document requests will provide additional opportunities for discussions between the Department and the FMC.

While I appreciate the invitation in your letter to offer alternative legislative approaches to obtaining compliance with FMC document requests, I think it best that the Administration makes its views known in the forthcoming Task Force Report.

As you know, however, the Department has been cooperating with the Federal Maritime Commission since last December in seeking resolution of outstanding rebating cases in which foreign companies have been involved, and we believe this is one way to ease the problem. In answer to your questions on this point, in our discussions with the foreign governments we have impressed upon them the need and the urgency for their companies to cooperate with the FMC. As Mr. Bank informed you during his testimony, four cases involve Consultative Shipping Group

countries. One had been settled at the time of his testimony and a second since then. We are informed that the FMC staff are optimistic that settlements will be reached in the other two outstanding cases. We have initiated discussions with three non-CSG Governments whose companies are involved in the other rebating cases, and will continue to press for their assistance. I and my staff will be meeting with Embassy representatives again shortly on all outstanding cases, and we will then follow up through our own Embassies in the capitals concerned.

As for the percentage of cases in which the FMC has sought our assistance, I do not have that figure. It is our understanding that the FMC refers cases to us when the staff believes it can no longer obtain satisfaction without recourse to the Courts. Five such cases were referred to us late last year and one earlier this year. Two more cases have been referred to us this week.

You have also asked for our views on the legalization of rebating as reportedly recommended by the Justice Department in the Inter-Agency Task Force discussions. I do not believe it would be appropriate for me to comment on that point while those recommendations are under review by the President. It is possible of course that the President may take a different approach to this issue than that of this bill but whatever the outcome, I would hope that there would be further opportunities to discuss the most effective means to deal with this matter.

In your letter you also refer to Congressman McCloskey's request for a submission to the Committee of a list of those actions or positions taken by U.S. Government agencies which in some fashion affect adversely the Department of State's ability to represent the United States Government in shipping negotiations. I regret that my reply to that question has been delayed due to my absence in China, and I enclose a copy of my answer to Congressman McCloskey for your information.

Sincerely,

JAMES R. ATWOOD,
*Deputy Assistant Secretary
for Transportation Affairs.*

Mr. AuCOIN. Counsel has a few additional questions for the purposes of establishing a record here, and I would like to recognize him to finish the questioning of the witness.

Mr. KYROS. Mr. Daschbach, just one question about the assessment of the penalties, and also the compromise.

There has been a complaint by letter received by the committee contending that the agency would be acting as investigator, judge, jury, and providing a sentence in a case where you would be able to assess the penalty.

How would you address that issue, since this bill provides that kind of power to the Commission?

Mr. DASCHBACH. My primary response would be that the decision would be appealable. In addition, under the mechanism that we have projected, if such an authority was given to the Commission, the matter would be submitted to an administrative law judge—who are, as you know, persons somewhat independent of the agency of which they are employed.

So I am not concerned that that problem is insurmountable. I think independent of the administrative law judge—

Mr. KYROS. You have already testified that you feel the agency absolutely needs this bill to go ahead with its enforcement program on rebating concerning foreign carriers as well as U.S. carriers.

Mr. DASCHBACH. That is correct.

Mr. KYROS. The U.S.-CSG agreed record that we spoke of earlier, November 15, 1978, in that record no specific commitments were made by any nation; is that right?

Mr. DASCHBACH. That is correct.

Mr. KYROS. As a matter of fact, Mr. Atwood testified for the State Department at hearings before the committee concerning the production of evidence on a cooperative basis if it proved to be ineffective. He stated the CSG agreed that the individual govern-

ment concerned would of course be prepared to discuss this with the United States and consider this.

I don't know if you recall what he said in regard to any action about getting documents and blocking statutes, possible waivers. I don't see that there is any evidence of good faith on the part of all the other nations in this regard, particularly when the Swedish Government, a member of CSG, on April 19 of this year, directed executives of two large shipping companies not to testify in a grand jury investigation going on in the United States.

The foreign minister of Sweden stated:

We have objected to what we have determined to be an unjust extension of American jurisdiction in international shipping matters, which reflects a basic difference in philosophy.

Isn't this clear and concrete evidence that despite all the good faith and work that went into those accords, they do not necessarily provide a solution?

Mr. DASCHBACH. As I say, we have sent, in nine specific cases, requests to the Secretary of State to assist us, and we have received no documents. We received an amount of correspondence coming forth and going back, but we really have not progressed with respect to information procurement any more than we had in November of 1978.

Mr. KYROS. No further questions.

Mr. AU COIN. Thank you

Mr. Daschbach, we appreciate your testimony

Our next witness will be Constantine Caras, General Counsel of the Maritime Administration.

STATEMENT OF CONSTANTINE G. CARAS, GENERAL COUNSEL, MARITIME ADMINISTRATION, DEPARTMENT OF COMMERCE

Mr. CARAS. Mr. Chairman and members of the subcommittee, I am Constantine G. Caras, General Counsel of the U.S. Maritime Administration. I am pleased to discuss H.R. 3055, a bill to strengthen the provisions prohibiting rebating practices in the U.S. foreign trades.

It is appropriate to reiterate what Mr. Daschbach said, that rebating by common carriers in the foreign waterborne commerce of the United States is prohibited under existing law. The recipients of rebates receive preferential rates in secret which are denied other shippers in violation of the law. When illegal rebating is widespread, law-abiding carriers are faced with the threat of the diversion of cargo to competitors who are willing to offer illegal rebates.

However, as a practical matter, it has been difficult to enforce this prohibition against rebating evenly. Several foreign nations have enacted "blocking statutes." These statutes prevent the carriers of the nation from complying with the FMC's requests for documents or information located in that country. Without this information, the FMC has had difficulty in successfully prosecuting foreign carriers for violations of antirebating laws. On the other hand, the documents of U.S. carriers are readily available under the usual evidentiary processes.

Practically speaking, this difference in access to the documents of foreign and U.S. carriers has generally resulted, however unin-

tentionally, in discriminatory enforcement of the antirebating law against the U.S. carriers.

This bill would strengthen the provisions prohibiting rebating in the foreign trades of the United States by requiring every vessel operating common carrier by water in foreign commerce to file periodically a certificate with the FMC which would attest that:

One, a policy has been established prohibiting any illegal rebating;

Two, this policy has been promulgated recently to all officers, employees, and agents;

Three, other efforts have been made to prevent illegal rebating; and

Four, full cooperation has been given to the FMC in any investigation of rebating practices.

The certificate would be made under oath by the chief executive officer of each company. The bill authorizes the FMC to require others involved in ocean shipping, such as brokers, consignors and, freight forwarders, to file similar certificates.

The FMC would also be permitted to initiate investigations of rebating practices. If any common carrier, or any person controlling a common carrier, refused to comply with a subpoena or order for the production of documents or information, then the FMC could suspend the tariffs filed by the common carrier. If the refusal to produce information is based on foreign blocking statutes, then the Secretary of State would be directed to consult with the government of the nation involved for assistance.

The authority to suspend tariffs for a failure to produce evidence would be tempered by the President's authority to set aside any such order, "for reasons of the national defense or the foreign policy of the United States." In addition, H.R. 3055 requires the Secretary of State to take the step of negotiating with other governments to secure compliance with the FMC's orders for documents or information. The bill would also strengthen the penalties for rebating, for failing to comply with a Commission order and for handling cargo in violation of a tariff suspension order. H.R. 3055 therefore is one method of resolving the disparity in the treatment of U.S.-flag and foreign-flag carriers.

We note that the President withheld his signature on H.R. 9518, a bill similar to H.R. 3055, which was passed by the 95th Congress. The refusal was based on the grounds that enactment would have undermined international negotiations on the rebating problem which were then being conducted with a number of major maritime nations. H.R. 9518 directed the Secretary of State to negotiate a comprehensive "regime of cooperation." H.R. 3055 differs in that it directs the Secretary to conduct bilateral negotiations with the nations involved.

The Department of Commerce strongly supports putting the U.S.-flag merchant marine on an equal footing with its foreign competition. However, after a year-long interagency study, a memorandum has recently been sent to the President on the maritime liner industry. Since we have not yet received a Presidential decision on this memorandum, we cannot at this time take a position on this bill. The Presidential memorandum addresses this issue in a broad context of the liner industry as a whole. We cannot say at this time

whether this bill will fit in with the President's decision in that broader context. We expect to have a decision for you in the near future.

This concludes my prepared statement, Mr. Chairman. I will be happy to address any question you or any of the members of the subcommittee may have.

Mr. AUCOIN. We appreciate your testimony. The committee is encouraged by your statement that Commerce strongly supports putting the U.S. flag and merchant marine on an equal footing with its foreign competition.

On the strength of that, and going back to page 3 of your testimony, where you refer to the withholding of the President's signature on H.R. 9518, I would like you to tell the committee what Commerce's recommendations to the President were when he faced the decision to sign the bill or not to sign the bill.

Could you tell the committee what your Department's recommendation was?

Mr. CARAS. Are we talking about last year's bill?

Mr. AUCOIN. That is right, last year's bill.

Mr. CARAS. Our recommendation to the Office of Management and Budget was that the President sign the bill.

Mr. AUCOIN. Thank you.

Mr. SNYDER?

Mr. SNYDER. I take it that the memorandum you refer to is an internal memorandum and not available?

Mr. CARAS. It is so internal we don't have it. It is internal to the White House.

Mr. SNYDER. But since it does deal with the subject of rebating in the broad context of the liner industry as a whole, I have to assume it recommended something.

Mr. CARAS. No. The Presidential memorandum is a memorandum written by White House staff officials to the President, basically summarizing the interagency task report.

Mr. SNYDER. Not a memorandum that you all sent over?

Mr. CARAS. No.

[The following was received:]

U.S. DEPARTMENT OF COMMERCE,
MARITIME ADMINISTRATION,
Washington, D.C., June 6, 1979.

Hon. JOHN M. MURPHY,
Chairman, Committee on Merchant Marine and Fisheries,
House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: During the hearing on H.R. 3055, held on May 16, 1979, I was asked by Mr. Snyder whether a memorandum was sent to the President setting forth recommendations on the subject of rebating. At that time, I understood that the Presidential memorandum only summarized the Inter-Agency Task Force Report. Upon further inquiry, I now understand that alternative recommendations were made to the President. As I stated in my testimony, however, I have no way of knowing what decisions the President will make.

Sincerely,

C. G. CARAS, *General Counsel.*

Mr. SNYDER. I misunderstood you.

When do you think we are going to get the interagency task force report?

Mr. CARAS. I know you have heard this before, but I think in the very near future—

Mr. SNYDER. Do you have any insight at all as to how it deals with rebating?

Mr. CARAS. No, sir, I don't know how the President will go.

Mr. SNYDER. From your perspective as a promoter of U.S. merchant marine fleets, has the FMC enforcement of the Shipping Act of 1916 hurt the U.S. merchant marine?

Mr. CARAS. I think we are all in agreement that the FMC has been hampered in the enforcement of the antirebating provision with respect to the equal treatment of United States and foreign-flag-vessels.

I don't think there is any disagreement on that.

Mr. SNYDER. In your statement there at the end, you decline to take a position on this bill until the President decides which way he wants to go.

Mr. CARAS. That is right.

Mr. SNYDER. You take that position as a loyal employee, I take it?

Mr. CARAS. Those are the rules of the game.

Mr. SNYDER. I am concerned that section 212(g) of the Merchant Marine Act of 1936, which is the law of the land—

Mr. CARAS. Yes.

Mr. SNYDER [continuing]. Requires you to "make recommendations to Congress from time to time for such further legislation as is deemed necessary to effectuate the purpose of this act.

Mr. CARAS. I believe Mr. Blackwell, who was then the Assistant Secretary, and Mr McCloskey had a dialog on that subject in the hearings last year, which lasted 2 or 3 days. And I think Mr. Blackwell explained that that is true, but we first have to recognize separation with respect to regulatory and promotional powers of the FMC on the one hand, and the Maritime Administration on the other.

We also have to recognize what is a fact of life, which is that recommendations from an executive agency must go through the Office of Management and Budget.

Mr. SNYDER. Do you have any recommendations for this committee?

Mr. CARAS. Do I have recommendations for this committee with respect to this legislation?

Mr. SNYDER. With respect to anything under your jurisdiction?

Mr. CARAS. Yes.

My understanding is, you will shortly get a report from the President. Please review it, and I know that the committee will do what it thinks is best in the interests of the merchant marine.

Mr. SNYDER. I will let you off the hook. I will go on, but I don't think your answers have been very good.

Mr. AuCOIN. I would like to recognize counsel for additional questioning.

Mr. KYROS. In dealing with what the chairman just asked you, it is a fact that the Maritime Administration did testify during hearings on the Maritime Administration's authorization request before the Senate Commerce Committee; is that correct?

Mr. CARAS. That is correct.

Mr. KYROS. At that time it is my understanding that the questioning was, what effect did illegal rebating have on the bankrupt-

cy of Pacific Far East Line and States on the west coast. Do you recall?

Mr. CARAS. I think the testimony at that time was that there certainly were allegations that illegal rebating occurred. I cannot personally get up in a court of law to prove that, but from a personal standpoint, I have no doubt that illegal——

Mr. KYROS. I am not asking for your personal viewpoint. The testimony—Senator Inouye asked if it did not harm the American fleet.

Mr. CARAS. The Maritime testimony would be that any illegal rebating does harm U.S. merchant marine.

Mr. KYROS. You said this committee should perhaps await the Presidential task force—the results of the task force. Are you aware of the statements of the former chairman of the Federal Maritime Commission, Carl E. Bakke, made on April 25, 1979, when he said the quixotic journey the administration is embarking on in search of recommendations for a new liner shipping policy is becoming a national, if not international, embarrassment.

In addition Mr. Blackwell, who was the former Maritime Administrator——

Mr. CARAS. That is right.

Mr. KYROS. Former head of your agency.

Mr. CARAS. That is right.

Mr. KYROS. I don't have the precise quote, but he said that the interagency task force had degenerated into an agency cat-and-dog fight.

Mr. CARAS. I am aware of those statements. All I can say is, let's wait and see.

Mr. KYROS. Thank you, Mr. Chairman.

Mr. AuCOIN. We appreciate your testimony. If there are no further questions' we also appreciate your answers to the degree you were able to give them.

I would now like to recognize Mr. Richard Bank, Director of the Office of Maritime Affairs.

STATEMENT OF RICHARD E. BANK, DIRECTOR, OFFICE OF MARITIME AFFAIRS, DEPARTMENT OF STATE, ACCOMPANIED BY STUART BENSON

Mr. BANK. I am Richard K. Bank, Acting Deputy Assistant Secretary for Transportation Affairs, and Director, Office of Maritime Affairs, Department of State. Accompanying me is Stuart Benson, Deputy Assistant Legal Adviser for Economic and Business Affairs.

The Department has been asked to testify today on H.R. 3055, a bill to strengthen the provision of the Shipping Act of 1916, prohibiting rebating practices in the U.S. foreign trades.

