

Liner Shipping Antitrust Exemptions in the Pacific Rim Regions: The Need for International Coordination to Tackle Global Competition Concerns

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The Pacific Ocean liner shipping market is cartelised, not only because of the unlawful price-setting activities of car-carrier cartels, but also because of antitrust exemptions for shipping companies' agreements. The current industry consolidation trend driven by economies of scale and digitalisation is likely to nurture the collusion-inducing environment further; as thus, strengthened competition law enforcement associated with the abolition of the exemption system is imperative. The global nature of the service and the experiences thus far indicate the need for internationally coordinated efforts toward that end. This article first explains the current trend in liner shipping services and various factors affecting the market structure to give the readers background knowledge to identify the competitive concerns., Then, it continues on to examines the legal frameworks adopted by countries in the Pacific Rim region, reviews and assesses competition issues and proposes legislative and enforcement measures necessary to the sector.

1. Liner Shipping and Related Services

1.1 Liner shipping business overview

Liner shipping is an ocean freight service transporting containers according to a predetermined schedule. Over 80% of global trade in terms of volume (70% in terms of value) is carried by ships and the amount of freight transported by liners accounted for 23.8%

of global dry-cargo volume in 2017.¹ The buyers of liner shipping services are shippers and forwarders; ocean container transport is used in many sectors as a means of long-distance transportation at a low cost.

Others operating in the ocean freight transportation sector include bulk carriers, tankers and charter ships. Bulk carriers and tankers differ from liner ships in that they do not use containers, while charter ships are not regularly scheduled. As such, the substitutability between liner shipping and other methods of freight transportation is limited.²

Recently, mega container ships have been employed to achieve economies of scale. However, not every port can accommodate mega ships so the hub-and-spoke system is used, under which the cargo is transhipped at the hub or transshipment port and delivered to regional ports.³ Global major global hub ports are located in Asian Pacific Regions. In 2016, the top 10 global mega hub ports in terms of throughput were Shanghai, Shenzhen, Ningbo, Guangzhou, Qingdao and Tianjin (China); Singapore; Hong Kong; Busan (South Korea); and Dubai.⁴ In Europe, the large hubs are Rotterdam and Antwerp, ranked 12th and 14th, while in the United States Los Angeles, Long Beach and New York were 18th, 22nd and 23rd respectively.⁵ The liner shipping companies regularly call these ports and other ports, delivering and transhipping containers, and form an essential part of the global supply chain.

¹ United Nations Conference on Trade and Development (UNCTAD), 'Review of Maritime Transport 2017' (2017) UNCTAD/RMT/2017 (UNCTAD 2017) x, 20

² See e.g. European Commission, *Maersk Line/HSDG* (Case M.8330) [2017] para 11 (Maersk Merger); *COSCO Shipping/OOIL* (Case M.8594) [2017] para 12 (COSCO Merger)

³ Organisation for Economic Co-operation and Development (OECD) (Directorate for Financial and Enterprise Affairs), 'Competition Issues in Liner Shipping: Note by the Secretariat' (2015) DAF/COMP/WP2/WD(2015)3 unclassified, 36
<[http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP2\(2015\)3&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP2(2015)3&docLanguage=En)> (OECD 2015); International Transport Forum, 'The Impact of Mega-Ships' (*OECD* April 2015) 12, 34 <https://www.itf-oecd.org/sites/default/files/docs/15cspa_mega-ships.pdf> (OECD Mega Ships)

⁴ UNCTAD 2017 (n 1) 65

⁵ *ibid*

Port operation and its services (e.g., transshipping, loading and unloading), in-land transportation and freight forwarding services are closely related to liner shipping services. Several Some liner shipping companies are vertically integrated and also perform some of these services.⁶ For example, the largest shipping liner, Maersk (Denmark), operates container terminal businesses, forwarding services, inland transportation and supply chain management businesses throughout the world.⁷ The Chinese state-owned operator China Ocean Shipping company (COSCO) provides integrated transportation services and is actively acquiring ports abroad.⁸

Liner shipping companies vary in their scale and coverage areas. Operators provide services independently or in cooperation with other companies. Joint activities have long been a feature of the liner shipping sector.

1.2 Conferences, Consortia, Alliance and Other Types of Agreements

1.2.1 Conferences

A conference is defined as

A group of two or more vessel-operating carries which provides international liner services for the carriage of cargo on a particular route of routes . . . which has an agreement or arrangement . . . within the framework of which they operate under

⁶ OECD 2015 (n 3) 37-39

⁷ A.P. Moller-Maersk, 'About' <<https://www.maersk.com/about>> accessed 15 May 2018

⁸ COSCO's Overseas terminals are Abu Dhabi, Antwerp, Busan, COSCO-PSA, Euromax, Noatum, Kumport, Piraeus, Seattle, Suez Canal, Vado Reefer Zeebrugge. COSCO Shipping Ports Limited, 'Terminals' <<http://www.coscopac.com.hk/en/Businesses/Terminals/>> accessed 15 May 2018. See also COSCO Merger (n 2) para 2

uniform or common freight rates and any other agreed conditions with respect to the provision of liner services.⁹

Essentially, a conference is a rate making agreement, the members of which may make a binding agreement in relation to the tariffs.

According to the OECD, while the majority of conference members are small-to-medium sized companies, in 2015 all top 30 liner shipping companies had signed at least one conference agreement; no more than 10% of liners had engaged in more than 10.¹⁰ According to the JFTC 2016 review, routes to and from Japan encompassed 21 conferences.¹¹ The review also revealed that 2% of shippers indicated the liner base rate set by the shipping companies complied with the rate set by the conference, 25–40% noted the rate differed, and 58–73% did not know if they were in compliance with the rate set by the conference.¹² At the end of FY2017, only three conferences were in effect in the United States.¹³

1.2.2 VSAs, Consortia and Other Operational Agreements

The VSAs, consortia or other types of operational cooperation agreements (e.g., space charter agreements, joint service agreements, assessment agreements, marine terminal facilities agreements)¹⁴ are prevalent in the liner sector. The United States Federal Maritime

⁹ United Nations, Convention on a Code of Conduct for Liner Conferences, adopted by a Conference of plenipotentiaries which met at Geneva from 12 November to 15 December 1973, 1334 UNTS 15, Annex 1, ch 1