We have commented during previous sessions of the Congress on similar bills. We continue to appreciate the difficulty in enforcing the present prohibition against rebating and to be concerned about possible disparities in Federal Maritime Commission enforcement between U.S. flag and foreign operators due to the problem of access to documents located abroad. In this regard, however, let me assure the committee that the Department strongly holds to the principle that the laws of the United States must be applied equal-

ly to all those who operate in our trades, and that possible disparity of application should be removed.

As we noted in testimony before the Senate in October 1977, a major difficulty in documenting illegal rebating is that the documentation required is often located in foreign countries, and that many such countries, including such close allies as the United Kingdom, the Federal Republic of Germany, Japan, and France have laws or regulations in force that forbid or restrict the release by companies of shipping documents to a foreign government.

Several of these laws were enacted in direct response to previous attempts by U.S. regulatory agencies to investigate foreign companies and shipping conferences, attempts which many governments considered an unwarranted effort to extend U.S. jurisdiction beyond U.S. territory in violation of their rights as sovereign states and of international law.

H.R. 3055 would impose stringent sanctions on shipping lines that refused to supply requested documents to the FMC or otherwise to cooperate with the Commission, even though the refusal or failure to cooperate resulted directly from the requirements of these foreign laws against disclosure.

While one of the provisions most difficult to achieve in last year's H.R. 9518, that which required foreign nations to negotiate regimes of cooperation with the United States or suffer severe penalties, has been eliminated. The proposed heavy sanctions in H.R. 3055 to obtain compliance continue to give us significant problems with that portion.

We are not confident that the threat of such sanctions, or their application, will persuade foreign governments to waive the application of their laws against disclosure. Instead, we believe that the threat and imposition of such sanctions could contribute to acrimony and inflexibility, which will reduce the prospects for foreign cooperation with the Commission and which may impair our overall relations with the countries concerned. Indeed, we have had indications that some countries would bar all U.S. ships from their ports in retaliation for the banning of vessels of their nationality from U.S. ports. Hence, we fear that the effect of implementing the sanctions which this legislation provides would be to hurt U.S. operators simultaneously—possibly more than U.S. actions hurt their foreign competitors.

In our testimony over the past 2 years, we have expressed our strong belief that in international maritime affairs, where different concepts of jurisdiction clash, negotiation would be a more fruitful means to obtain cooperation from foreign governments and lines than that of punitive actions.

On March 6, Deputy Assistant Secretary Atwood, in testifying before this committee, pointed out that foreign governments have also condemned illegal rebating in the conference trades and described the results of a series of United States-Consultative Shipping Group talks. As the committee is aware, the Consultative Shipping Group is composed of governmental representatives of the major European shipping states and Japan. He also described the framework for cooperation which has grown out of the discussions in London in November 1978.

The agreed record of those discussions is well known to this committee. In applying the framework, the Federal Maritime Commission requests the assistance of the Department of State in those cases where the Commission staff is unable to obtain records or other matters subject to investigation or section 21 order from foreign flag operators or entities with headquarters abroad. This is especially true where the foreign entity refuses to cooperate, citing the existence of a law in his own home country which makes illegal the turning over of documents or records to the FMC. As a result of those talks, the FMC has sought our assistance in settling several outstanding cases, and I think it would be worthwhile to update that report.

As we have already informed you, one case, the Ned-Lloyd/Leif Hoegh problem, has been settled. In respect to three other cases involving Consultative Shipping Group countries, we continue to be in close consultation with the governments concerned and with FMC staff seeking settlement.

I can report, Mr. Chairman, that in two cases, Phoenix and Knudsen, the attorneys for the lines involved have informed the FMC and the FMC has informed us that they were close to settlement in those cases.

Discussions between the company attorneys and FMC staff continue to progress, we are informed, and we are optimistic that settlements will be reached. Since January, we initiated discussions with two non-Consultative Shipping Group countries—India and Bangladesh—in Washington and in their respective capitals in respect to rebating problems in which lines of their countries were involved.

Of course, in any case where cooperation and diplomatic efforts do not secure settlement of the matter, the Commission remains free to pursue remedies available to it under U.S. law. We have remained in close touch with the FMC staff on difficulties which they may be meeting in rebating cases, and have urged them to refer such claims to us when they arise. Since January, despite our almost weekly contacts, the Commission staff has not had any more cases to refer to us.

In a moment, I will refer to those comments that were made by the Chairman of the FMC in his testimony.

In addition to the diplomatic channel to overcome the problems of enforcing rebating legislation, I should refer to the FMC's already active program of requiring conferences and other rate-making bodies to undertake a program of self-policing. While there has been some resistance on the part of some conferences to provide self-policing bodies, this practice has gradually spread, and the Commission is considering a program to require the self-policing of independent carriers. This kind of a program, it appears to us, is more in line with the President's objective to eliminate Government regulation and return responsibility to the commercial sphere. The FMC, of course, will continue to maintain its responsibility for the public interest by its oversight function.

On November 5 of last year, the President vetoed H.R. 9518, legislation almost identical to that now being considered by the committee. The Department and other executive agencies have sought to discuss this and similar legislation with committee staff

and with those in the maritime community which support it. There appears to be little disagreement as to the general issue upon which it is based, but there has been little consultation prior to the actual introduction of the bill itself.

The closure of ports to foreign carriers via the suspension of tariffs, for failure to violate one's own law, is impractical. If the proponents of this bill seek the active cooperation of the foreign lines and governments, more practical solutions could be found. The Department is concerned that should the provisions to which I referred come into force and are applied, U.S.-flag vessels would be barred either by governments or by dock-side labor abroad. We are convinced that this is a real possibility if the United States enacts legislation that disregards other countries. If our respective vessels are barred from our respective ports then the traffic will be carried by various cross-traders. Our negotiators will then have to work out a solution similar to the one being worked on presently. The only difference being that there might very well be fewer U.S. operators to represent since they would be the ones to suffer during any retaliatory boycott.

If I might take a minute of the committee's time to relate an incident which some in this room recall quite well. About 6 or 7 years ago, a shipping provision was appended to the legislation which created DISCS—Domestic International Sales Corporations—provision permitting DISCS additional tax incentives if they exported their products on U.S.-flag ships or aircraft. The Department of State opposed the provisions, stating that it would violate our treaties of friendship, commerce, and navigation and that it would lead to similar, if not stronger, forms of protectionist activities abroad which would harm U.S. shipping interests. However, the legislation was enacted, and a Maritime Administration publication subsequently informed shippers of the tax advantage that could be obtained if they shipped on U.S.-flag vessels.

Few, if any, chose to participate. What the program did generate, however, was an active and attractive fiscal incentive program in, among other places, Brazil and India, where similar decrees based on our legislation were promulgated, granting local manufacturers 30- to 50-percent tax incentives to export their manufactured and semi-manufactured goods on local flag vessels.

This came to the attention of the Department of State and the Maritime Administration via the local complaints of U.S.-flag carriers serving Brazil who, in spite of certain commercial agreements, were losing significant cargoes to Brazilian carriers. Robert Blackwell, as maritime administrator, members of his staff, and I had to travel to Brazil and engage in difficult negotiations in order to resolve that problem to the satisfaction of the U.S.-flag carriers involved.

These carriers, prior to the resolution, lost hundreds of thousands of dollars in freight revenues. It is not too difficult to foresee an equally unwelcomed reaction should the measures envisioned in the penalty portion of H.R. 3055 be permitted to remain.

Finally, Mr. Chairman, our comments, of course, must be taken within the context of the pending message from the President to the Congress on maritime policy. We do not know what his recommendation on the rebating problem will be. However, we would

expect, following his message and the consideration which this and other committees in the Congress will give to it, to work with other executive agencies and the Congress toward resolving the problems which characterize the rebating issue.

Thank you very much.

Before ending, Mr. Chairman, I would like to make a number of comments, concerning statements by previous speakers.

I refer specifically to the statements of the Chairman of the Federal Maritime Commission, Mr. Daschbach. Unfortunately, Mr. Daschbach left the impression that there was an atmosphere of noncooperation or noncompliance in discussions between the Federal Maritime Commission and the State Department in rebating matters.

He indicated, "no, not ever," in regard to whether there has been any release of information by foreign governments. Following the U.S.-CSG talks in which Mr. Kyros participated, as well as Mr. Daschbach, and Mr. Moakley, as well as Commission staff, at the suggestion of Mr. Daschbach, certain elements were added in the agreed record.

The Federal Maritime Commission has conveyed to the Department of State a total of nine cases in which they sought our assistance in removing governmental impediments to foreign governments in the negotiation and settlements of cases between the Federal Maritime Commission and foreign carriers.

I can report that in every instance the foreign government impediments have been removed, and the foreign governments have agreed not to apply the blocking statutes. Two of the cases have been resolved completely through settlements satisfactory to the Federal Maritime Commission.

As I mentioned a moment ago, a number of them are still under consideration. We have asked, almost biweekly, the Federal Maritime Commission for any new cases in which they were unable to obtain documents abroad. Since January they have said there have been no new cases where they have been frustrated in obtaining those documents. We have not promised and no one promises to obtain the documents—but we have promised to try to remove governmental impediments and foreign government blocking statutes, by working with Commission staff, so that settlement might be made.

So I feel confident that this is the way it can be achieved.

One more comment in regard to a statement by Mr. Kyros regarding the Swedish foreign minister. I will not in any way represent the Swedish foreign minister, but it is a known fact—it was part of the agreed record that Mr. Kyros participated in—that the grand jury issue was not part of the CSG talks whatsoever.

So it is not part of the matter at hand having to do with rebating. So the statement made by the Swedish foreign minister concerning the noncompliance with the grand jury request has nothing to do with the Federal Maritime Administration's rebating questions.

Mr. AuCOIN. We appreciate your statement.

Let me see if I understand. You are saying that Mr. Daschbach was untruthful in his statement to the committee?

Mr. BANK. No, I am not. I am saying he was totally truthful but incomplete in the response.

Mr. AuCOIN. Mr. Daschbach said he never, when I asked him the question as to how effective consultation had been in providing the information from the foreign carriers, he indicated that he knew of no instances that information came as a result of consultations.

That was a flat statement, and an absolute statement, and you are saying that that was an untruthful statement?

Mr. BANK. No, I am saying it is absolutely truthful.

Mr. AuCOIN. I want to make sure that the record is clear. That was not clear from your rejoinder.

Mr. BANK. It was truthful. However, it was not complete. Where he has not obtained documents, the Federal Maritime Commission staff and the Commission itself has been satisfied with the results—

Mr. AuCOIN. Let me ask you the same question, how effective do you think consultation has been as a means of obtaining the information from the foreign carriers that would place them on a par with U.S. operators? Do you think it is effective?

Mr. BANK. I think there is a potential for disparity; I do agree. The cases that have been forwarded to us by the Federal Maritime Commission are the ones of which we have the most knowledge.

We don't work at the Federal Maritime Commission, so we don't know all the cases. But on those they have referred to us, I would say it has been significantly effective. There are cases that have not been settled, but there have been cases that have been settled and we have been effective.

Mr. AuCOIN. Because there have been some cases that have been settled, you think that consultation means is an effective means, then?

Mr. BANK. Yes, it is effective in removing governmental impediments.

Mr. AuCOIN. Effective enough that the State Department recommended it to the President to veto the legislation of last year; is that correct?

There is such a good record from the consultation process that you felt it was advisable that State recommend to the President that he veto it?

Mr. BANK. The recommendation to the President preceded the U.S.-CSG talks. The talks took place on November 17 and the veto took place on November 5. Following the veto and the discussions that took place in London, the agreed record was promulgated. It is only since that time that we have had the experience of working with the Federal Maritime Commission.

As we pointed out last year prior to the November discussions, the Federal Maritime Commission had failed completely—I will not say failed, had not ever referred a case to the State Department for our assistance in obtaining cooperation from foreign governments, inviting their companies' cooperation in settling cases before the Commission.

We appreciate the new attitude at the Federal Maritime Commission in working closely with us in trying to resolve these cases.

Mr. AUCOIN. It is your testimony before the committee this morning that we have effective consultation process that we are operating under?

Mr. BANK. I believe it is effective enough that the Federal Maritime Commission has not come to us with a new case since January.

Mr. AUCOIN. I am asking you whether it is effective.

Mr. BANK. It is an effective process. There can be more effective ones, I believe.

Mr. AUCOIN. We appreciate you going on record and giving us that description.

Mr. SNYDER. You say you have helped them get settlement. Have you helped them get documents?

Mr. BANK. The process goes like this, Mr. Snyder—

Mr. SNYDER. I do not want the process. I want to know if you have helped them get documents

Mr. BANK. I don't think the FMC has settled all, although they have obtained settlements satisfactory to them.

Mr. SNYDER. You have to settle for a whole lot less when you cannot get it.

Mr. BANK. The basis of the legislation, and some of these statements, which we agree on as well, is that blocking statutes exist in foreign countries, which stand in the way of turning over documents. We have been successful in removing the application of those blocking statutes by the foreign governments, and what now remains are negotiations between the companies and the Federal Maritime Commission.

It is our role, it is an intergovernmental role, to remove the impediments caused by conflicting national laws.

Mr. SNYDER. You heard me ask Mr. Daschbach about the report. He indicated it was your responsibility and not his after the November 1978 meeting in London.

Has any such report been made to the President?

Mr. BANK. No. I agree with the second definition of the report. We were to report to the President through the White House. In fact, Mr. Daschbach and Mr. Atwood and Mr. Johnston of the White House staff, who accompanied us to London, discussed this, and that was in fact considered to be a report to the President on the success of these talks.

[The following was received in reference to the above:]

DEPARTMENT OF STATE,
Washington, D.C., May 22, 1979.

Hon. JOHN M. MURPHY,
*Chairman, Committee on Merchant Marine and Fisheries,
House of Representatives, Washington, D.C.*

DEAR MR. CHAIRMAN: I am writing in connection with the May 16 hearings on H.R. 3055 held by the Subcommittee on Merchant Marine of the House Committee on Merchant Marine and Fisheries.

During the course of the hearings, members of the Subcommittee inquired whether Secretary Vance had sent to the President a report on the discussions held in London in November 1978 between delegations representing the U.S. and the Consultative Shipping Group. You will recall that the President had asked for such a report in his November 4, 1978 Memorandum of Disapproval of H.R. 9518. So that the Subcommittee record will be correct, I wish to advise you that the Secretary did submit such a report to the President on December 16, 1978. With the concurrence of the White House, I am enclosing a copy of that report, and we request that a copy of this letter and the report be included in the hearing records.

I hope that this material will be helpful to the Subcommittee.

Sincerely,

DOUGLAS J. BENNET, JR.,
Assistant Secretary,
Congressional Relations.

Enclosure.

THE SECRETARY OF STATE,
Washington, D.C., December 16, 1978.

Memorandum for: The President.
From: Cyrus Vance.
Subject: U.S.-CSG Shipping Talks.

You will recall that on November 4 you pocket vetoed the Maritime Anti-Rebating Bill (H.R. 9518), which would have imposed severe enforcement measures in the area of ocean shipping rebating. In your Memorandum of Disapproval, you referred to forthcoming discussions with twelve European countries and Japan (the Consultative Shipping Group or CSG) on rebating enforcement and other broad policy issues. In order to give those talks a chance for success, and in light of the pending work of the interagency maritime task force, you elected not to approve the bill. You also instructed the Department of State to pursue the talks vigorously, and asked for a report on the results.