¹⁰ OECD 2017 (n 3) 12

¹¹ Japan Fair Trade Commission (JFTC), 'Review of the System for Exemption from the Antimonopoly Act for International Ocean Shipping' (February 2016) 26-27 <<http://www.jftc.go.jp/en/pressreleases/yearly-2016/February/160204.files/160331.pdf>> (JFTC 2016)

¹² The percentage differs by route. *ibid* 27-28

¹³ United States Federal Maritime Commission, '56th Annual Report for Fiscal Year 2017' (2017) 12-13 <<https://www.fmc.gov/assets/1/Page/AnnualReportFY17.pdf>> (US FMC 2017 Report)

¹⁴ US FMC 2017 Report (n 13) 12-13. Operational cooperation agreements, including space charter agreements and slot exchange agreements, may be also categorised as VSAs. See e.g. Hong Kong Competition Commission (HKCC), 'Decision to Issue a Block Exemption Order in Respect of Vessel Sharing Agreements (Case BE/0004) Statement of Reasons' (8 August 2017) paras 2.27-2.30

Commission found the number of VSAs and space charter agreements in effect at the end of FY2017 was, respectively, 39 and 233.¹⁵ According to the US FMC, certain VSAs, some of which involve joint provision of shipping services, are formed by members from different alliances, an explanation for which is provided in the next section. For example, Maersk and CMA-CGM, which respectively belong to 2M and Ocean Alliance, have formed a VSA regarding US-Central America routes (FMC Agreement No. 012479),¹⁶ and THE Alliance and Orient Overseas Container Line (OOCL), member of the Ocean Alliance, on the Japan-US routes (FMC Agreement No. 012488).¹⁷ Meanwhile, according to a review conducted by the Japan Fair Trade Commission (JFTC) in 2016 (JFTC 2016 review), 21 new consortia were formed in 2014.¹⁸

1.2.3 Alliances

Alliances are the way by which liner shipping companies cooperate with each other to provide services on a plurality of routes. While an alliance is similar to a consortium and vessel sharing agreement (VSA), in that they strive for operational cooperation among shipping companies, an alliance covers more than one route and is a more comprehensive solution to providing a global network.¹⁹ An alliance often signifies closer cooperation and greater long-term commitment.

¹⁵ *ibid*

¹⁶ US FMC, Federal Maritime Commission Agreement Library, Maersk/CMA CGM WCCA Vessel Sharing Agreement (originally filed on 31 March 2017)
<<https://www2.fmc.gov/FMC.Agreements.Web/Public/AgreementHistory/1984>>

¹⁷ US FMC, Federal Maritime Commission Agreement Library, THE Alliance / OOCL Vessel Sharing Agreement (originally filed on 27 July 2017)
<<https://www2.fmc.gov/FMC.Agreements.Web/Public/AgreementHistory/2026>>

¹⁸ JFTC 2016 (n 11) 35

¹⁹ Asia-Pacific Economic Cooperation Transportation Working Group, 'Liner Shipping Competition Policy: Non-Ratemaking Agreements Study (Stage 1)' (May 2008) 22-23; OECD 2015 (n 3) 9; US FMC 2017 Report (n 13) 12

Currently, three mega alliances exist: 2M Alliance, Ocean Alliance and THE Alliance.²⁰ 2M controls 37% of the global shipping market, Ocean Alliance controls 33% and THE Alliance 21%.²¹ Consolidation is occurring at all levels of alliances; while there were three alliances (G6 Alliance, CKYH Alliance and New World Alliance) and six independent carriers in 2011, the same companies formed four larger alliances (2M Alliance, Ocean Three Alliance, G6 Alliance and CKYHE Alliance) and changed the market structure in 2015, which further changed in 2016 when the current three mega alliances were formed.²² The alliances are significant in that ‘the position of “independent carrier” [has] practically disappeared in the industry’.²³

As the alliances provide sea freight transportation services under their own brands, the companies in the alliances necessarily coordinate on the routes, scheduling, vessel allocations and overall volume of service in relation to the services they provide.²⁴

²⁰ 2M Alliance was formed by Maersk and Mediterranean Shipping Company (MSC, Switzerland); Ocean Alliance includes CMA-CGM (France), Orient Overseas Container Line (Hong Kong) and COSCO; and THE Alliance include formed by Ocean Network Express (a JV formed by three Japanese liners) and Yang Ming (Taiwan). Global Shippers Forum, ‘The Implications of Mega-Ships and Alliances for Competition and Total Supply Chain Efficiency: An Economic Perspective’ (November 2016) 11 <<https://www.globalshippersforum.com/media/1267/gsf-mega-ships.pdf>> (GSF Report)

²¹ UNCTAD 2017 (n 1) 49; OECD 2015 (n 3) 34

²² Before 2016, there existed the 2M Alliance, the CKYHE Alliance (COSCO, K Line, Yang Ming, Hanjin/DRS-Sen and Evergreen), Ocean Three Alliance (UASC, China Shipping and CMA CGM) and G6 the Alliance (NYK, Hapag-Lloyd, OOCL, MOL, APL and HMM). OECD 2015 (n 3) 29; OECD Mega Ships (n 3) 30

²³ OECD 2015 (n 3) 29

²⁴ Maersk Merger (n 2) paras 32 and 38; COSCO Merger (n 2) paras 52 and 58. Recently Maersk, CMA-CGM and MSC had planned to form the P3 Alliance to engage in closer coordination among members with wider coverage; this was blocked by the Ministry of Commerce of the People’s Republic of China (MOFCOM). ‘MOFCOM Announcement No. 46 of 2014 on Decisions of Anti-Monopoly Review to Prohibit Concentration of Undertakings by Prohibiting Maersk, MSC and CMA CGM from Establishing a Network Center’ (20 June 2014). The US FMC and the European Commission did not object. See US FMC, ‘53rd Annual Report for Fiscal Year 2014’ 10 <<https://www.fmc.gov/assets/1/Page/53rdAnnualReport.pdf>>; OECD, ‘Competition Issues in Liner Shipping - European Union’ (2015) OECD DAF/COMP/WP2/WD(2015) 7-8, available at <http://ec.europa.eu/competition/international/multilateral/2015_june_liner_shipping_en.pdf>

1.2.4 Voluntary Discussion Agreements (VDAs)

Voluntary discussion agreements (VDAs), often seen in the liner shipping sector, are agreements for regular information exchanges, which sometimes involve tariff guidelines. VDAs often involve agreements on a general rate increase (GRI), also known as general rate restoration.²⁵