The talks were held in London on November 15 to 17. The U.S. Delegation included representatives of all U.S. agencies with an interest in maritime policy, appropriate Congressional staff and Mr. William Johnston of the Domestic Policy Staff. The talks resulted in an Agreed Record (attached), prepared jointly by the Delegations.

The U.S. Delegation expressed its strong concern regarding the enforcement difficulties which the FMC has encountered in cases of alleged illegal rebating by foreign-flag carriers. We called attention to your veto of the Anti-Rebating Bill and the hope you expressed for cooperation by foreign governments to assist reasonable FMC enforcement efforts. In response, the CSG side expressed strong appreciation for your veto and your recognition of the international nature of ocean shipping. In that spirit, the CSG countries indicated that they would seek the cooperation of their carriers in providing to the FMC, through mutually agreed independent accountants, such information as may be necessary to reach settlements of enforcement actions. This practice was employed successfully in a recent settlement with a number of Japanese carriers, and in light of the November talks we believe it can be pursued with other CSG countries as well. Where those procedures may fail, the CSG countries agreed to consider waivers of their domestic legislation to permit the production of evidence directly to the Commission.

We also discussed the work of the maritime policy task force chaired by the White House and OMB. We expect an extensive presentation of the views of the CSG countries in the coming weeks. The talks included as well an exchange of views and considerable agreement on the desirability of expanded channels of communication and cooperation on regulatory and enforcement matters.

As I hope this report reflects, the talks were viewed as very satisfactory from both sides. On the specific problem of enforcing our anti-rebating laws—the subject of your Memorandum of Disapproval—I believe concrete progress was made in a manner consistent with considerations of national sovereignty and international comity.

Mr. SNYDER. Who did you say reported?

Mr. BANK. William Johnston, who is on the Domestic Policy staff at the White House.

Mr. SNYDER. You did not get hold of Jimmy?

Mr. BANK. I don't know.

Mr. SNYDER. You indicate in your statement, that you think that suspension of tariffs, which is effectively closing our ports to foreign vessels, would result in reciprocal action by other countries, and that we ought not go that route. To bolster that you give an example of how India and Brazil retaliated to our proposal on the DISC act.

Do you believe that if we suspended tariffs of certain vessels their home countries would close their ports?

Mr. BANK. No.

Mr. SNYDER. We have 50 percent cargo preference on foreign aid. They are not about to close their ports to our ships.

Mr. BANK. The point I made was this: In dealing with the major rebating cases in the developed country areas, we would find in a number of cases, not only Government participation, but dockside labor, which is as patriotic as our maritime labor is, after seeing one of their vessels blocked, would see to it that U.S.-flag vessels would not operate in their ports.

Mr. SNYDER. I bet you India would not be so willing to do that, as hungry as they are.

Mr. BANK. I agree with you.

Mr. SNYDER. Last year you referred to tariff provisions as Draconian. Do you have any suggestions as to forcing carriers to respond to FMC subpoenas, discovery orders—any suggestions that might be a little less Draconian?

Mr. BANK. As we pointed out, we were in the process of working on an Inter-Agency White House memo. However, we have discussed from time to time suggestions. One of those made was that after discussion between the Department and the Federal Maritime Commission—the Department of State would be given a certain period of time, 60 days or 90 days, to help find a solution that satisfies the Federal Maritime Commission; and that if that result is not achieved, action can be taken by the Federal Maritime Commission in regard to the operator involved. The operator, any subsidiary or parent thereof, would not have any action before the Commission acted upon.

Perhaps a resolution of that type would be sufficient to——

Mr. SNYDER. Forbid a carrier to do business with the FMC?

Mr. BANK. To have any new action taken. This does not close the ports or keep them from continuing with existing tariffs, but new tariffs would not be acted on. This has been an idea raised.

Mr. SNYDER. If the carrier was a member of a conference, would that bar the conference from doing business with the FMC?

Mr. BANK. This has not been fully discussed, and it is an interesting prospect. It may require or result in conference pressure to comply with section 21 orders. It is a thought.

There are many different solutions to this problem. Our problem is the suspension provisions of 3055. We mentioned in our testimony that this would be a very good subject for discussion among agencies and by congressional staff in trying to seek out a solution that will meet many problems.

Mr. SNYDER. Wouldn't that force them to operate under existing tariffs which have enough leeway to rebate already?

Mr. BANK. You are assuming that all actions before the Commission involve an increased tariff rather than the possible decrease in tariff.

Mr. SNYDER. What you are saying is, they could continue under the old tariffs, but they could not initiate any new actions with the FMC.

So what you are assuming is that they can go ahead and operate——

Mr. BANK. You are assuming that all new tariffs would anticipate increased rates. Let me emphasize that this is a thought, an idea that we have raised, and we would like to see it raised.

There are questions about all aspects of it.

Mr. SNYDER. Instead of raising tariffs, they could decrease the rebate. Just a minute ago you commented on your work with the interagency task force. Can you tell us when you are going to finish?

Mr. BANK. I agree with Mr. Caras who spoke before me. I can only say that it is coming.

Mr. SNYDER. Oh, Lord.

Mr. BANK. I have no idea the exact date of the message to the Congress.

Mr. SNYDER. Do you know if there will be one?

Mr. BANK. Yes, I am told there will be one.

Mr. SNYDER. By anybody in authority?

Mr. BANK. Yes.

Mr. SNYDER. Who can we find out from?

Mr. BANK. I believe the committee staff has been in contact with the domestic policy staff at the White House, and could probably get a better idea from the domestic policy staff, which is responsible for this.

Mr. SNYDER. Everything is, wait 2 weeks, 2 weeks, ever since I can remember.

Thank you.

Mr. KYROS. Mr. Bank, as I understand your testimony this morning, beyond your prepared statement, you state that the Chairman of the Federal Maritime Commission has made incomplete answers, which is a very harsh indictment. And second, you criticize this committee inferentially because we failed to consult with you before issuing H.R. 3055.

You are perfectly aware from statements of the chairman of this committee that a rebating bill was going to be filed again. We have met you frequently at various places and functions. You have had every single opportunity—I cannot understand how we would not be listening to any advice you would be offering.

Mr. BANK. I think I deserve the opportunity to respond to that. I disagree with your connotation that the statements made about Mr. Daschbach's testimony were harsh. They were not harsh. They were merely indicative of the belief that we have, based on this testimony and earlier testimony, that he did not tell the full story in regard to the cooperation that exists.

Mr. KYROS. You have cooperated. He says it has not been fruitful, though.

Mr. BANK. It has been fruitful.

Mr. KYROS. He says it has not been.

Mr. BANK. When asked if he has ever received any documents, he says he has never received any, but he has had cooperation.

Mr. KYROS. I think the record is clear. All of the sentences were in English. They never obtained documents in foreign settlements as they would have in the American cases, and therefore, he is saying the settlements are unequal.

Mr. BANK. That does not speak to the cooperation issue.

Mr. KYROS. Absolutely it does, because the settlement requires someone to say, yes, before we will settle and compromise. But it also requires the production of documents that are obtained in the case of Americans.

Earlier you said that you believed that disparity in treatment itself is an unequal application of the laws and is harmful to U.S. carriers.

Why should some foreign carrier send \$40,000 to the FMC and say that is the end of it and we will not give you a single record? Your introduction of these foreign shipping individuals through their government to FMC does not offer any further assistance.

Mr. BANK. We don't introduce them. Their American attorneys are working in coordination with the FMC. But it is up to the Federal Maritime Commission to decide whether it wants to make a settlement.

If the Commission decides to settle without the documents, it is a decision by the Commission. If they remain unsatisfied, they remain unsatisfied.

In regard to the second point——

Mr. KYROS. Stay on the first one. They make a settlement without the documents because they cannot get them if you cannot get them. Why don't you say so? You cannot get the documents. You cannot get the documents from foreign carriers they obtain from U.S. carriers.

Mr. BANK. We agree on that. There is no disagreement on that.

Mr. KYROS. Second, three U.S. carriers have been prosecuted under criminal law, section 371, title 18. A criminal conspiracy case may seem slight to some, but to me it is serious; that they should be subjected to this and foreign carriers are not is unequal treatment.

Mr. BANK. I agree with you.

If I might answer the one point about the consultations with the committee regarding legislation, we have discussed this many times, you and I and a number of other people. We have simply said by our statements that we wished that consultation would be greater with the industry and with the Congress prior to the introduction of legislation so that a number of ideas might be raised among the different agencies and different interest groups for this legislation.

We want to see proper and effective legislation in the field as much as you do.

Mr. KYROS. Your final statement is then, as I understand it, first, you cannot really make a judgment because this committee should await the results of the interagency task force.

Mr. BANK. That is correct.

Mr. KYROS. Are you certain that the interagency task force recommendations will specifically address rebating?

Mr. BANK. I am not certain that it will.

Mr. KYROS. So there are two contingencies, in all honesty, one, we are not sure when the recommendations will come down; and secondly, we are not certain they will address rebating.

Mr. BANK. That is right. I have not seen the final documents.

Mr. KYROS. Those two contingencies exist?

Mr. BANK. Yes, they do.

Mr. KYROS. By the way, when we inquire from domestic policy staff, and ask them all they say is, they are just waiting for certain things to happen. So no one is certain when the recommendations will come down.

The rebating investigations really broke in the North Atlantic and the Pacific in 1976. It is now 4 years later.

Don't you think it is an unseemly long time for U.S. carriers to have to struggle to survive when rebating is going on?

Mr. BANK. It is a very long time.

Mr. CORRADO. I understand when and if this reluctant inter-agency task force ever appears, that they will recommend legalizing rebating.

One, do you have any knowledge of that? Two, does State recommend that? And three, what does that do for us?

Mr. BANK. Ernie, to the first question, I know that it is being considered, or I am aware that that is one option being considered within the domestic policy staff. The Department has raised this issue.

To say we support it, that is not necessarily correct. We have made suggestions of that possibility along with other possibilities, but that in fact is not in our memorandum to the domestic policy staff.

And your third question—

Mr. CORRADO. What does it do for us?

Mr. BANK. There are those who argue that legalizing rebating is the purest form of competition, and that it would also remove from the scene the necessity of Government policing action, policing action of the conferences, and rather, by allowing the conferences themselves from self-policing provisions to assure that rebates or undercutting of rates, is a much better way of doing it.

These are the arguments.

Mr. CORRADO. Wouldn't it be unequal—for example, in the case of the U.S. carrier who has already admitted to rebates and has paid stiff fines. And also, isn't one effect of it taking the foreigners off the hook.

Mr. BANK. If those would be the results, of course, they would be inequitable.

Mr. Snyder. Mr. Chairman, I don't have any more questions but I do have a request of the Chair. I have a luncheon at 12 o'clock. We are making calls to get someone else, but pending someone's arrival, I would like to ask unanimous consent that I be permitted to submit questions to any of the further witnesses in writing for their response for the record.

Mr. Donnelly [presiding]. No objection.

Mr. KYROS. On page 3 of your statement you state in the first paragraph, "Indeed, we have had indications that some countries would bar all U.S. ships from their ports in retaliation for the banning of vessels of their nationality from U.S. ports."

What countries?

Mr. BANK. We have had discussions with individuals in a number of countries. I would rather not discuss it directly. It is not a question of a threat.

I can tell you that there are provisions of the British Merchant Shipping Act of 1975 which provide for certain retaliatory acts. There have been indications of maritime labor abroad, of individual countries—that this would be the reaction, or that it is the estimate of a government official that this would be the action taken by dockside labor, that should their vessels be barred from

U.S. ports, similar action would be taken against U.S. vessels in their ports.

Mr. KYROS. What is your assessment of the probability of such action?

Mr. BANK. I think it is a significant possibility, and I think since it is and we would be the ones that would be injured in the long run, I think we should try to find another solution to enforcing the rebating.

Mr. KYROS. You just said the possibility of retaliation, because of the possibility of sanctions

Mr. BANK. That is correct.

Mr. KYROS. What about the possibility of retaliation occurring as a result of grand jury investigations that are going on with U.S. liner conferences resulting in indictments of, for example, British shipping owners and other foreign carriers? Is there a possibility of retaliation? Have you considered that?

Mr. BANK. First of all, let me state—

Mr. KYROS. Have you considered that?

Mr. BANK. Retaliation by foreign countries in cases where there are indictments by grand juries?

Mr. KYROS. Any possibility of retaliation as a result of that?

Mr. BANK. We have anticipated international problems. Retaliation, I don't see what kind of retaliation could occur.

Mr. KYROS. Suspending American carriers, the same kind of retaliation?

Mr. BANK. You are talking about a grand jury case now?

Mr. KYROS. Yes.

Mr. BANK. The grand jury case, if it does involve indictments of officials of the United States and other—

Mr. KYROS. Have you discussed with foreign carriers or individuals the possibility of indictment?

Mr. BANK. There have been discussions, yes.

Mr. KYROS. And so you have considered the possibility of any possible retaliation they might take?

Mr. BANK. I would say yes.

Mr. KYROS. By the way, you thought that the agreed record made no reference to antitrust. There is specific reference to an antitrust provision.

Mr. BANK. But not on the individual case that is going on and to which the Swedish Foreign Minister spoke. The basis for the discussion was the removal of the current North Atlantic case from the discussion.

Mr. KYROS. The agreed record provides in regard to antitrust that each country would be able to pursue their national laws. It is under section 4(a), in the area of antitrust, that two countries can discuss the importance of notification and consultation, while recognizing such proceedings would not prejudice the freedom of both sides to invoke their laws as deemed necessary.

So foreign nations in antitrust proceedings could invoke their own laws and discuss the extraterritorial effect of the U.S. laws; isn't that a fact?

Mr. BANK. That is correct. All I am saying is, the discussions in the U.S.-CSG forum specifically excluded the current ongoing

grand jury proceeding in the United States. General discussions of grand jury or antitrust matters were included.

But the matter which you quoted from the newspaper account of a statement by the Swedish Foreign Minister makes specific reference to the ongoing case.

Mr. KYROS. I recall the last day of the meetings you and I were talking to Gerald Lanchin. I asked him what would happen to this agreed record if, in the event an antitrust grand jury proceeding led to the indictment against any foreign carrier or individual.

He said, you can tear it up into little pieces.

Mr. BANK. Mr. Lanchin is no longer doing maritime policy.

Mr. KYROS. Once he was chairman of the proceedings on the other side.

Mr. BANK. Yes, but that was a personal opinion. To say that will take place is a personal position.

Mr. KYROS. Surely.

Thank you.

Mr. DONNELLY. Thank you, Mr. Bank.

Our next witness will be Donald Flexner, Deputy Assistant Attorney General for the Antitrust Division.

STATEMENT OF DONALD FLEXNER, DEPUTY ASSISTANT ATTORNEY GENERAL FOR THE ANTITRUST DIVISION, DEPARTMENT OF JUSTICE

Mr. FLEXNER. I will submit my prepared statement for the record.

As you know from reading the statement, our primary concern is over the possibility that the exclusion sanction that would accompany tariff suspensions might prove to be more anticompetitive than necessary to accomplish any purposes of an enforceable antirebating bill.

I would be happy to answer any questions.