According to the JFTC 2016 review, in December 2015 there were 23 VDAs on routes to and from Japan.²⁶ The review also revealed that 9–24% of shippers acknowledged that the base rate had increased due to guidelines set through VDAs, while 38–69% of shippers were uncertain.²⁷ The US FMC found 16 rate discussion agreements in effect at the end of FY2017 on routes to and from the US.²⁸ While the details of VDAs in Asia-Pacific region are not known, the members of VDAs may cross alliances as in the case recently closed Transpacific Stabilization Agreement.²⁹

1.3 Liner Shipping Companies and Consolidation

Liner shipping companies vary in size, coverage and number of vessels they own. In 2017, the five largest companies were Maersk, MSC, CMA-CGM, COSCO and Hapag Lloyd (Germany).³⁰

²⁵ JFTC 2016 (n 11) 31

²⁶ *ibid* 32

²⁷ The percentage differs by route. *ibid* 32-33

²⁸ US FMC 2017 Report (n 13)12-13

²⁹ American Shipper, 'Transpacific Stabilization Agreement Shatters Operations' (15 January 2018) <<https://www.americanshipper.com/main/news/transpacific-stabilization-agreement-shatters-oper-70396.aspx>>

³⁰ UNCTAD 2017 (n 1) 30

Consolidation is a feature of the industry.³¹ American President Lines was acquired by CMA-CGM, China Shipping Container Liners and COSCO merged, Maersk acquired Hamburg Sud and Hanjin Shipping exited the market in 2016. The next year, Hapag Lloyd and United Arab Shipping Company merged, Nippon Yusen KK, Mitsui Osaka Shosen Lines (MOL) and Kawasaki Kisen (K Line) consolidated to form a joint venture called Ocean Network Express,³² and 14 Korean liner shipping companies including Hyundai Merchant Marine formed a partnership.³³

1.4 Government Involvement

Governments play significant roles in the maritime transport sector.³⁴ Maritime transport is not only essential to national economies of Pacific-Rim countries but is also vital to national defence and security. This was demonstrated when Hanjin, a South Korean liner, collapsed in 2016, causing turmoil in the South Korean economy and global trade.³⁵ Against this background, shipping companies in the region often benefit from special tax deductions and other forms of state aid.³⁶ For example, Japan's Basic Act on Ocean Policy requires the government take measures necessary to enhance the international competitiveness of the

³¹ UNCTAD 2017 (n 1) 13-14, 48-50; OECD Mega Ships (n 3) 30

³² UNCTAD, 2017 (n 1) 48

³³ World Maritime News, 'South Korean Container Carriers Unite' (4 August 2017) <<https://worldmaritimeneews.com/archives/226620/south-korean-container-carriers-unite/>>

³⁴ OECD Mega Ships (n 3) 68

³⁵ See e.g. Reuters, 'Factbox: Hanjin Shipping Collapse—By Numbers (12 September 2016) <<https://www.reuters.com/article/us-hanjin-shipping-debt-factbox/factbox-hanjin-shipping-collapse-by-numbers-idUSKCN11I06B>>; Commissioner Doyle, 'Lessons from Hanjin Shipping Bankruptcy' (2017 TPM Conference, 2 March 2017, Long Beach, California) <https://www.fmc.gov/lessons_from_hanjin_shipping_bankruptcy_commissioner_doyle%E2%80%99s_prepared_remarks_at_2017_tpm_conference/>

³⁶ For information about Europe, see Kelyn Bacon, *European Union Law of State Aid*, (3rd edn, OUP 2017), paras 12.83- 12.111

Japanese maritime industry,³⁷ while the Marine Transportation Act provides that the Ministry of Land, Infrastructure, Transport and Tourism (MLIT)

[S]hall set a basic policy for the comprehensive and systematic promotion of measures concerning the securing of Japanese-flagged vessels and the training and securing of the seafarers boarding such vessels necessary to secure stable marine transportation.³⁸

Accordingly, in 2018 the MLIT Maritime Bureau set a goal to increase the number of Japanese-flagged vessels by 20% in five years and the number of seafarers by 50% in ten years.³⁹ Taxes will be reduced to achieve this goal.⁴⁰

Furthermore, closely related services like port construction and operation are either conducted by governments or state-owned companies or under the concession of some form of public-private partnership.⁴¹

The Chinese government's involvement stands out. While China has been trying to pursue the growth of its ocean shipping industry for a period of time,⁴² it is now a part of the One Belt One Road (OBOR) initiative, also called the Belt and Road Initiative.⁴³ OBOR aims at establishing transportation routes connecting China and Europe by both land and ocean.

³⁷ Basic Act on Ocean Policy art 24

³⁸ Marine Transportation Act art 34

³⁹ MLIT Maritime Bureau, '*Nihon Senpaku oyobi Senin no Kakuho ni kansuru Kihon Hoshin no Henko tou ni tsuite*' (On Amendment of the Basic Policy to Secure Japanese-Flagged Ships and Sea Fares)' (January 2018) <<http://www.mlit.go.jp/common/001219794.pdf>>

⁴⁰ *ibid*

⁴¹ UNCTAD 2017 (n 1) 73-74

⁴² The State Council of the People's Republic of China, 'Several Opinions of the State Council on Promoting the Sound Development of the Maritime Industry' (15 August 2014) <<http://en.pkulaw.cn/Search/SearchLaw.aspx>>

⁴³ The National Development and Reform Commission, Ministry of Foreign Affairs and Ministry of Commerce of the People's Republic of China, 'Vision and Actions on Jointly Building Silk Road Economic Belt and 21st-Century Maritime Silk Road' (28 March 2015) <http://en.ndrc.gov.cn/newsrelease/201503/t20150330_669367.html>

The initiative outlines the transportation infrastructure to be built as well as the standardisation activities, safety measures and policy coordination to be implemented by participating countries.⁴⁴ To date, more than 70 countries have decided to participate.⁴⁵ Against this background, the Chinese government is pushing COSCO, a state-owned liner company, to become a global player and more closely involved in business. In 2016, COSCO merged with China Shipping as a part of Chinese government policy to strengthen its state-owned enterprises⁴⁶ and promote OBOR.⁴⁷ The merger made COSCO the then-third largest shipping company in the world.⁴⁸ The company will take over OOCL in June 2018,⁴⁹ while the China Development Bank has promised to provide COSCO with 180 billion yuan (\$26 billion) to fulfil its role in OBOR.⁵⁰