Mr. DONNELLY. Mr. Kyros?

Mr. KYROS. Mr. Flexner, the one matter I think perhaps we should clear up on page 5 of your statement, you state that "we are also very concerned about section 10 of this bill. Section 10 would grant amnesty to carriers that have in the past engaged in illegal conspiracies to violate certain provisions of the Shipping Act."

"The bill would also preclude the Department of Justice from prosecuting any future conspiracies of this nature.

"As a matter of principle, we are generally opposed to amnesty legislation."

Mr. Flexner, do you recall for 2 torturous years we went through hearings on this section?

Mr. FLEXNER. I recall that.

Mr. KYROS. At that time, as I understood it, it was the intention of the 95th Congress, the last Congress, to clarify that in 1972 the Congress had indeed decriminalized that particular provision.

That there was their judgment, really. It wasn't their intent to grant amnesty. That is how the Congress saw it.

Mr. FLEXNER. That is correct, in respect to the provisions under the Shipping Act pertaining to rebating. What remained in effect, as you know, was section 371 of the United States Code, which

covers concerted activity to violate other provisions of the law, which may only have civil sanctions attached to them.

Mr. KYROS. And the Department of Justice made its position clear in repeated testimony to the Congress on H.R. 9518 that it was their judgment that section 371 of title 18, the conspiracy section, still applied irrespective of the action of Congress. It was an honest difference between the Congress and the Department of Justice.

You are saying in effect that you disagree with the judgment of the Congress as to what it understood the 1972 act to mean. That is what you are really saying.

Mr. FLEXNER. I don't think I am. I think it is fairly clear from the provision in the proposed bill that Congress now recognizes that if it wants to deal with the 371 issue, it must do so specifically, and it has proposed provisions that we do not oppose, that make it clear that prospectively 371 would not apply to the antirebating provisions of the Shipping Act.

We are only talking about an issue of principle about which I am concerned, and I think the Department is concerned; and which would have application under other laws, namely, whether or not there ought to be retrospective amnesty for what might be willful violations of a civil law through joint action.

I think that as a general matter, that ought to be of concern, and I am sure it is of concern to this committee.

Mr. KYROS. In the other parts of your testimony, you in effect say that we should await—the committee should await the results of the Inter-Agency Maritime Policy Task Force.

Mr. FLEXNER. No, sir, I don't think my testimony says that. I don't think we would have—suggest that this committee await anything. If you feel in your best judgment you should go forward, you should certainly do that.

I am simply saying that I am not in a position to state a position for the Department or the administration. I realize that that handicaps the committee. I regret that that is the case, but I would certainly not recommend that the committee feel that it is in any way constrained from going forward and taking whatever action it deems appropriate.

Mr. KYROS. Did the Department of Justice ever consider action under the same conspiracy section, title 18, United States Code, section 371, against those foreign carriers who were engaged in rebating?

Mr. FLEXNER. Sir, I don't know the answer to that question.

Mr. KYROS. Why didn't they?

Mr. FLEXNER. I just said I do not know the answer to that question.

Mr. KYROS. But you represent Justice and you understand—I know you understand the disparity of the treatment that might occur between a foreign carrier and a U.S. carrier. I am sure that that is not something that appeals to your sense of fairness.

Mr. FLEXNER. In principle, there is no reason why, if there is evidence of a conspiracy involving foreign lines, 371 should not be applied. I do not know whether it was considered by the Criminal Division. I do not know if we had any evidence under review by the Criminal Division, so I cannot answer your question specifically.

I can certainly agree with the underlying principle.

Mr. KYROS. Just to refine it further, almost every time you have rebating you get a couple of people involved, you get a conspiracy. I think those foreign carriers, in their settlements, imperfect as they may be, nevertheless in their settlements they have indicated that they rebated.

Was there a specific policy in Justice that said, "No, we will not go after them?"

Mr. FLEXNER. I am sure there is not. That I can say confidently.

Mr. KYROS. No further questions. Thank you.

Mr. DONNELLY. Are there any further questions?

Thank you very much.

Next we will have Charles Hiltzheimer from Sea-Land.

[The complete statement of Donald Flexner follows:]

PREPARED STATEMENT OF DONALD L. FLEXNER, DEPUTY ASSISTANT ATTORNEY
GENERAL, ANTITRUST DIVISION

Mr. Chairman, members of the subcommittee, I am pleased to be here today to discuss the Justice Department's views on H.R. 3055, a bill that would, among other things, amend the Shipping Act of 1916 to increase civil penalties against carriers found to have engaged in rebating from \$5,000 to \$25,000 per occurrence, authorize the Federal Maritime Commission (FMC) to suspend for up to one year the tariffs of carriers that engage in rebating or that fail to comply with the FMC's investigative demands relating to rebating, and grant amnesty from prosecution for certain types of conspiracies to violate the Shipping Act.

A memorandum has been prepared for the President which summarizes a year-long interagency study on the maritime liner industry. That memorandum discusses rebating in the context of the overall liner industry. Since we do not yet have a Presidential decision on rebating and maritime in general, we cannot at this time state a Departmental or Administration position on the bill. However, we would like to discuss some issues which should be considered in relation to the bill.

The bill contains provisions that would authorize suspension of the tariffs of ocean carriers that are found to have engaged in rebating or that fail to comply with FMC investigative demands regarding possible rebating. Section 3 of the bill would permit the FMC to suspend for up to twelve months the tariff of any carrier found to have engaged in rebating, in addition to subjecting such carrier to an increased civil penalty of \$25,000 for each shipment on which a rebate was paid. In addition, section 5 of the bill would authorize the FMC to suspend indefinitely the tariffs of carriers that fail to comply with its demands to produce documents, answer interrogatories, or provide other types of information. In either of these circumstances, the President would be statutorily empowered to overturn the FMC's determination if he finds that such action is required for reasons of the national defense or the foreign policy of the United States. A tariff suspension under either provision would effectively prohibit the affected carriers from entering United States ports.

The first anti-rebating statutes were enacted in the last century to force common carriers, primarily railroads, which had been giving preferential rates to large shippers, to adhere to their tariffs and treat all shippers large and small similarly. In 1916, when Congress enacted the Shipping Act, it prohibited rebating not only to protect the small shipper, but also to protect nonconference carriers from the deferred rebate system by which the conference lines retroactively granted substantial rebates to large shippers who patronized conference lines exclusively.

However, while it prohibited rebating, Congress permitted ocean carriers to form conferences subject to government supervision and granted approved conferences limited antitrust immunity. The primary function of a conference is to permit ocean carriers to meet and jointly set rates, an activity that they could not otherwise engage in under the Sherman Act. These rates must be filed with the FMC, and it is unlawful for carriers to deviate from them without amending the tariff. In setting rates, the conferences often set rates at a sufficiently high level to yield a profit to the least efficient conference members. As a result, we believe that shipping rates are often maintained at an artificially high level. This situation invites rebating by the more efficient or innovative carriers who are tempted to obtain additional cargo by offering secret price concessions or improved services at lower rates to shippers. American carriers, however, are hampered in their ability to grant such concessions

because they are more vulnerable than their foreign-flag competitors to detection by regulatory agencies such as the Securities and Exchange Commission and the FMC. This bill attempts to eliminate this disparity among carriers' ability to rebate or introduce low-cost innovations by making it easier for the FMC to investigate alleged rebating by foreign carriers and by increasing the penalties for illegal rebating.

The provision which would authorize the FMC to suspend tariffs under sections 3 and 5 could have potentially anticompetitive effects. This authorization, which would be in addition to the increased penalties for rebating, would potentially deprive such carriers of the right to enter United States ports for up to one year, thus eliminating them as competitive forces in such markets.

The Department of Justice is especially concerned about the FMC authority to suspend the tariffs of carriers who fail to respond to its investigative subpoenas. While we are sympathetic to the enforcement difficulties faced by the FMC with regard to foreign-flag carriers, we are concerned that the solution presented by this legislation would be unnecessarily anticompetitive.

The Department of Justice is aware of the problems associated with unlawful rebating. However, we think the committee should consider whether this bill may be an inappropriate approach to those problems. As we mentioned earlier, the President's Interagency Task Force which has been studying these issues with a view toward presenting this Congress with a cohesive maritime policy expects a Presidential decision soon. When the President has completed his review of the Task Force's report, we will be in a better position to work with the Congress on these issues.

We are also very concerned about section 10 of this bill. Section 10 would grant amnesty to carriers that have in the past engaged in illegal conspiracies to violate certain provisions of the Shipping Act. The bill would also preclude the Department from prosecuting any future conspiracies of this nature. As a matter of principle, we are generally opposed to amnesty legislation.

Rebating regardless of its future status has been and remains illegal. The various carriers engaged in this activity were aware of its illegality at the time they engaged in it, and their ability to avoid detection or prosecution until now should not be rewarded. Moreover, a grant of amnesty to ocean carriers may encourage firms in other regulated industries to think that they can successfully avoid prosecution by seeking amnesty from Congress.

Mr. Chairman, this concludes my prepared remarks. I would be glad to answer any questions this Subcommittee may have.

STATEMENT OF CHARLES I. HILTZHEIMER, CHAIRMAN AND CHIEF EXECUTIVE OFFICER, SEA-LAND SERVICE, INC.

Mr. HILTZHEIMER. Mr. Chairman, my name is Charles I. Hiltzheimer and I am chairman of the board and chief executive officer of Sea-Land Service, Inc. As the committee knows, Sea-Land is our Nation's largest containership operator. We strongly support H.R. 3055.

On October 14, 1977, just about 19 months ago, I sat here and testified in support of H.R. 9518; an almost identical bill which the 95th Congress subsequently passed by overwhelming votes but which President Carter refused to sign into law. There is no less need for H.R. 3055 than there was for H.R. 9518.

With your permission I will submit a copy of my prepared statement on H.R. 9518 for the record.

There has not been any significant improvement in the situation since I last testified on the need for antirebate legislation.

The settlements which the FMC has made with a limited number of foreign carriers do not seem to have produced the body of data on rebating that the legislation is intended to develop.

Although six Japanese carriers have entered into civil compromise agreements with the FMC and consented to the payment of civil penalties on rebating charges since this committee acted on H.R. 9518, I note that the scope of the charged rebating practices

has never been revealed. It appears that the Japanese lines did not produce any concrete data or records to the FMC, and instead, merely bought their peace by paying their fines.

Zim-Israel line also made a settlement without providing the FMC with details of its rebating; the Netherlands-flag carrier NedLloyd lines and Norway's Hoegh Line have entered into a civil compromise agreement concerning rebating by their joint service.

It is also interesting to note that none of these foreign carriers have been prosecuted by the Department of Justice under the conspiracy theory that Justice pursued against Sea-Land and two other American companies.

Is that because the Department of Justice evaluates such prosecutions of foreigners as futile because only American companies records can be reached by our Government?

There are signs that foreign carrier rebating continues in the U.S. liner trades while American carriers are adhering to the law. It continues to appear that our law enforcement does not reach foreign carriers effectively and indirectly provides an incentive to foreign rebating.

H.R. 3055 will address the continuing inability of U.S. authorities to obtain adequate evidence of unlawful rebating by foreign carriers; the ability of foreign carriers to avoid U.S. law enforcement; and the inequity of enforcement of the law upon Americans while foreign carriers remain beyond reach.

Why was H.R. 9518 pocket vetoed? Why is H.R. 3055 opposed? The asserted reasons which have surfaced are totally invalid, as I shall explain.

Some opponents have said that illegal rebating is anti-inflationary and that strengthening the FMC's power to combat violations of the Shipping Act of 1916 would be inflationary. But I have not seen any legislative proposals to legalize rebating. So long as rebating is illegal, effective and evenhanded enforcement of the law is essential. Otherwise, law-abiding carriers will face grave competitive disadvantage.

If inflationary effect were a valid theory for opposing law enforcement, then Congress would be dutybound to enact legislation declaring that all violations of U.S. law will be forgiven if the violations have an anti-inflationary effect.

To argue that H.R. 3055 should be opposed because it is inflationary approaches the heights of governmental irresponsibility. If combating illegal rebating has inflationary impact that must mean that illegal rebating is widespread and a significant market influence.

Opponents of antirebate legislation have suggested that rebating is only engaged in by conference members in response to fair and open price competition from honest and public spirited nonconference carriers. Such a characterization of rebating is totally wrong.

Nonconference rebaters were legion in the past and will always be a problem until Congress legislates the means of dealing with them effectively. We have heard allegations that even the Soviet carriers compound their predatory tariff actions by adding illegal secret rebates in some trades.

Opponents tell us there is no need for legislation because the malpractice problems can be stopped through negotiations with

other nations. Indeed, President Carter's memorandum of disapproval of H.R. 9518 took note of the fact that the United States was engaged in discussions with European nations and Japan on a number of shipping problems, including rebating.

However, it does not appear that any meaningful results have been achieved through the international discussions thus far. We do not see any prospects for such results absent legislation.

As recently as March 6, Deputy Assistant Attorney General Donald L. Flexner was asked by Chairman Murphy "from your point of view, does the FMC now have sufficient powers to obtain documents located overseas?" and replied, "I can't answer that, Mr. Chairman. Obtaining documents overseas is a very difficult process, whether for the Federal Maritime Commission or the Department of Justice."

The last meeting of the U.S. Government and the Consultative Shipping Group was held in London in 1978. It produced nothing but platitudes and soothing words to lull our executive branch into inaction. No agreement has been reached under which foreign carriers could be compelled to produce records or data to U.S. authorities.

In fact, the latest clear-cut foreign governmental action has been a refusal to cooperate. The official agreed record of the fall 1978 London meeting of CSG and U.S. representatives reported grave concern among the CSG representatives about U.S. antitrust law issues. On April 19, the Journal of Commerce reported that one CSG member, Sweden, has instructed its shipping companies not to testify in a U.S. grand jury investigation on alleged liner conference violations.

In a recent appearance before this committee the Chairman of the FMC spoke of his disappointment in our Government's efforts to obtain foreign cooperation and said:

... The CSG records show no active effort to encourage compliance with the law. Moreover, the document is left to the interpretation of each government. Our experience has been that adherence has been uneven, that foreign governments continue to respond to our requests for assistance in greatly varying degrees.

Deputy Assistant Secretary of State James R. Atwood advised this committee on March 6, that the CSG accords do not place any obligations upon the CSG countries and that "there was no commitment to outlaw rebating, no commitment to stop rebating, no commitment to do anything other than discuss the problems."

One other objection raised to H.R. 9518 was that the absence of a Presidential right to override a suspension of the tariffs of a carrier would impair the President's powers over foreign affairs. I have never shared that concern. Perhaps that is because I have not been troubled by the SEC's statutory right to suspend the effectiveness of the registration statement of a noncooperative foreign corporation. I see no difference between that SEC authority and giving the FMC power to suspend the tariff of a noncooperative foreign carrier who has refused to provide data on U.S. commerce as required by U.S. law.

Nevertheless, it appears that section 5(d)(4) of H.R. 3055 adequately addresses and removes that objection of the administration by giving the President 10 days in which to disapprove a tariff

suspension order issued by the FMC under this bill. We approve this compromise.

I would like to offer comments upon some other specific provisions of H.R. 3055.