2. Antitrust Exemptions in the Liner Sector

⁴⁴ *ibid* ch IV

⁴⁵ HKTDC Research, 'The Belt and Road Initiative: Country Profiles' <<http://china-trade-research.hktdc.com/business-news/article/The-Belt-and-Road-Initiative/The-Belt-and-Road-Initiative-Country-Profiles/obor/en/1/1X000000/1X0A36I0.htm>> accessed 15 May 2018

⁴⁶ See European Union (Directorate-General for External Policies), 'Study: Transformation of China and Global Economic Interdependence', (April 2017) DG EXPO/B/PolDep/Note/2017_64 EN, 16 <[http://www.europarl.europa.eu/RegData/etudes/STUD/2017/570484/EXPO_STU\(2017\)570484_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/570484/EXPO_STU(2017)570484_EN.pdf)>; The Central Committee of the Communist Party of China and State Council, 'Guiding Opinions of the CPC Central Committee and the State Council on Deepening the Reform of State-Owned Enterprises' (24 August 2015) <<http://en.pkulaw.cn/Search/SearchLaw.aspx>>

⁴⁷ COSCO Shipping, 'The Merger of COSCO and China Shipping Adopted with 99% of Votes' (1 February 2016) <http://en.coscocs.com/art/2016/2/1/art_6923_45343.html>

⁴⁸ Financial Times, 'Cosco Takeover of Orient Overseas Affirms China's Trade Ambitions' (10 July 2017) <<https://www.ft.com/content/11eca6ea-6545-11e7-8526-7b38dcaef614>>

⁴⁹ Drewry, 'Takeover of "Perfect Bride" OOCL Takes Container Industry One Step Closer to Liner Paradise' (10 July 2017) <<https://www.drewry.co.uk/news/news/takeover-of-perfect-bride-oocl-takes-container-industry-one-step-closer-to-liner-paradise>>

⁵⁰ Reuters, 'China's COSCO secures \$26 bln financing pledge from CDB' (12 January 2017) <<https://uk.reuters.com/article/cosco-china-development-bank-idUKL4N1F22SF>>

In the major countries in the Pacific Rim region, the liner shipping sector is exempted from the application of competition law, either under sector specific legislations, special provisions in the competition law or by virtue of the block exemption system established by the competition laws.⁵¹ There are three types of exemption regimes: block exemptions, sector specific legislation and sector specific legislation based on the collective bargaining system.

2.1 Block Exemptions from Competition Law

The block exemption regime exists in Hong Kong,⁵² Malaysia⁵³ and Singapore.⁵⁴ Under this system, competition authorities examine an application for the block exemption and grant it when the conditions set under the competition laws are satisfied. The system is similar to Article 101(3) of the Treaty on the Functioning of the European Union.

The scope of the exemption varies; while Singapore and Malaysia grant the exemption to both VDAs and VSAs, Hong Kong only grants it to VSAs.⁵⁵ Hong Kong sets

⁵¹ For a brief overview, see UN Economics and Social Commission for Asia and the Pacific, 'Shipping Block Exemption from Competition Law' (2015) <http://www.unescap.org/sites/default/files/Policy%20Brief%20on%20Block%20Exemption_0.pdf> accessed 15 May 2018

⁵² HKCC, Competition (Block Exemption for Vessel Sharing Agreements) Order 2017 <https://www.compcomm.hk/en/enforcement/registers/block_exemption/block_exemption.html>

⁵³ Malaysia Competition Commission (MyCC), Competition (Block Exemption Order for the Vessel Sharing Agreements and the Voluntary Discussion Agreements in Respect of Liner Shipping Service) (Amendment) Order 2014, Federal Government Gazette of 4 July 2014 (P.U.(A)195); idem, Competition (Block Exemption Order for the Vessel Sharing Agreements and the Voluntary Discussion Agreements in Respect of Liner Shipping Service) (Amendment) Order 2017, Federal Government Gazette of 6 July 2017 (P.U.(A)191)

⁵⁴ Singapore, Block Exemption for Liner Shipping Agreements Order 2006 (G.N. No. S 420/2006); Block Exemption for Liner Shipping Agreements (Amendment) Order 2010 (G. N. No. S 768/2010); Block Exemption for Liner Shipping Agreements (Amendment) Order 2015 (G.N. No. S 718/2015) (collectively, Singapore Orders)

⁵⁵ HKCC (n 52); MyCC (n 53), Singapore Orders (n 54)

the upper limit share at 40% for VSAs,⁵⁶ while Singapore sets it at 50%⁵⁷ and Malaysia does not set such a limit. While rate-making agreements are exempted in Singapore on the condition that such agreement does not prevent members from establishing such service contracts independently and secretly; such agreements are not exempted in Malaysia. In Hong Kong, liner shipping companies do not seek such exemptions because rate-making agreements are no longer ‘representative of the liner shipping agreements’.⁵⁸ All three competition authorities have set a five-year time period for the exemption.⁵⁹

2.2 Sector Specific Legislation

Sector specific legislation, which replaces competition law for the liner shipping sector, exists in China,⁶⁰ Japan,⁶¹ South Korea⁶², Taiwan⁶³ and the United States.⁶⁴ The scope and conditions of the exemption vary. In the US, liner shipping companies are prohibited from restricting shippers’ freedom to conclude independent service contracts, under which they

⁵⁶ HKCC (n 52) para 8

⁵⁷ Singapore Orders (n 54) para 4

⁵⁸ HKCC (n 14) para 2.24

⁵⁹ HKCC (n 52) paras 1-4; MyCC (n 53) para 4; Singapore Orders (n 54) para 2. When Malaysia first granted the exemption in 2014, it was set at three years. MyCC, Competition (Block Exemption Order for the Vessel Sharing Agreements and the Voluntary Discussion Agreements in Respect of Liner Shipping Service) (Amendment) Order 2014 (n 53) para 4.

⁶⁰ Regulations of the People’s Republic of China on International Maritime Transportation, adopted at the 49th Executive Meeting of the State Council on November 5, 2001, promulgated by Decree No.335 of the State Council of the People’s Republic of China on December 11, 2001 as amended 31 May 2013 arts. 32-38

⁶¹ Kaijo Unso Hou [Marine Transportation Act], Law No. 187 of 1 June 1949, as last amended 2 June 2017 arts. 29-2 - 29-4

⁶² Maritime Transport Act, as last amended 9 June 2009 (Law Ref 19626, 2009) (R.O. Korea) art 29 and Monopoly Regulation and Fair Trade Act, as last amended 25 March 2009 (Law Ref 17914, 2010) (R.O. Korea) art 58

⁶³ Shipping Act promulgated on 3 June 1981, last amended on 22 January 2014, arts 34-35 and Fair Trade Act of 2017 art 46

⁶⁴ The Ocean Shipping Reform Act of 1998, Pub L 104-258, 112 STAT 1902 (1998) sec 105

negotiate with the shipper on an individual basis. In contrast, Japan and Korea did not implement such a restriction. The institutional setting differs as well; while the US FMC is an independent regulatory body, the transport minister, MLTI, who also deals with industry policies, oversees the liners' agreements is in charge of liner sector regulation. In China, a liners' agreement is sent to the Competent Communications Department of the State Council.⁶⁵ If an agreement 'can be detrimental to fair competition', an investigation is conducted jointly by the Competent Communications Department, the Department for Commerce and Industry and the Pricing Department,⁶⁶ which may result in prohibitive or restrictive measures such as ordering to amend relevant agreements, suspending application of freight rate.⁶⁷

To clarify the further discussion, it is essential to summarise Japanese law.⁶⁸ Under the Marine Transportation Act, carriers are obligated to notify the MLTI when they conclude or amend an agreement.⁶⁹ The MLTI may order the suspension or amendment of the agreement, on its own initiative, if it i) 'unjustly impairs the benefits of users'; ii) is 'unjustly discriminatory'; iii) 'unjustly restricts participation and withdrawal' from the agreement; or iv) is not 'kept to the minimum necessary for the purpose of the agreement'.⁷⁰ The MLTI also notifies the JFTC, which then may request the MLTI take measures if the above conditions are not met.⁷¹

⁶⁵ Regulations of the People's Republic of China on International Maritime Transportation art 20

⁶⁶ Regulations of the People's Republic of China on International Maritime Transportation arts 32-33

⁶⁷ Regulations of the People's Republic of China on International Maritime Transportation art 37

⁶⁸ For details, see JFTC 2016 (n 11) 24-26

⁶⁹ Marine Transportation Act art 29-2 (i)

⁷⁰ *ibid* art 29-2 (ii)

⁷¹ *ibid* arts 29-2 (i) and (ii). The number of notifications in FY 2014 was 35. JFTC 2016 (n 11) 26

Although the JFTC is competent in regulating mergers, its role is limited. As discussed below, its current major concern is alliances, which are essentially agreements rather than mergers. The application of the Antimonopoly Act (AMA), enforcement of which is entrusted with the JFTC, is exempted in relation to the agreement. So far the JFTC has enforced the AMA only in relation to car-cargo cartels.⁷² The JFTC could do so because the practice had not been notified to the MLTI in compliance with the Marine Transportation Act and thus was not exempted from the AMA.⁷³

The JFTC has been engaging in advocacy. It requested the MLTI abolish the exemption system in 2006, 2010 and 2016.⁷⁴ In 2016, the MLTI and the JFTC were to consult on the exemption system; in preparation, the JFTC conducted a thorough survey and analysis, which concluded the current exemption system should no longer be maintained.⁷⁵ The JFTC Competition Policy Research Centre, which brings together officials and academics on joint research projects, also recommended abolishing the exemption system.⁷⁶ Despite such efforts, after the consultation the MLTI announced the current exemption system would be maintained, but it would more closely examine the conference rate-making agreements in light of the Marine Transportation Act, request shipping companies amend or withdraw from conferences when the MLTI finds the agreement does not operate as provided and re-

⁷² JFTC, Press Release: The JFTC issued Cease and Desist Orders and Surcharge Payment Orders against International Ocean Shipping Companies on International Ocean Shipping Companies (18 March 2014) <<http://www.jftc.go.jp/en/pressreleases/yearly-2014/March/140318.html>>

⁷³ JFTC, *Jidosha Unso Gyomu wo Okonau Senpaku Unkou Jigyosha ni taisuru Haijo Sochi Meirei, Kachokin Noufu Meirei tou ni tsuite* [On Cease and Desist Orders and Surcharge Payments Orders against International Ocean Shipping Companies] (18 March 2014) <<http://www.jftc.go.jp/houdou/pressrelease/h26/mar/140318.html>>

⁷⁴ See JFTC 2016 (n 11) 2-3

⁷⁵ JFTC 2016 (n 11) 40

⁷⁶ JFTC Competition Policy Research Centre, '*Shogaikoku ni okeru Gaiko Kaiun oyobi Kokusai Kouku ni kansuru Kyoso Ho Tekiyo Jogai Seido no Doko to Wagakuni heno Shisa CR02-16*' [Comparative Study: Exemptions from Competition Law in the Ocean Shipping and Airline Sectors] (June 2016) <<http://www.jftc.go.jp/cprc/reports/index.files/cr-0216.pdf>>

examine the exemption system when the number of notified conference agreements decreased and the abolishment of the exemption would not interfere with the provision of stable international ocean transport service.⁷⁷ The consultation was a result of the regulatory reform initiative undertaken by the cabinet in 2010,⁷⁸ the equivalent of which does not exist under the current administration. No future JFTC/MLTI consultation on this issue has been scheduled at the time of writing.

2.3 Collective Bargaining

A sector specific regulatory scheme based on collective bargaining exists in Australia⁷⁹ and New Zealand, although it is expected to change the regime to the block exemption model soon.⁸⁰

In Australia, shippers form associations, called peak shippers bodies, recognised by the Australian government as representing their members' interests.⁸¹ When liner shipping companies contemplate concluding an agreement, they must notify the registrar of the draft agreement and send a copy to the peak shippers body.⁸² If peak shippers body requests a

⁷⁷ MLTI, '*Gaiko Kaiun ni kakaru Dokusen Kinshi Ho Tekiyo Jogai Seido ni kansuru Saikento no Kekka ni tsuite*' [On the Result of Re-Examination on Antitrust Exemption System Concerning Marine Transport] (14 June 2016) <http://www.mlit.go.jp/report/press/kaiji02_hh_000204.html>

⁷⁸ See Cabinet Office, '*Kisei/Seido Kaikaku ni kakaru Taisho Hoshin*' [The Policy Concerning Regulatory and Institutional Reform] (18 June 2010), 23 <http://www.cao.go.jp/sasshin/kisei-seido/publication/220618/item100618_03.pdf>; MLTI, '*Gaiko Kaiun ni kakaru Dokusen Kinshi Ho Tekiyo Jogai Seido no Minaoshi ni tsuite*' [On the Result of Examination on Antitrust Exemption System Concerning Marine Transport] (17 June 2011) <http://www.mlit.go.jp/report/press/kaiji02_hh_000083.html>