Section 3 of the bill would increase the civil penalty for rebate or refund violations to \$25,000 per shipment and would also provide for tariff suspension for up to 12 months. Great care must be exercised to insure that the tariff suspension penalty for proven rebating is only used for the most aggravated offenses and that the language of the bill is not construed as making tariff suspension mandatory in all cases.

Therefore, we recommend that line 14 on page 2 of H.R. 3055 be amended by inserting a period after the word "paid," by deleting the words, "and to suspension by the Commission" and then inserting the words "upon finding repeated willful violations of subsection (b)(3) by a carrier the Commission may order the suspension."

There appear to be some drafting errors in numbering subsections of the bill. We have identified them in exhibit A to my prepared statement and I will not consume the committee's time by reciting them now.

Mr. Chairman, I reiterate that there is no less need for H.R. 3055 than there was for H.R. 9518. Sea-Land urges the Congress to promptly enact H.R. 3055. The American carriers have demonstrated their commitment to abiding by the Shipping Act's prohibitions of rebating. We ask only for fair, evenhanded, and effective enforcement of the law against all carriers.

I thank you for this opportunity to express Sea-Land's views, and I am ready to answer any questions of the committee.

Mr. DONNELLY. On page 5 of your statement you testified, and I quote, "However, it does not appear that any meaningful results have been achieved through the international discussions thus far."

Then on page 6 you state, and I quote:

The last meeting of the U.S. Government and the consultative shipping group was held in London in 1978. It produced nothing but platitudes and soothing words to lull our executive branch into inaction.

Is it not your opinion that the attempts to obtain records through international agreement is futile?

Mr. HILTZHEIMER. That is my opinion, yes.

Mr. DONNELLY. Thank you. Counsel?

Mr. CORRADO. Am I correct in assuming that your organization opposes legalizing rebating?

Mr. HILTZHEIMER. I would oppose legalizing rebating.

Mr. CORRADO. Why?

Mr. HILTZHEIMER. Because of a number of reasons.

First, American carriers are not professional in rebating, and they would be outdone in an international arena where the pros have been practicing longer than we have.

Second, Americans traditionally, on balance, are higher cost operators than foreigners, so if you had a legalized rebating situation, the foreigner could rebate more than the American, and you would still have an unequal situation.

Third, rebating is not confined to—not spread to all shippers and all commodities at the same time. So you have inequality and

discriminatory effects within the trade that would cause more instability than we have today.

So those are some of the things that come to mind that would make me object to that as a solution.

Mr. CORRADO. Thank you.

Mr. KYROS. You heard testimony this morning by Mr. Bank of the State Department concerning the possibility of retaliatory action by foreign nations, in the event that the suspension action that is imposed in this legislation were utilized by the FMC.

Do you, as a U.S. carrier, fear such retaliatory action? Are you concerned about that?

Mr. HILTZHEIMER. No, sir, we do not see any evidence that would lead us to believe that we are going to be shut out or suffer any irreparable damage by actions taken by foreign governments.

I believe the issue is whether or not foreigners are going to be required to obey U.S. law. There is no question so long as the U.S. law is illegalizing rebating, the Americans have to comply with that, and I think they are.

The question is whether or not the foreigners are going to comply with U.S. law. I feel that it is only equitable that they be required to do the same as the U.S. carriers, and if there were any consideration of retaliatory actions by foreign governments, they would have to weigh very heavily the value of their shipping lines engaging in the U.S. foreign commerce, which is the most lucrative that exists on its own, that exists in the world.

So I would not have the concern expressed by Mr. Bank that we may suffer retaliation by enacting this legislation.

Mr. KYROS. From your own experience currently as one of the largest carriers operating in the world, in the many oceans, is there a current need for this rebating bill? Is the very nature of the bill such that it would bar people from even contemplating rebating as well as perhaps take care of any rebating that might exist currently?

Mr. HILTZHEIMER. From a practical viewpoint, I don't think any legislation or any governmental action would ever stamp out rebating 100 percent, since our laws and police forces do not eliminate crime within our own country.

However, I think that if you provide law enforcement that can be effective and equally applied, it certainly gives evenhanded treatment to all parties under the law, and it also acts as a deterrent to keep the rebating at a minimum.

Mr. KYROS. Mr. Hiltzheimer, there has been settlements with some foreign carriers in which the same kind of documents and the same kind of information and continuing requirements were not precisely similar to those settlements with American carriers.

Is that a fact and does it result in an unfair disparity with American carriers?

Mr. HILTZHEIMER. Yes, that is a fact, that all foreign carriers that have made settlements with the FMC have done so, to the best of the information I have, on the basis of declaring that they rebated x amount of money and they would pay a fine of a certain amount. And that was pretty well the extent of the case.

Whereas in our case, and the other American lines, we have had to furnish extensive data, go to great lengths and expense, attorneys and accountants, furnishing information to the Commission.

We have even had to go through the embarrassment of furnishing shippers, names, and in some cases, alienate shippers who do not want to use us for future business. The foreign competitors escape all of this, and as far as I am concerned, the FMC has just had to take their word.

Mr. KYROS. So there has been considerable disparity in the settlement of U.S. cases and foreign cases, by the FMC?

Mr. HILTZHEIMER. Yes.

Mr. KYROS. In the case of three U.S.-flag carriers, there has been criminal prosecution under 18 U.S.C. 371, but none, to my understanding, has been brought against a foreign shipping company; is disparity also indicated in that kind of treatment?

Mr. HILTZHEIMER. I think it is very obvious with three American companies prosecuted, indicted under the conspiracy theory, and no foreigners have yet been indicted, that you can draw the logical conclusion that it is very probable that no foreigners will be indicted.

Mr. KYROS. Finally, Sea-Land Shipping Co. has often talked about, a proposed right of independent action. You have talked about that as a possible mechanism for giving price flexibility and responsiveness in conferences. Some other carriers have debated that.

Would that by itself be a solution to rebating?

Mr. HILTZHEIMER. No, I don't think it would serve as a solution to rebating. Again, it is a device that is anti-inflationary in the sense that it provides flexibility of pricing within a conference structure, if a carrier elected to exercise it without the requirement that you obtain majority approval by conference members.

I think the shippers would welcome it, and I think it would be a healthy system for the conferences. My perspective is that the conferences will not last unless they become more flexible in their pricing. But it is a deterrent to rebating in the sense that an individual line who knows another carrier is rebating has the ability to cut his prices legally to the level that the rebater is using; and in that sense that takes the incentive away from the rebating carriers. But alone, by itself, it is not a solution to rebating.

Mr. KYROS. One final question.

In those accords we have been talking about, the Consultative Shipping Group, agreed record of November 17, 1978, one of the provisions was that on matters of enforcement the FMC, must give notice to the particular foreign shipping company, the CSG nation involved, and also must give 30-days notice of any enforcement action specifically by the FMC.

Was the same kind of treatment accorded to U.S. citizens and shipping companies under our laws?

Mr. HILTZHEIMER. Well, I'm not specifically knowledgeable on that. I don't think I could answer that accurately.

Mr. KYROS. Thank you very much.

Thank you, Mr. Chairman.

Mr. DONNELLY. Thank you very much, sir.

Is Dr. John Fearnside here, the Deputy Under Secretary, Department of Transportation?

Thank you for appearing this morning.

What we will do at this time is recess for 10 minutes. I will go over and vote and come right back and see if we can finish this up expeditiously.

[Whereupon, the subcommittee was in recess.]

Mr. DONNELLY. The committee will be in order.

Dr. Fearnside, welcome to the subcommittee. We thank you for coming.

STATEMENT OF DR. JOHN FEARNSIDES, DEPUTY UNDER SECRETARY, DEPARTMENT OF TRANSPORTATION

Dr. FEARNSIDES. Thank you, Mr. Chairman. I appreciate the opportunity to represent the Department of Transportation and to express some views with respect to H.R. 3055, a bill to strengthen the provisions prohibiting rebating in the maritime transport of goods in the foreign commerce of the United States.

Mr. Chairman, I have made a couple of editorial revisions in the statement, and I would be happy to submit it for the record. I thought I would just go through it very quickly and make a couple of additional points that I think would help to clarify the statement that we have submitted.

[The following was received for the record:]

STATEMENT OF DR. JOHN J. FEARNSIDES, DEPUTY UNDER SECRETARY, DEPARTMENT OF TRANSPORTATION

Mr. Chairman and members of the subcommittee: I appreciate the opportunity to express the views of the Department of Transportation on H.R. 3055, a bill to strengthen the provisions prohibiting rebating in the maritime transport of goods in the foreign commerce of the United States.

Secret rebating by common carriers is illegal. Last year the 95th Congress passed H.R. 9518 in an attempt to deter rebating in our foreign trades. The President did not sign this bill indicating his desire to achieve its objectives through international negotiations and a comprehensive U.S. maritime policy dealing with the broader organizational and regulatory issues of the U.S. oceanborne trades. The enforcement inequities which characterize our present regulatory system are of great concern to the Congress, the Department of Transportation and to U.S. flag carriers. Due to foreign country blocking statutes, which prevent foreign carriers from giving FMC documents, U.S. carriers are more susceptible to prosecution for rebating than their foreign flag counterparts.

H.R. 3055 is a renewed attempt to deal with these problems and the Department of Transportation fully supports the goals it seeks to achieve. The Department supports a strong U.S. flag fleet which can only survive if the competitive conditions under which it operates are fair and equitable to all participants.

Thus, while we subscribe to the aims of H.R. 3055, we would like to offer some thoughts on certain aspects of the bill. A memo has recently been sent to the President which summarizes the activities of a year long interagency study on the Maritime Liner Industry. That memorandum requests his decision on what the overall policy toward the maritime industry, including rebating should be. Since we do not yet have that decision, we cannot at this time give you a position on this bill.

U.S. carriers face a competitive disadvantage in the conference system. U.S. carriers are effectively required to adhere to their conference tariffs, while certain foreign carriers are effectively able to offer discounts from their conference tariff rates in the form of secret rebates. This is because of the inability of the FMC to enforce our laws equally between U.S. and foreign carriers. The governments of many of these carriers forbid them from producing their documents for FMC inspection. While these foreign governments strongly support the conference system, their laws have the effect of preventing effective enforcement activities by the FMC to assure the fairness of that system.

Secret rebating is practiced in order to gain a competitive advantage in trades where rates are apparently set higher than the levels at which at least some

carriers are willing to perform the service. American carriers are hampered in their ability to grant such concessions, however, because they are more vulnerable than their foreign flag counterparts to detection and prosecution by regulatory agencies such as the FMC and the Securities and Exchange Commission.

As a means to promote flexibility in conference rate structures and to reduce the incentive to rebate, DOT would like to suggest that Congress consider whether a right of independent action should be included in all FMC approved rate fixing agreements. Independent action might be a workable way out of rate situations which create frustration to innovative conference carriers. Likewise, shippers seeking to expand their foreign markets could receive expedited decision making in some cases.

The advantages of independent action are: (1) shipper discrimination involved in rebating should be ameliorated by the exercise of independent action by individual carriers and (2) conference ratemaking procedures should be expedited.

Mr. Chairman, this concludes my prepared statement. I will be happy to answer any questions you or other members of the Subcommittee may have.

Dr. FEARNSIDES. Secret rebating by common carriers is illegal. Last year the 95th Congress passed H.R. 9518 in an attempt to deter rebating in our foreign trades. The President did not sign this bill, indicating his desire to achieve its objectives through international negotiations and a comprehensive U.S. maritime policy dealing with the broader organizational and regulatory issues of the U.S. oceanborne trades.

The enforcement inequities which characterize our present regulatory system are of great concern to the Congress, to U.S.-flag carriers and, among others, we in the Department of Transportation.

Due to foreign country blocking statutes, which prevent foreign carriers from giving FMC documents, U.S. carriers are more susceptible to prosecution for rebating than their foreign-flag counterparts.

H.R. 3055 is a renewed attempt to deal with these problems and the Department of Transportation fully supports the goals it seeks to achieve. The Department supports a strong U.S.-flag fleet which can only survive if the competitive conditions under which it operates are fair and equitable to all participants.

Ordinarily, because we subscribe to the aims of H.R. 3055, we would offer some thoughts on certain aspects of the bill. However, because a memo has recently been sent to the President which summarizes the activities of a year-long interagency study on the maritime liner industry, we do not at this point have any comments on our position on this bill.

U.S. carriers face a competitive disadvantage in the conference system. U.S. carriers are effectively required to adhere to their conference tariffs, while certain foreign carriers are effectively able to offer discounts from their conference tariff rates in the form of secret rebates. This is because of the inability of the FMC to enforce our laws equally between the United States and foreign carriers. The governments of many of these carriers forbid them from producing their documents for FMC inspection. While these foreign governments strongly support the conference system, their laws have the effect of preventing effective enforcement activities by the FMC to assure the fairness of that system.

Secret rebating is practiced in order to gain a competitive advantage in trades where rates are apparently set higher than the levels at which at least some carriers are willing to perform their service. American carriers are hampered in their ability to grant

such concessions, however, because they are more vulnerable than their foreign-flag counterparts to detection and prosecution by regulatory agencies such as the FMC and the SEC.

As a means to promote flexibility in conference rate structures, and to reduce the incentive to rebate, the Department of Transportation has in the past suggested that Congress consider whether a right of independent action should be included in all FMC approved rate-fixing agreements. Independent action might be a workable way out of rate situations which create frustration to innovative conference carriers. Likewise, shippers seeking to expand their foreign markets could receive expedited decisionmaking in some cases.

The point I was going to add on page 4 of my prepared statement, Mr. Chairman, with respect to the advantage of independent action, was articulated very well by Mr. Hiltzheimer earlier today. My feeling is that independent action will have some advantage in providing U.S. carriers an opportunity to legally compete with the illegal rebating practices of foreign carriers. Obviously, this will not prevent rebating by itself, but at least it could, absent other moves, provide the U.S. carriers with a little bit of extra flexibility in dealing with competitors within the conference.

This concludes my prepared statement, Mr. Chairman. I would be happy to answer any questions that you might have.

Mr. DONNELLY. Thank you.

On page 2 of your statement you make mention of the inter-agency memo that was recently sent to the President. Do you know exactly when that was sent off to the President?

Dr. FEARNSIDES. No, sir, I don't know exactly when it was sent. It certainly was in the recent past.

Mr. DONNELLY. A week ago, 2 weeks ago?

Dr. FEARNSIDES. In that general area. It has been a week or two as I understand it.

Mr. DONNELLY. Do you know what the status of it is?

Dr. FEARNSIDES. My understanding is that the response from the President is due very quickly.

Mr. DONNELLY. A week, 2 weeks?

Dr. FEARNSIDES. Sir, that has been beyond our ability to influence for a while now.

Mr. DONNELLY. When you do find out, you will let us know?

Dr. FEARNSIDES. I will, indeed, Mr. Chairman.

Mr. DONNELLY. Thank you.

Counsel?

Mr. KYROS. Thank you, Mr. Chairman. Just a couple of questions, Dr. Fearnside.

You say on page 3 that—

Secret rebating is practiced in order to gain a competitive advantage in trades where rates are apparently set higher than the level at which at least some carriers are willing to perform the service.