⁷⁹ Competition and Consumer Act 2010 (Cth) part X (CC Act) Act No. 51 of 1974 as amended (CC Act) part X

⁸⁰ New Zealand Ministry of Business, Innovation and Employment, 'Block Exemption for Specified International Liner Shipping Activities' <<http://www.mbie.govt.nz/info-services/business/competition-policy/cartel-reform/block-exemption-for-specified-international-liner-shipping-activities>> accessed 15 May 2018

⁸¹ CC Act part X art 10.03

⁸² CC Act part X div 6

negotiation, the liner shipping companies must participate.⁸³ Once both sides reach agreement, the liners' agreement is registered by the registrar of liner shipping⁸⁴ and exempted from Australian competition law provisions relating to cartels and other agreements that effect to restrict competition.⁸⁵ The parties to the registered agreement are obligated to negotiate the terms and conditions, and other issues, with the shippers on a continuous basis.⁸⁶

When one or both contracting parties does not have the capacity to negotiate effectively or to make an informed decision, collective bargaining may function as a means of correcting information asymmetry and reducing transaction costs.⁸⁷ This argument is habitually employed worldwide in the labour and agricultural products markets. Inasmuch as the shippers as well as the shipping companies are fragmented, the Australian system has some appeal.

Yet the system appears to not be functioning as designed and the Australian Productivity Commission recommended its abolishment in a 2005 report,⁸⁸ as did the Australian-New Zealand Joint Productivity Commission in 2012⁸⁹ and a comprehensive

⁸³ CC Act part X art 10.29

⁸⁴ CC Act part X div 6 s B

⁸⁵ CC Act part X div 5

⁸⁶ CC Act part X div 7

⁸⁷ See Australian Competition and Consumer Commission, 'Guidelines for Authorisation of Conduct (Non-Merger) for Consultation' (November 2017) 42-45

⁸⁸ Australian Government Productivity Commission, 'Review of Part X of the Trade Practice Act 1974: International Linear Cargo Shipping' (2005) <www.pc.gov.au/inquiries/completed/cargo-shipping2005/report/partx.pdf>

⁸⁹ Australia and New Zealand Productivity Commission, 'Joint Study—Strengthening Trans-Tasman Economic Relations, Recommendation 4.14' (2012) <<http://www.pc.gov.au/inquiries/completed/australia-new-zealand>>

competition law review report in 2016.⁹⁰ The 2016 report also recommended implementing the block exemption system and addressing procompetitive agreements among the liner shipping companies under that system.⁹¹ Those advocating for its end reason the collective bargaining system is not working as a safeguard of shippers' interests, and those shippers may pursue their interests by using services provided by forwarder or establishing their own freight transportation service. They also assert reasonable grounds no longer exist to treat liner shipping service differently.⁹² Although the Australian government did not accept the recommendation immediately, it has stated the issue is open to discussion and consideration.⁹³

2.4 International Laws and Institutions

Although there is no supranational institution like the EU in the Pacific Rim region, different regulatory regimes coexist in the liner shipping sector. The Asia-Pacific Economic Cooperation (APEC) Transportation Working Group and Maritime Experts Group, which issued non-binding guidelines in 2011, have made some efforts towards the coherent approach in the liner sector in relation to the competition law and policy. The guidelines state that 'non-ratemaking agreements ... may continue to be permitted as a positive form of supplier collaboration'⁹⁴ and that 'APEC member economies do not subject non-ratemaking

⁹⁰ Ian Harper and others, 'Competition Policy Review: The Final Report' (March 2015) 285
<<http://competitionpolicyreview.gov.au/final-report/>>

⁹¹ *ibid*

⁹² *ibid* 380-85

⁹³ Australian Government, 'Government Response to the Competition Policy Review' (24 November 2015) 6
<<https://treasury.gov.au/publication/government-response-to-the-competition-policy-review>>

⁹⁴ APEC (Transportation Working Group/Maritime Experts Group), 'APEC Guidelines Related to Liner Shipping' (2011) guidelines 1

agreements to a market share test based on a pre-defined threshold level as a condition for a formal exemption from the relevant provisions of general competition law'.⁹⁵ Because the recommendations are not binding they are not followed. Rate-making agreements are allowed in Japan, Korea and the United States as explained above and a market share threshold has been set in Hong Kong⁹⁶ and Singapore.⁹⁷

3. Competition Issues in the Liner Sector

Under such market structure and regulatory systems, what competitive concerns exist in the Pacific Rim liner sector? Because of the exemption system and lack of enforcement by competition authorities, this question is not easy to answer. Yet, it would be reasonable to identify the possible concerns as follows.

3.1 Alliance: Collusion and Dominant Position

The Ocean Alliance is expected to obtain more than a 40% share of the transpacific (North America—Asia) route,⁹⁸ which may have market power. Ocean, together with 2M and THE Alliance, is considered a mega alliance; the three hold more than a 90% share of the global shipping market,⁹⁹ which may indicate oligopolistic market structure and possibly collective dominance. Even if an alliance does not expressly restrict its members from competing on

⁹⁵ *ibid* 4

⁹⁶ Hong Kong Exemption Order (n 52) para 8

⁹⁷ Singapore Exemption Order (n 54) para 4

⁹⁸ JOC, 'Ocean Alliance Leads Pack in Asia Import Gains on US Trades (26 July 2017) <https://www.joc.com/maritime-news/container-lines/ocean-alliance-leads-pack-asia-import-gains-us-trades_20170726.html>; Lloyd's Loading List Group, 'Shippers Should Prepare for Ocean Alliance Upheaval in 2018 (21 December 2017) <<https://www.lloydsloadinglist.com/freight-directory/news/Shippers-should-prepare-for-Ocean-Alliance-upheaval-in-2018/70988.htm#.WwLNUkgvzD4>>

⁹⁹ UNCTAD 2017 (n 1) 49

price, competitive sensitive information will be exchanged among members.¹⁰⁰ Alliances also determine major issues such as routes, frequency, reliability and the number of the vessels they employ and so it may be in a position to be able to determine output and service quality.¹⁰¹ This dominant position might be abused against both shippers and the providers of bunkering and other services that the liner shipping companies procure.¹⁰²