Well, of course there is selective rebating on certain commodities where it's not a case where the rates have been set higher, but rather, where the carrier, having a low-cost capital investment, like a foreign carrier, is able to rebate in order to fill his ship. So once he has met all his fixed costs on his vessel, all that cargo is coming on and it's just a matter of meeting his handling costs and

whatever else he gets is enormous profit for him. So it's really not only just the case where there's a higher level, but there are actually cases where people try to fill their ships; isn't that a fact?

Dr. FEARNSIDES. I am sure that may be, Mr. Kyros. I think the feeling, in general, is that extensive rebating goes on and that it could be a reflection of the fact that the agreed-to rates may be higher than they ought to be. But, if I may make an analogy to some of the transportation systems I am more familiar with, there certainly are cases where the marginal costs of providing a particular service gives one competitor an advantage over another.

Mr. KYROS. Now, in the other case, on the high seas, you put ships on the line and might have an overcapacity, an overtonnaging of a certain trade, especially since our trades are open. Now, that result will be that too much capacity will be chasing too few cargoes. And then again, it's really not so much rates as it is the desperation of carriers to keep in operation.

The Justice Department, in one of their studies, has said "Well, it's not very hard. What you do is you keep taking units off. The shipowner just pulls his ships." Well, that's not so easy to pull them off.

What I'm suggesting is there may be some other reasons than just a higher level of rates that is inordinate or not necessary for market purposes.

Dr. FEARNSIDES. Once again, in the trucking industry there have been cases where people are willing to make a very small return on their investment just to keep in business or to keep rolling, if you will.

What we have learned, Mr. Kyros, in dealing with the regulations of all transportation industries, and what I hope the Transportation Department can bring to the consideration of maritime matters, is that while the rules of competition and economics seem to work in general, the dynamics of various transportation industries must be considered in depth. You cannot assume that because you have taken, in my mind, a particular regulatory approach in one mode of transportation, that you will get the very same results in other modes. The dynamics are often very different.

Mr. KYROS. I think that's a very helpful attitude.

On page 2 you say the Department of Transportation "fully supports the goals it seeks to achieve" by the present legislation, and you subscribe to its aims.

Then, subsequently, you discuss the right of independent action, which as you know has been discussed earlier, by Sea-Land, for example, and other proponents as a flexible pricing mechanism. Of course, the right of independent action only affects conference members.

For example, in the Pacific Basin, 50 percent of the operation, I understand, is nonconference. So that wouldn't affect nonconference carriers. It would not be a mechanism by which that might alleviate rebates; isn't that correct?

Dr. FEARNSIDES. That's right. The right of independent action would only help conference rebating.

Mr. KYROS. Thank you very much, Dr. Fearnside.

Thank you, Mr. Chairman.

Mr. DONNELLY. Thank you very much, Dr. Fearnside.

Our next witness is C. William Neuhauser, executive secretary, National Maritime Council.

STATEMENT OF C. WILLIAM NEUHAUSER, EXECUTIVE SECRETARY, NATIONAL MARITIME COUNCIL, ACCOMPANIED BY W. PATRICK MORRIS, LEGISLATIVE DIRECTOR

Mr. NEUHAUSER. Thank you, Mr. Chairman. I would like to bring up also Mr. W. Patrick Morris, our legislative director.

Mr. Barker, the chairman of the board of directors, called this morning. He had fully planned to be here and something came up which precluded him from doing so. So with your permission, I would read his statement.

Mr. Chairman and members of the Merchant Marine Subcommittee, my name is James R. Barker. I am the chairman of the board of governors of the National Maritime Council, a nonprofit trade association consisting of seagoing and shoreside labor unions, major U.S. shipyards, and U.S. flag liner operators, providing general cargo service in the U.S. foreign trades.

The purpose of our organization is to strengthen America's maritime industry through the development and maintenance of a national maritime policy, consistent with an international trade policy which will increase the foreign commerce of the United States.

The NMC appreciates this opportunity to present the industry's views with respect to H.R. 3055, legislation designed to strengthen the provisions of the Shipping Act of 1916 prohibiting rebating in the U.S. foreign trades.

The Shipping Act of 1916 is the basic statute setting forth the obligations and responsibilities of all liner carriers, both United States and foreign flag, serving our foreign trades. One such obligation is that all such carriers file with the Federal Maritime Commission and adhere to the published tariffs for the carriage of goods. Rebating can take many forms, but basically is the practice of collecting less money than the published tariff for a specified service performed and is expressly unlawful.

Certain carriers use this illegal practice in order to attract more cargo for their vessels by one or more of a variation of schemes, up to and sometimes including simply offering secret kickbacks. Rebating also runs contrary to the entire philosophy of common carriage, which is founded on the principle that a carriers' service will be offered at the same price to all similarly situated customers.

In the 95th Congress, the House of Representatives and the Senate sought to attack this pernicious practice by passing legislation, namely, H.R. 9518. That bill, which received bipartisan support, passed the House by the overwhelming margin of 390 to 1, and the Senate unanimously, but was pocket vetoed by President Carter relying on the misadvice of the Departments of Justice and State.

During your deliberations on that legislation, this subcommittee compiled a record consisting of some 739 pages. The record clearly documented the need for legislative action to combat rebating and to rectify the patently unfair situation where U.S.-flag carriers must comply with Federal Maritime Commission requests for information and documents concerning their pricing behavior while

their foreign competitors will not or do not because of the existence of blocking statutes.

To address these problems, H.R. 3055 would amend the Shipping Act of 1916 in four important respects. First, a new paragraph (7) would be added to subsection 18(b), increasing the civil penalties for rebating under subsection 18(b)(3), from not more than \$1,000 per day to not more than \$25,000 per shipment.

In addition, the FMC, upon a finding of such violation, could suspend any or all of that carrier's tariffs or rights to utilize conference tariffs for a period up to 12 months. The carriage of cargo during such suspension period would subject the offender to a civil penalty of not more than \$50,000 per shipment.

Second, a new subsection would be added to section 21 providing the FMC expanded authority to require certifications from U.S. and foreign flag carriers, forwarders, shippers, brokers, and other persons subject to the Shipping Act of 1916, attesting to company policies and efforts to address rebating and to other information necessary for the Commission to faithfully carry out the mandate of the law. Failure to file such certifications may result in a civil penalty of not more than \$5,000 per day the violation continues. We note that the certification requirement would be applied across the board in a nondiscriminatory fashion.

Third, a new subsection would be added to section 22, authorizing the Commission, in connection with an adjudicatory proceeding examining possible rebating, to issue an order to show cause why the tariffs of a carrier or its right to utilize a conference tariff should not be suspended for failure of that carrier to comply with any subpoena or order of the FMC to answer interrogatories, questions propounded by deposition, or to produce documents related to any Commission investigation of illegal rebating.

If the carrier fails to produce the requested documents, answer the questions or interrogatories, and fails to show cause why it has a right to withhold such information, the FMC, after consultation with the Secretary of State, has authority to suspend any or all tariffs of that carrier which may be on file with the Commission. This power to suspend tariffs as well as the power to suspend tariffs for a violation of the rebating proscription may be overridden by the President for reasons of foreign policy or national defense.

Finally, two new subsections would be added to section 32, the general penalty provision of the statute. Subsection (d) would preclude the imposition of a penalty on any person for conspiracy after August 29, 1972, to rebate or refund, or to defraud the Commission by concealment of such rebates or refunds.

This provision was contained in H.R. 9518. The committee report on that bill describes at length the reasoning for the committee action to include the provision, so I will not replot that ground.

New subsection (e) would authorize the FMC to assess or compromise civil penalties prescribed in the Shipping Act of 1916. This power, which the Congress has vested in a number of other regulatory agencies, should expedite the formal assessment of penalties and lessen the chance of inconsistent treatment among carriers.

We believe H.R. 3055 is urgently needed because the President's basis for vetoing H.R. 9518 has proven to be incorrect. Mr. Carter

put all his eggs in one basket, that is, the United States/Consultative Shipping Group talks in November, 1978. In London, the United States delegation labored long and hard to achieve an Agreed Record. That document was intended, in part, to serve as the basis for an interchange of information to enable the Federal Maritime Commission to enforce the antirebating provisions of the Shipping Act of 1916.

Specifically, paragraph 3 of the Record provides in pertinent part:

* * * where the FMC is investigating a CSG conference line for suspected illegal rebating within U.S. jurisdiction and, first, had exhausted the possibilities for obtaining evidence from within the United States or on a voluntary basis, and second, could specify what kinds of further evidence it needed from within a CSG country, the CSG country concerned would undertake as an act of comity to seek the cooperation of and encourage the carrier to provide the necessary evidence to allow a settlement to be reached. * * * In cases where production of evidence on such a cooperative basis proved ineffective, the U.S. side stated its view that the relevant CSG government should grant waivers (or abstain from prohibitions as the case may be) for the production of evidence, and the CSG side agreed that the individual government(s) concerned would, of course, be prepared to discuss with the United States and to consider this.

Subsequent enforcement efforts under this international arrangement have been less than a success. Foreign carriers have remained extremely reluctant to cooperate with the FMC in its rebating investigation. Although the Commission has reached settlements with a number of foreign flag carriers, we understand that none of these carriers has made disclosures of the type and magnitude that the FMC demands of U.S.-flag carriers. Indeed, it is our understanding that no documentary evidence has been produced by any foreign flag carrier and no CSG government has granted a waiver of its blocking statute.

Accordingly, if there is to be fair, equitable, and evenhanded administration of U.S. shipping laws, legislation along the lines of H.R. 3055 is required.

This concludes Mr. Barker's statement. I will attempt to answer any questions that you gentlemen may have.

Mr. DONNELLY. Counsel?

Mr. KYROS. No questions, Mr. Chairman, thank you.

Mr. DONNELLY. If there are no questions, we appreciate your coming by, Mr. Neuhauser. Thank you very much.

I have been informed that Mr. May, Mr. Brand, and Mr. Avery are not here, so our final witness is Hon. Robert Leggett, president of the Joint Maritime Congress.

Welcome, Mr. Leggett. If you like, you could submit your statement for the record.

STATEMENT OF HON. ROBERT L. LEGGETT, PRESIDENT, JOINT MARITIME CONGRESS

Mr. LEGGETT. Thank you very much, Mr. Chairman. I was going to ask unanimous consent that that occur.

Mr. DONNELLY. Without objection.

[The following was received for the record.]

STATEMENT OF HON. ROBERT L. LEGGETT, PRESIDENT JOINT MARITIME CONGRESS

Mr. Chairman and Members of the subcommittee, I appreciate the opportunity the subcommittee has provided the Joint Maritime Congress to present its views on H.R. 3055, legislation designed to provide additional and more evenhanded enforce-

ment strength to the Federal Maritime Commission to combat rebating practices in our Nation's oceangoing foreign trades.

I am particularly glad today, Mr. Chairman, to indicate the strong support of the Joint Maritime Congress for early enactment of the proposed legislation under consideration.

Today, I need not go into great detail on the history of this legislation inasmuch as the members of this subcommittee are well familiar with it, having been actively engaged in consideration of anti-rebating legislation for nearly two years. As a personal note, I recall that while serving as a member of the Merchant Marine and Fisheries Committee, I was among the several members who joined the distinguished Chairman, Mr. Murphy, on October 12, 1977, in introducing H.R. 9518, a bill identical in intent and similar in construction to that of H.R. 3055. As all of us here today know, that bill was passed overwhelmingly in modified form by both Houses of the Congress only to be pocket vetoed by President Carter in November, 1978. That veto—one that did not give the Congress the opportunity for reconsideration—was an extreme disappointment to those of us serving in the Congress at the time, as well as to the U.S. Maritime and related industries who had sought and developed a forceful yet reasonably directed legislative tool to be used by the Federal Maritime Commission (FMC) in the enforcement of illegal rebating practices in what is commonly known as our international liner trades.

In his "Memorandum of Disapproval," President Carter observed in part:

"This legislation, which would impose severe enforcement measures in the area of ocean shipping rebating, reflects concern of the possible disparity in enforcement of our anti-rebating laws against U.S.-flag carriers but not against foreign-flag operators. I share that concern, and any disparity that exists must be eliminated."

With such "concern," why then the failure to sign H.R. 9518? The President advised that he was delaying the United States from taking unilateral action in deference to then ongoing multilateral negotiations with other member nations of the Consultative Shipping Group (CSG) "in an attempt to reach cooperative agreements involving a number of shipping problems, including rebating." Too, the President also said he was "directing the Administration's Maritime Policy Task Force to provide, by an early date, a set of recommendations that will address both the substance of our rebating laws as well as procedures for enforcement, taking into account the inherently international character of ocean shipping."

Well, what has happened? Once again, the U.S. Maritime industry plays a waiting game with the Administration. While the negotiations with the 13 member CSG did produce what has been termed "a commitment" to improve their cooperation with the FMC in its work to enforce existing anti-rebating statutes as they would apply to their ships which participate in our trades, their intervention will occur only when the FMC can indicate what specific information is needed from a member country, and only when all other attempts to obtain evidence have failed.

And yes, we are still waiting for the Interagency Maritime Task Force report. All of us hope that the President, who has proclaimed May 22 as National Maritime Day, will perhaps use that opportunity to announce a comprehensive set of creative proposals addressing both the promotional and regulatory reforms sorely needed to revitalize the U.S. maritime industry. Unfortunately, the signals we have been receiving are that that report will be but a fragile shell, if indeed it is ever unveiled at all. One FMC Commissioner has observed that the delay in producing the report is an "embarrassment" of both national and international proportions. Sadly, we must agree with that observation.

Those of us in the industry remain firm in our belief that the preamble to the 1936 Merchant Marine Act remains a fundamentally solid foundation statement upon which all other U.S. Maritime laws, policy, and practice rise in building a sound U.S. economy and national security system. Because of the Administration's policy vacuum, we must turn to the Congress for the leadership in developing a rational maritime policy that will meet the challenges the industry and our Nation faces today in a vigorously competitive international economic system. For U.S.-flag shipping generally that means trying to survive against cutthroat practices of foreign competitors.

Unfortunately, the interagency rivalries and conflicts of this Administration and those which have preceded it in the policy arena have not been abated. Direction therefore must come from the Congress. I am confident that this subcommittee and its counterpart in the Senate and the respective full committees have the foresight and fortitude to move forward with diligence in the months ahead to formulate comprehensive and desperately needed new maritime policy measures for the Nation.

Today, the Committee has before it legislation that is not designed to cure all the ills which beset our Nation's oceangoing shipping. Under consideration is a needed

tool which as the Chairman has noted "would permit the Commission to carry out its regulatory function to deter rebates in a swift, effective and evenhanded fashion. For this first time, foreign-flag operators would be required to comply with FMC subpoenas and discovery orders or face possible exclusion from our foreign trades."

The need of such a tool is abundantly clear. Senator Daniel Inouye, Chairman of the Senate Merchant Marine and Tourism Subcommittee observed when he introduced S. 199, a bill identical to H.R. 3055, "Existing mechanisms in law which reduce the incentive for carriers to engage in illegal rebating have been rendered inoperative by Administrative and Judicial interpretation, and lack of a coherent, unified national shipping policy."