3.2 Price Fixing and Information Exchanges

It is unnecessary to outline how VDAs and conferences cause anticompetitive effects. Conferences were once advocated on the grounds of ‘excessive competition’, ‘destructive competition’ and ‘empty core’ theories, which essentially tells that the price fixing is necessary because that the liner-shipping service is characterised by large-sum investments where the marginal cost to load an additional container on a fleet is negligible; if liner shipping companies were left to compete against each other, no investment would be profitable and the service would cease and thus price agreement is necessary. A similar argument was put forward to justify antitrust exemptions for conferences and VDAs in Japan, Malaysia and Singapore.¹⁰³ Although certain economic analyses suggest otherwise, these

¹⁰⁰ See e.g. U.S. Department of Justice, Comments of the U.S. Department of Justice on the THE Alliance Agreement, FMC Agreement No. 012439 (22 November 2016); Comments on the OCEAN Alliance Agreement, FMC Agreement No. 012426 (19 September 2016). Both documents are available at <<https://www.justice.gov/atr/comments-federal-agencies#fmc>>. See also OECD 2015 (n 3) 30

¹⁰¹ UNCTAD 2017 (n 1) 14, 49-50, 68. See also Maersk Merger (n 2) paras 32 and 38; COSCO Merger (n 2) paras 52 and 58; GSF Report (n 20) 16

¹⁰² OECD Mega Ships (n 3) 72; GSF Report (n 97) 16

¹⁰³ MLTI (n 73); Singapore Competition Commission, ‘Consultation on CCC’s Proposed Recommendation to the Minister with Respect to Liner Shipping Agreements’ (May 2015) 5-7<<https://www.cccs.gov.sg/public-register-and-consultation/public-consultation-items/2015-public-consultation-on-proposed-recommendation-to-extend-beo-for-liner-shipping-agreements>> accessed 15 May 2018; Malaysia Competition Commission, ‘Overview on The Proposed Block Exemption for Liner Shipping Agreements by the MyCC’ (2013) <http://mycc.gov.my/sites/default/files/Overview-on-The-Proposed-Block-Exemption-for-Liner-Shipping-Agreements-by-the-MyCC_pptx.pdf> accessed 15 May 2018

theories have been criticised on the grounds that they assume a non-differentiated market; there are less restrictive ways for liner shipping companies to address their issues, such as long-term contracts and forming alliances; and there are many industries (e.g. energy) characterised by large investments and negligible marginal costs that are not exempted.¹⁰⁴ The EU abolished the exemption for conferences in 2008; the lack of recognisable impact appears to demonstrate that there is no need for price fixing to ensure secure service.¹⁰⁵

Another justification for price fixing is the stability of the contract terms and services. Such a claim is easily refuted. If stability implies a stabilised price, this claim only reiterates the anticompetitive effect of such agreements. It is unlikely consumers prefer a stable higher price to a fluctuating lower price.¹⁰⁶ On the other hand, if the stability means service is provided without disruptions such as bankruptcy, this echoes the destructive competition theory and criticism against it is also applicable here. Finally, if stability implies a better quality of service in terms of punctuality, reliability or more regular calls of port, such an argument should be seen as meaningless a matter of policy. It should be the market that decides the best price-quality mix. There is no reason to believe the quality of service ensured by the inflated price best serves consumers.

Even without formal VDAs and conferences, shipping companies may still collude. Such collusion is easy where cartel activities have been taking place for decades and

¹⁰⁴ For further details, see OECD (Directorate for Science, Technology and Industry, Division of Transport), 'Competition Policy in Liner Shipping Final Report' DSTI/DOT(2002)2 (16 April 2002) ch 4 <[http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=dsti/dot\(2002\)2&doclanguage=en](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=dsti/dot(2002)2&doclanguage=en)>; Peter Carstensen, 'Economic Analysis of Antitrust Exemptions', in Roger D Blair and D Daniel Sokol (eds), *The Oxford Handbook of International Antitrust Economics*, vol 1 (OUP 2014) 38-42; JFTC Competition Policy Research Centre (n 72) ch 3

¹⁰⁵ See e.g. US FMC, 'Study of the 2008 Repeal of the Liner Conference Exemption from European Union Competition Law' (January 2012) <https://www.fmc.gov/assets/1/documents/fmc_eu_study.pdf>; OECD 2017 (n 3) 25

¹⁰⁶ According to the JFTC, while 97% of shippers indicated the level of freight rates was one of their criteria for choosing shipping companies, only 53% of them chose the stability of freight rates. JFTC 2016 (n 15) 9-10

companies interact either through the process of operational cooperation¹⁰⁷ or simple multi-market contacts.¹⁰⁸ Liner shipping companies are typically situated in such environments.¹⁰⁹ The digitalisation taking place in the liner shipping sector¹¹⁰ may further facilitate collusion by increasing transparency and easing price adjustments and coordination.¹¹¹

3.3 Exclusionary practices

Anticompetitive exclusion, such as through predatory pricing, is also a concern. Certain alliances have established a strong position in the market and several liner shipping companies have deep pockets as they are subsidised or owned by the government. Furthermore, government involvement may be driving shipping companies to focus on their presence and share in the global maritime market rather than maximisation of profits. Under such circumstances, the likelihood for predatory pricing tends to be greater.¹¹² Vertically integrated liner shipping companies may also engage in exclusionary practices through their positions as port operators or any other economic position in the adjunct markets.¹¹³

¹⁰⁷ Thomas K Cheng and Kelvin H Kwok, 'A Neglected Theory of Harm: Joint Ventures as Facilitators of Collusion across Markets' (2017) 5(3) *Journal of Antitrust Enforcement*, 434

¹⁰⁸ Jay Pil Choi and Heiko Gerlach, 'Cartels and Collusion: Economic Theory and Experimental Economics', in Roger D Blair and D Daniel Sokol (eds), *The Oxford Handbook of International Antitrust Economics*, vol 2 (2014 OUP) 419-420

¹⁰⁹ See OECD 2015 (n 3) 44-45. Furthermore, considering parties to VDAs are also members of several alliances, VDAs may negatively affect competition not only amongst VDA members but also amongst the alliances by facilitating collusion.