H.R. 3055 provides needed increased penalty incentives for compliance with anti-rebating provisions of the Shipping Act of 1916.

Section 2 increases from \$5,000 to \$25,000 the maximum civil penalty for violation of Section 16—engaging in illegal rebating practices.

Section 3 increases from \$1,000 per day to \$5,000 per day the maximum penalty for violating provisions of Section 18 other than rebating. These include failure to file a tariff, charging rates other than those published in the tariffs, and modifying tariffs without proper notice.

Section 3 also increases from a maximum of \$1,000 per day to a maximum of \$5,000 per shipment, the civil penalties for rebating under Section 18. The Federal Maritime Commission also may suspend any or all tariffs or rights to use conference tariffs for up to 12 months. If during such a suspension period the carrier engages in the carrying of cargo, it would be subject to a maximum civil penalty of \$50,000.

In view of the severity of the rebating problem, the attendant erosion of the conference system and demise of U.S.-flag shipping if left unabated, the Joint Maritime Congress views the increased enforcement penalties as reasonable.

Section 4 requires the chief executive officer of any carrier covered by the bill and to the extent deemed "feasible" for any shipper, cosignor, consignee, forwarder, broker, or other carrier or other person subject to the bill, to file a written certification under oath with the Federal Maritime Commission attesting to an anti-rebating policy that has been promulgated to appropriate officers, employees and agents; the details of efforts to comply with such a policy; and an expression of cooperation with the FMC to investigate and end illegal rebating practices. The section also places a maximum civil penalty of \$5,000 for each day such certification is not filed as required by the FMC.

Initially, certification was proposed to apply only to subsidized U.S. carriers so that none would participate in illegal rebating and at the same time receive U.S. government assistance. Because this was viewed as discriminatory, the legislation was modified to include all vessel owners.

The rationale for such certification is clear. It not only provides added assurances that those companies who receive tax supported assistance will not engage in illegal rebating activities, but sets a policy standard in law for all companies to adhere to the statute as a matter of day-to-day routine.

Section 5 of the bill goes to the heart of the challenge of providing evenhanded anti-rebating enforcement for both U.S. and foreign carriers, as it provides the FMC with the power to suspend any or all tariffs of carriers who fail to comply with an FMC subpoena or discovery order during investigation of illegal rebating practices. As FMC Chairman Richard J. Daschbach has correctly observed, this provision "is the cornerstone" of this legislation "since it provides the Commission with direct and immediate means of requiring the cooperation of a foreign carrier."

To enhance the opportunity for international cooperation in the production of necessary documentation that might be withheld due to the blocking statutes of other nations, the bill directs the Commission to notify the Secretary of State who "shall promptly consult with the Government of the nation within which the documents or information are alleged to be located for the purpose of assisting the Commission in obtaining the documents or information sought."

In view of the Consultative Shipping Group's stated desire to cooperate in alleviating illegal rebating practices in the U.S. liner trades, this provision should provide the necessary and clear direction to the Secretary of State to seek such cooperation. The language is clear, the intent certain, and hopefully the Department of State, if the provision is enacted, will move with dispatch to comply with its spirit.

As desirable as truly evenhanded enforcement of the anti-rebating statute may be in applying to foreign carriers, there may be times when tariff suspension orders against foreign carriers would not be in our national interest. As a safeguard, the bill wisely provides that before any tariff suspension order can go into effect against a foreign carrier, "it shall be immediately submitted to the President who may, within ten days after receiving it, disapprove any such order if he finds that

disapproval is required for reasons of the national defense or the foreign policy of the United States."

We would hope that such disapproval authority will be used judiciously by the Chief Executive.

By enactment of new anti-rebating legislation, the United States will send a powerful signal to those who enjoy free access to our trade that we also wish to keep it free from corruption. Though there may be international moans and groans, such legislative action is well grounded in precedent. For example, the Federal Aviation Administration Act of 1958 provides the President with veto power authority over some international airline agreement decisions. As noted by Chairman Daschbach: "The Securities and Exchange Commission . . . relies heavily upon certification required on financial statements and is authorized by 14 U.S.C. 77(h) to reject a securities registration statement upon failure of a foreign or domestic corporation to furnish information relevant to the statement."

The United States was pushed into extending its territorial water limit to 200 miles due to similar actions by other nations, and our businesses are expected to comply with the laws of other nations when they accept the privilege of doing business in them.

As an additional incentive for cooperation by carriers with the Commission, Section 10 removes the imposition of criminal penalties for conspiracy to rebate in deference to the power of the Commission to assess all of the 1916 Shipping Act civil penalties.

H.R. 3055 and S. 199 should be viewed as regulatory reform. I would hope, when these bills reach the respective floors of the House and Senate, that they will be so viewed by the Members. I am particularly glad, in view of the history of this legislation, that this subcommittee and its corresponding unit in the Senate are acting early in this First Session of the 96th Congress. Should for some vacuous reason, the President decide to veto the bill, time is on the side of Congress to override. In view of the nearly unanimous support for this legislation in the 95th Congress, we can be confident that sometime this year this anti-rebating legislation will become the law of the land.

Mr. LEGGETT. As long as the statement is in the record, I'm not going to unduly tax the patience of the committee. I appreciate your waiting over lunch to finish this hearing.

I point up in my statement the views of the President with respect to rebating. He is against it. He wanted to resolve this matter this year, and I think it's the responsibility of this committee to help the President accomplish the aims that he has indicated that he wants.

The statement I have prepared is really excellent. It is fully comprehensive, and I would hope the staff of the committee would take the time to read it. Obviously, as has been indicated, if we had an interagency task force recommendation before us, perhaps we would not have to move in this splintered fashion on this particular bill.

On the other hand, contrary to some of the evidence that the committee has received, it is my understanding that not only has the interagency task force recommendation not come down, I have it on excellent authority that the recommendation has not gone up. So to belabor that point as we have so often in the past I think is probably not really too salutary.

I would hope the President might, by some miraculous effort, choose May 22, Maritime Day, as the proper day to elucidate a national maritime policy, that would cover the regulatory field and some of the promotional areas. I am not planning on that, but I would hope that that might occur.

I would point up that our colleague, Senator Dan Inouye, when the Senate Committee passed this bill out this year, over on page 5 of my statement, he states that "existing mechanisms in law which reduce the incentive for carriers to engage in illegal rebating have

been rendered inoperative by administrative and judicial interpretation, and lack of a coherent, unified national shipping policy."

I would support the amendment suggested by Mr. Hiltzheimer, that softens the closeout suspension a little bit. What he says is that we ought to fully and completely exhaust the intentions of a particular carrier before we cut them out. And if foreign countries retaliate against the United States, if we're accepting rebating foreign, and if foreign countries ask our companies for their books, and if they don't provide the information, then I think they ought to receive exactly the same kind of treatment that we're offering to foreign companies in this bill.

I know it's perhaps a little unusual that we would seek remedies against foreign countries, but we have done it, of course, in the fishing bill. They said if you ask them for various kinds of information, they're going to retaliate. We are getting exactly everything we need under the 200-mile H.R. 200 legislation of the Congress, and they are being very cooperative.

Additionally, under the ODS program, what we need is evidence of foreign wages and rates paid. As a practical matter, I have been over it with the Department of Commerce, and on virtually every single voyage they provide Xerox copies of the entire manifest, of what the crews make on direct wages, indirect wages, et cetera. So this is not a totally unusual procedure for foreign countries to provide information to our Government to enforce our laws.

I would hope we could enact a formidable liner conference regulatory modification bill in this Congress. I would hope that we would have the independent action procedure that has been recommended. I would hope it would have neutral body policing, that perhaps could assist in getting some of this information without aggressive retaliatory action that we have in this bill.

As I understand it, the State Department fully supports the bill. They merely believe that the Department of Commerce, or the FMC, might be abrasive in cutting off foreign entrance to our ports. Well, we have provided in the bill that the President can suspend any action by the FMC in the interest of this country or national defense.

So I believe we are really all tracking pretty much. The measure has passed the Congress before. The Congress really hasn't changed that much. We ought to adopt the amendment suggested by Mr. Hiltzheimer and move forward very quickly with this legislation.

Mr. DONNELLY. Thank you very much. I want to compliment you on your excellent statement.

Counsel?

Mr. KYROS. Mr. Leggett, one proposal was the awaiting the results of the task force. But the fact is, even in passing this legislation, is there any reason why this could not fit into a complete plan for shipping policy, especially on the regulatory side?

Mr. LEGGETT. Right. It certainly fits. I would hope that we could pass at some point in this Congress a package of things, rather than treating every single bill as piecemeal. I know that we're almost together on some bilateral policy considerations; we're almost together, the shipping companies, on regulatory programs, the antitrust immunity; the President, I think, it has been recommended to him that he submit a bulkier program. It is my informa-

tion that that bulkier program might build some ships, and I would hope we could move, perhaps in June, to some hearings on some kind of composite legislation like that.

Mr. KYROS. Thank you, Mr. Leggett.

Thank you, Mr. Chairman.

Mr. DONNELLY. Thank you very much, Mr. Leggett.

The statement of Mr. George Avery, chairman of the National Industrial Traffic League, will be inserted in the record.

[The following was received for the record:]

THE NATIONAL INDUSTRIAL TRAFFIC LEAGUE,

Washington, D.C., May 29, 1979.

Hon. JOHN M. MURPHY,

*Chairman, House Merchant Marine and Fisheries Committee,
Longworth House Office Building, Washington, D.C.*

DEAR CHAIRMAN MURPHY: The National Industrial Traffic League wishes to take this opportunity to offer its strong support for H.R. 3055, a bill to amend the 1916 Shipping Act regarding the prohibition of rebating practices in the U.S. foreign commerce. These remarks are offered for the record of hearings on H.R. 3055.

The League, in its 1978 testimony in support of HR 9518, made clear its unqualified support for correct tariff application by all carriers and all shippers in the U.S. trades.

At a special League meeting held in St. Louis April 24-6, 1979, the League unanimously approved its support for even-handed regulatory treatment of all liner carriers serving the U.S. trades.

It remains clear that the FMC's current legislative authority is ineffective in securing even-handed regulatory treatment of all liner carriers, and the League endorses the passage of H.R. 3055.

We offer our support of H.R. 3055 for your consideration and the consideration of your committee and staff prior the May 31 markup session of the bill.

Sincerely,

GEORGE F. AVERY, JR.,
CHAIRMAN, WATER FREIGHT TRANSPORTATION,
Maritime Committee.

KOMINERS, FORT, SCHLEFER & BOYER,
Washington, D.C., May 15, 1979.

Hon. JOHN M. MURPHY

*Chairman, House Committee on Merchant Marine and Fisheries,
Longworth Building, Washington, D.C.*

DEAR CHAIRMAN MURPHY: With hearings scheduled before your committee tomorrow, upon H.R. 3055, relating to ocean shipping rebates, it seems timely to call your attention to an aspect of the matter which merits attention.

There has been considerable comment upon the difficulties confronting the Federal Maritime Commission in enforcing the relevant Shipping Act provisions against foreign-flag carriers, and the consequent discriminatory impact of the Commission's regulatory efforts, against U.S.-flag carriers. There, however, is a little-noticed parallel to that situation, involving U.S. exporters and importers and their overseas corporate affiliates, on one hand, and, on the other hand, their independent foreign competitors who have no U.S. corporate affiliations through whom the Commission may develop its anti-rebating investigations.

Of the fifty or more civil penalty settlement agreements announced by the Commission it is my belief that not a single one has involved an independent foreign-based exporter or importer. At least some foreign-flag carriers have been required to settle up with the Commission, but no foreign-based shipper or consignee has yet been brought to account, unless it also has a U.S. corporate affiliation through which the Commission has been able to pursue its investigations. The resultant discrimination against U.S. exporters and importers is therefore, in a sense, more pronounced than that as between U.S.-flag and foreign-flag carriers.

The irony of this situation is enhanced by the fact that the agency has based its enforcement efforts against U.S. exporters and importers and their corporate affiliations, upon a questionable interpretation of the law. That erroneous interpretation is essentially that acceptance of a rebate establishes a shipper violation, without more; and that in effect the Shipping Act prohibitions against acceptance of rebates

by a shipper are co-extensive with the Act's prohibitions against payment or allowances of rebates by carriers. That interpretation is reflected in a memorandum submitted to your committee in behalf of the Commission after the close of the public hearings last year, which is reprinted in your Committee's Hearings on H.R. 9518, 95th Cong., p. 47. The Commission memorandum, thus states, incorrectly I believe, that :

Section 16 of the Shipping Act, 1916 (46 U.S.C. section 815) makes its unlawful for any shipper to obtain or attempt to obtain transportation by water at less than the rates of charges in the tariff filed with the Federal Maritime Commission by any unjust or unfair device. *The Commission has interpreted this section to make it unlawful for any shipper to solicit or knowingly accept a rebate from a common carrier.* [Emphasis supplied.]

In fact the carriers provisions of the Shipping Act are significantly broader than the shipper provisions. Payment of a rebate by a carrier may violate Section 18(b) (3), whether the carrier acts wilfully and without need to inquire into the means by which accomplished; but receipt of that payment does not involve a shipper or consignee in a statutory violation unless it is accomplished "knowingly and wilfully" and also "by means of false billing, false classification, false weight, false report of weight, or by any other unjust or unfair device or means." Both the requirement of "wilfulness" and the "means of false billing, . . ." etc., conditions of a shipper/consignee violation, under Section 16, initial paragraph, have been largely disregarded.

The result is that the U.S. shipper or consignee is not only bearing the brunt of the enforcement effort, contrasted to his wholly foreign competitor, but he is also being held to the stricter carrier standard of accountability, when in fact the shipper/consignee statute is significantly less strict.

In this connection, I recently asked the Commission under the Freedom of Information Act for the Commission actions or interpretations supporting the underlined sentence in the Commission memorandum quoted above, expressing doubts that the Commission itself had so interpreted Section 16. The reply was that, "The statement was the work product of a Commission attorney. There are no underlying documents." See attached correspondence. It seems inescapable to me that the interpretation attributed to the Commission—upon which the recent investigations appear to have proceeded—does not in fact have the formal sanction of the Commission or the courts and is incorrect.

There is also enclosed for your convenience in reference a copy of an analysis of the legislative history and reported decisions involving Shipping Act rebates, which I believe sets out a correct reading of the statute, and the summary letter of February 1, 1978, by which it was earlier submitted to committee's chief counsel.

Very truly yours,

J. ALTON BOYER.

GRAHAM & JAMES,
Washington, D.C., May 31, 1979.

Congressman JOHN M. MURPHY,
Chairman, Committee on Merchant Marine and Fisheries,
Rayburn House Office Building, Washington, D.C.

DEAR MR. MURPHY: As counsel for the Pacific Coast European Conference, a shipping conference serving the West Coast of the United States (and headquartered there), we are constrained to comment critically on, and seek deletion of, one aspect of H.R. 3055, a bill to amend the Shipping Act, 1916; and we respectfully request that these comments be included in the printed record of proceedings.

The provision giving us concern would grant power to the Federal Maritime Commission to "assess" civil penalties, a power to this point reposing in federal district courts. This provision is tangential to the focus and substance of the bill (rebates) and, at the same time, sweeps across all sections of the Shipping Act, not simply the specific ones otherwise to be amended by the proposed legislation. Specifically, proposed new subsection "(e)" to Section 32 of the Shipping Act, which would be added by Section 10 of the bill, provides:

"(e) Notwithstanding any other provision of law, the Commission shall have authority to assess or compromise all civil penalties provided in this Act: Provided, however, That, in order to assess such penalties [,] a formal proceeding under section 22 of this Act shall be commenced within five years from the date when the violation occurred."

This is the second time in recent years that such "assessment" power has been sought by (or for) the Commission, the earlier occasion arising in connection with

H.R. 755 in the 92d Congress, which (without the penalty-assessment power) ultimately became Public Law 92-416, 86 Stat. 653. Section 3 of that earlier bill would initially have given both "compromise" and "assessment" penalty power to the Commission, but, as enacted, restricted the grant of authority to the former only:

"Sec. 3. Any civil penalty provided herein may be compromised by the Federal Maritime Commission, or may be recovered by the United States in a civil action." This is the present state of the law, which, we respectfully submit, should be retained.¹

Explained below are the reasons we opposed that prior "assessment" power, reasons applying with equal force today. As additional, timely bases of opposition, we offer the following comments:

In support of the "assessment" power the Federal Maritime Commission has cited similar authority in the Occupational Safety and Health Administration (46 U.S.C. 666(i)), and referred to Recommendation 72-6 of the Administrative Conference of the United States (ACUS) suggesting that authority for all agencies. There are, however, significant disparities between both ACUS and 29 U.S.C. 666(i), and H.R. 3055.

One of the main reasons for the ACUS recommendation was that litigation for civil penalties usually involves small dollar amounts, averaging less than \$1,000 per case. (Official Recommendations of the Administrative Conference of the United States, 1972). Clearly the "assessment" power proposed in H.R. 3055 does not meet that criterion, the bill proposing increased Shipping Act penalties of \$25,000 and \$50,000. Further, as stated by the Federal Maritime Commission, in the first seven months of federal Fiscal Year 1979, the Commission has collected penalties for alleged rebating in 33 cases of \$3,442,000, averaging \$104,303, far more than \$1,000 per case. Consequently, the basis for the ACUS recommendation is out of tune with the level of penalties the Federal Maritimes would be authorized to collect under H.R. 3055, and which it has collected under its existing penalty "compromise" authority.

The cited "assessment" authority of the Occupational Safety and Health Administration is equally inappropriate. That authority as set forth in 29 U.S.C. 666(i) permits penalty assessment only upon the agency "giving due consideration to appropriateness of the penalty with respect to" various factors including "the gravity of the violation" and "the history of previous violations." No similar restraints are attached to the proposed "assessment" power of the Federal Maritime Commission. Also, the level of penalties in 29 U.S.C. 666 do not reach the magnitude of those proposed in H.R. 3055.

What emerges is that too little attention has been focused on that nature and consequences of the "assessment" power proposed in H.R. 3055, commentary and consideration having been directed to the main thrust of the bill, *i.e.*, to combat unlawful rebating. Scant, if any, attention has been directed either to justifying or analyzing the new high level of penalties proposed to be "assessed" compared to the current level of compromise settlements, or to the scope of H.R. 3055 which would extend the "assessment" power to all civil penalties under the Shipping Act. Accordingly, we suggest that before such far reaching and unprecedented authority is vested in the Federal Maritime Commission, the proposed "assessment" power be opened to the exposure of public debate. This would provide the full range of arguments and facts for and against this aspect in H.R. 3055, which, as mentioned, was previously rejected in consideration of H.R. 755 (92d Congress) resulting in enactment of Federal Maritime Commission "compromise" power.

We were instrumentally involved in opposing the "assessment" language in H.R. 755, in 1971 and 1972, and the reasons for our opposition apply equally to H.R. 3055. Accordingly, and in avoidance of overburdening your files with duplicative materials, reference to some of that earlier history may be the most succinct way of capsulizing the congressional rejection of the concept now espoused by H.R. 3055, as recently as seven years ago.

Our initial statement of opposition, a letter of July 19, 1971, was published as a part of the Hearings before the Subcommittee on Merchant Marine of the Committee on Merchant Marine and Fisheries held March 16, 1971 (Serial No. 92-8, 92d Cong., 1st Sess., pp. 173-178). Then-Chairman Bentley's response of August 5, 1971, follows immediately in those printed Hearings (pp. 178-181). Our subsequent response was transmitted to both the House Merchant Marine and Fisheries Committee and Senate Commerce Committee in the latter part of 1971, and, ultimately, we

¹ Actually, there is an anomaly of codification, in that this provision, as a "section" of Public Law 92-416, alone, did not formally modify any provision of the Shipping Act, and thus does not appear anywhere, insofar as we can determine, in the United States Code system. To the extent that S.199 would make this existing language part of the Shipping Act, we would support the endeavor.

transmitted a prepared statement (including, *inter alia*, our aforesaid response) to the Senate Commerce Committee in conjunction with its consideration of the parallel bill, S. 2138, in late November, 1971. We are unaware whether these latter two documents ever made publication and/or whether they remain in your Committee's archives; if desired we would be pleased to provide copies anew.

Significantly, we were not the only ones to make formal opposition to the grant of penalty "assessment" power to the Commission. It was also opposed by the Committee on Maritime Legislation of the Maritime Law Association of the United States, which, through its Chairman, Herbert M. Lord, Esq., of Burlingham Underwood Wright White & Lord, wrote, in relevant part (letter dated June 26, 1971; *Id.*, at pp. 181-182), as follows:

"[O]bjection * * * stems from the consideration that an administrator, strongly pressing policy directives, is apt to react unfavorably to opposition, even reasoned opposition, and attempt to smoothe the administrative path by imposition of civil penalties. In the case of a real contest the parties in such matters probably would prefer to submit themselves to the dispassionate justice of the courts. This is not, of course, to say or imply that the administrative agencies generally or any in particular do not usually perform their functions fairly and with restraint. But it has been suggested that enforcement of the provisions of the Shipping Act of 1916, involving concepts closely related to competition, and keen competition at that, often require a form of juridical determination better left to the courts."

Ultimately, as already noted, the "assessment" provision was stricken in the bill as passed into law. The Report of the Senate Commerce Committee (No. 92-1014) explained the deletion, thus:

"H.R. 755 as passed by the House contained a provision which would have authorized the Federal Maritime Commission to assess civil penalties for violations of those sections of the Shipping Act, 1916, subject to the Commission's jurisdiction, and the Intercoastal Shipping Act, 1933. This also would have applied to violations of the Commission's orders, rules and regulations. Opposition was expressed to this committee to granting the Commission authority to assess a civil penalty in lieu of referring the violation to the Justice Department for prosecution. It has been contended that such a procedure would undermine the very concept of due process under law, as the very nature of the administrative agency process necessarily makes the agency peculiarly ill-suited for the imposition of punitive sanctions.

"Section 3 of the bill, added by the Committee, authorized the Commission to *compromise* the amount of civil penalties rather than to *assess* the penalty. Under this procedure should the 'violatee' and the Federal Maritime Commission fail to arrive at an accepted compromise, the penalty could only be recovered in a *de novo* proceeding in a U.S. district court." (emphasis in original)²

Beyond the reasons briefly outlined in Mr. Lord's letter and the Senate Report, quoted above, and without undue elaboration, we would only add the following comments:

First, the delegation of penalty-assessment power to the Commission is not at all routine or commonplace, across the broad spectrum of administrative agencies. The Federal Maritime Commission itself has a limited penalty-assessment power, strictly with regard to two fairly recent enactments, dealing however solely with the question of establishing suitable bonding ("financial responsibility") assurance with respect to death or injury to, or non-performance of transportation for, passengers (46 U.S.C. §§ 817d(c) and 817e(c)). In contradistinction, where an administrative agency exercises a continuing regulatory function, as with the three major transportation agencies (ICC, CAB, and FMC), actions to assess penalties, in the event voluntary compromise fails, is invariably set in the federal district courts, on suit brought by the Department of Justice as the "attorney" for the agency.³

Second, although it has been suggested that the right of appeal to a U.S. Court of Appeals, from a final agency determination, might provide an adequate substitute for the present right of a *de novo* trial in a federal district court, upon reflection, it is obvious that such is not the case. First, as you of course know, there is always a "presumption of correctness" in what the lower tribunal did, whether it be court or agency, on any appeal; and, if the private party has lost in the proceedings below, the burden of proof and persuasion has resultantly shifted from the government to the private party. Second, reviewing courts (again, whether of lower-court or agency determinations) generally do not review the factual findings or the amount of the penalty or punishment imposed. Yet obviously these are often the most critical features of any civil penalty proceeding.

² S. Rep. No. 1014, 92d Cong., 2d Sess., U.S. Code Cong. & Ad. News, pp. 3123-24 (1972).

³ The exception in 29 U.S.C. 666(i) is discussed above.

Finally, and while the foregoing two considerations apply equally to court or agency proceedings, there is an additional factor which applies to agency determinations, alone. That is the very strong deference which reviewing courts are obliged to give to an agency determination, in its exercise of presupposed "administrative expertise." This is well-exemplified in two cases dealing with the Federal Maritime Commission itself, *Consolo v. Federal Maritime Commission*, 383 U.S. 607 (1966), and *Federal Maritime Commission v. Aktiebolaget Svenska Amerika Linen*, 390 U.S. 238 (1968). In both cases the U.S. Court of Appeals for the District of Columbia Circuit reversed the Federal Maritime Commission for "ignor[ing] the substantial weight of the evidence" (342 F.2d 924, 926), in the first case, and for lack of "adequate findings to establish and support [its] conclusions" (372 F.2d 932, 934), in the second. These determinations of the appellate court would have been proper for review of a Federal district court determination; but in both cases the U.S. Supreme Court reversed the Court of Appeals, reinstating the Commission decision, because of the significantly narrower standards of review permitted where an administrative agency is involved. Those cases involved principally prospective-looking orders of the Commission, no penal assessment being involved (although findings of past violation, which might subsequently be made the subject of district-court penal proceedings, were).

For all of the foregoing reasons, it should be apparent that the right of Court of Appeals' review is not at all an adequate "due process" substitute for the present system of a *de novo* hearing, on the penalty-assessment issue, in a Federal district court.

As noted at the outset, we have no objection whatsoever to the present *compromise* power of the Federal Maritime Commission, and which, as your Committee will be fully aware, it has been exercising with some considerable energy over the past one to two years. We cannot, however, perceive that any evidence of need or desirability for giving the Commission a penalty *assessment* power, as well, has at any time been adduced, before your Committee or elsewhere. The issue was carefully considered by your Committee and ultimately the entire Congress, in 1972, and flatly rejected. We respectfully urge that that determination should be reaffirmed at this point.

We will of course be pleased to answer any questions which you or any member of the Committee may have, further with regard to this matter. Thank you for your time and consideration of these views.

Very truly yours,

ELIOT J. HALPERIN.

COUNCIL OF EUROPEAN AND JAPANESE
NATIONAL SHIPOWNERS' ASSOCIATIONS,
London, England, May 14, 1979.

Hon. JOHN M. MURPHY,
Chairman, Merchant Marine and Fisheries Committee,
Longworth Building, Washington, D.C.

DEAR CHAIRMAN MURPHY: The Council of European & Japanese National Shipowners' Associations (CENSA)¹ appreciates the opportunity to submit the following comments in connection with your consideration of the subject legislation.

CENSA wishes to bring your attention to the very extensive testimony that it submitted at the hearing on H.R. 9518, in the 95th Congress, on November 30, 1977, contained in House Report Serial No. 95-24. H.R. 3055 is similar to H.R. 9518, and the views expressed in our testimony are thus still pertinent to the issues presented.

Furthermore, we wish to draw your attention to the Agreed Record of the November 15-17, 1978 meeting held in London between U.S. and Consultative shipping Group representatives. Items 3 and 4(e) of this Record, dated November 17, 1978, read as follows:

"3. The U.S. side presented its serious concern regarding the enforcement of U.S. law in the area of rebating and other malpractices. Attention was, in particular, drawn to the President of the United States' recent memorandum of disapproval of H.R. 9518 (the Anti-Rebating Bill). The President had asked the Federal Maritime Commission to step up its enforcement efforts, and to seek the assistance of the Department of State in obtaining any necessary cooperation from foreign govern-

¹ The Council of European & Japanese National Shipowners' Associations (CENSA) is comprised of the National Shipowners' Associations of Belgium, Denmark, Finland, France, the Federal Republic of Germany, Greece, Italy, Japan, the Netherlands, Norway, Sweden, and the United Kingdom, plus individual liner operators/container consortia from most of these countries.

ments. The CSG side welcomed the President's recognition that both the substance of U.S. law on these practices and the procedures for enforcement should take account of the international dimension of shipping, and the significance he had attached to the present talks. CSG governments reiterated their dislike and disapproval of those activities—including hidden rebates from conference rates—identified by them at the September working group to constitute "malpractices". In relation to such "malpractices" CSG governments indicated that, where the FMC is investigating a CSG conference line for suspected illegal rebating within U.S. jurisdiction and firstly, had exhausted the possibilities for obtaining evidence from within the U.S. or on a voluntary basis, and secondly, could specify what kinds of further evidence it needed from within a CSG country, the CSG country concerned would undertake as an act of comity to seek the cooperation of and encourage the carrier to provide the necessary evidence to allow a settlement to be reached. It has been suggested that in some cases information in summary form might be drawn up by independent mutually agreed upon accountants, to meet the requirements of a satisfactory settlement, in accordance with the interests of both governments. In cases where production of evidence on such a cooperative basis proved ineffective, the U.S. side stated its view that the relevant CSG government should grant waivers (or abstain from prohibitions as the case may be) for the production of evidence, and the CSG side agreed that the individual government(s) concerned would, of course, be prepared to discuss with the U.S. and to consider this."

"4(e) In relation to consultation on the particular problem of hidden rebates, CSG delegations undertook, in addition to the procedures noted in paragraph 3 above, that where such malpractices had been shown to be prevalent in any of their conference trades with the U.S., they would be prepared to discuss the matter with the CSG lines concerned with a view to establishing the principal reasons for the prevalence of malpractices, and devising possible solutions to be reviewed with the U.S. authorities."

In view of this background, we respectfully submit that a unilateral solution by means of U.S. domestic legislation would be premature. Considerable progress was made at the London meetings in November, 1978, and we urge that intergovernmental discussions be permitted to find a solution of the issues involved by means of continued consultations. In this connection, CENSA also wishes to bring your attention to Item 7 of the Agreed Record, reading as follows:

"7. Both sides expressed satisfaction with the dialogue between the U.S. and the CSG which had taken place during the course of the year. It was felt that it had contributed to a substantially improved understanding of each other's policies and concerns. Further discussions after the completion of the U.S. policy review are considered desirable. At that stage a CSG proposal for a Contact Group with the U.S. would be considered."

CENSA appreciates these views being considered by your Subcommittee.

Sincerely,

PETER G. SANDLUND,
Washington Representative.

Mr. DONNELLY. This hearing is adjourned.
[Whereupon, at 1:05 p.m., the subcommittee was adjourned.]