¹¹⁰ UNCTAD 2015 (n 1) 14

¹¹¹ OECD, 'Algorithms and Collusion: Competition Policy in the Digital Age' (14 September 2017) 18-32 <<http://www.oecd.org/daf/competition/Algorithms-and-collusion-competition-policy-in-the-digital-age.pdf>>

¹¹² David E.M. Sappington & J. Gregory Sidak, 'Anticompetitive Behavior by State-Owned Enterprises: Incentives and Capabilities', in R. Richard Geddes (ed) *Competing with the Government: Anti-Competitive Behavior and Public Enterprises* (2004 Hoover Institution Press) 14-17

¹¹³ OECD (Directorate for Financial and Enterprise Affairs Competition Committee), 'Competition in Ports and Port Services' DAF/COMP(2011)14 (2014) 11-12 <<http://www.oecd.org/regreform/sectors/48837794.pdf>>; GSF Report (n 20)18

4. Need for Reform and International Cooperation

Overall, how well is the current regulatory regime in the liner sector in Pacific-rim countries functioning and what reform is necessary? The answer varies because the institutional setting and political and economic situations differ from country to country. In Japan, the competition concerns listed in the previous section are not addressed sufficiently under the current regime. Anticompetitive price fixing and information exchange agreements are exempted. Alliances, which are essentially agreements rather than mergers,¹¹⁴ have been formed without JFTC competitive assessments. Although exclusionary practices may be regulated as an unfair trade practice, if the exclusion is done by way of pricing, whether by predatory pricing, conditional pricing or margin squeeze, it would be difficult to find the practice unlawful under the AMA because it would be authorised by the MLTI under the Marine Transportation Act.

In theory, the Marine Transportation Act may be enforced in line with competition policy; however, this is not a realistic scenario. The language of the relevant provision vaguely states that the MLIT may issue the order when consumer interest is unjustly harmed and proving such harm is likely to be difficult. Although long-term effects and market dynamism, which drive efficiency, should be taken into account when assessing consumer harm, it is likely these effects are seen only as speculative and therefore insufficient to result in a remedial order. For effective competition law enforcement, harm should be presumed by the existence of a rate-making agreement. The Maritime Transport Act lacks such a principle. Furthermore, the Act is enforced by the MLTI, which is also in charge of industrial policy

¹¹⁴ See OECD 2015 (n 3) 32

and not an independent administrative body, which makes it even more unlikely the Act will be enforced in line with the competition policy.¹¹⁵

Such consideration leads to the conclusion that the regime should be reformed, in Japan and in other jurisdictions. The following sections examine what reform is necessary and how it might be achieved.

4.1 Choice of Regulatory Model

The block exemption model differs from sector specific legislation in that it is the competition authority that makes assessments. The exemption may be accompanied by a time limit, also, while, sector specific legislation does not expire unless the legislature decides to abolish the exemption. The block exemption system also differs from sector specific legislation in that the onus to prove the necessity of and justification for the exemption is placed on the liner shipping companies, while the need for the abolishment of the sector specific legislation must be presented by those who want such abolishment (typically the competition authority). The competition authorities attentive to the anticompetitive effect of certain types of agreements may view the same evidence yet arrive at different outcomes; non-approval of the overreaching application and thus no exemption under the block exemption model on the one hand as in Hong Kong¹¹⁶ and failure to convince the legislature

¹¹⁵ One possibility is to establish an independent administrative body that monitors and regulates ocean shipping transport services and is not involved in industry policy. However, this is also unrealistic considering the strong resistance against the idea of an independent regulatory body. The JFTC is a rare example of an independent regulatory body that has survived over time, while no independent body exists in the telecommunication, energy or transport sectors.

¹¹⁶ See above 2.1

to change the sector specific legislation regime and perpetual exemption on the other as in Japan.¹¹⁷

Some may argue that sector specific legislation may be enforced in line with competition law as demonstrated by the US FMC. With regards to Japan, this scenario is unrealistic as already discussed. Furthermore, even leaving aside the issue as to whether the US FMC is truly acting in line with competition policy,¹¹⁸ one should remember that no major international ocean-shipping company is based in the country and thus protecting the national interest tends to mean protecting the shipper's interests. The sector specific government agencies in other countries, including Japan, who have many shipping companies to protect, should not be expected to act like the US FMC.

The division of work between the competition authority and the ocean shipping regulator in relation to competition law enforcement is also inefficient; the enforcement of the competition law entails special expertise, which the ocean shipping regulator is unlikely to possess.¹¹⁹ Liner shipping companies also provide other maritime transportation services and information obtained in relation to one service may be relevant to the others. The regulatory system under which the competition authority deals with various maritime services, as long as the issue relates to the competition issues, should be more effective and efficient.

The Australian collective bargaining model is based on a different philosophy and worth separate consideration. First, it should be noted that this model does not make much sense if competition, rather than rate-making agreements, is the norm in the sector.

¹¹⁷ See above 2.2

¹¹⁸ About the issue, see e.g. US DOJ, Competition Issues in Liner Shipping, OECD DAF/COMP/WP2/WD(2015)13 paras 9-10.<<https://www.justice.gov/atr/file/823411/download>> for the detail.

¹¹⁹ This is more likely in small countries where governmental resources and experiences tend to be limited. In Japan it is unlikely a sector specific regulator would gain the necessary expertise, not only because the ocean shipping industry is not large but because officials at the ministries customarily change position every two years.

Additionally, unlike the labour and agricultural markets, shippers and forwarders have different requirements and bargaining power; thus, it would be difficult to find common ground. This suggests the efficiency improvement effect of collective bargaining would not be as strong as in the labour and agricultural sectors. The Australian experience indicates free markets may resolve negotiation power imbalances and transaction cost issues by making use of forwarders and shippers jointly establishing their own shipping companies.¹²⁰

This analysis suggests sector specific legislation should be transformed into the block exemption model, although not necessarily a system like that in the EU. For example, the block exemption system does not exist in Japan. Yet, a combination of the JFTC guidelines and their prior-business consultation will function in a manner that is similar to the one under the block exemption system. Under such a system, businesses could use the guidelines to conduct self-assessments and, when necessary, hear the JFTC's views in advance. Once the JFTC notifies the business that there is no competitive concern, it could not take measures against the practice until it withdraws such position.¹²¹ This way, legal certainty and predictability would be secured.

4.2 Treatment of Conferences, VDAs, Consortia and Alliances

As already discussed, the conferences or rate-making agreements are not necessary and is likely to have an adverse effect on the competition. Therefore, the exemption should not be granted to such agreements.

Information exchanges or VDAs are not necessarily anticompetitive; their competitive effect depends on the nature of the information and the way it is exchanged. While

¹²⁰ See above 2.3

¹²¹ JFTC, 'Prior Consultation System for Activities of Businesses, Etc.', <http://www.jftc.go.jp/en/legislation_gls/imonopoly_guidelines.files/priorconsultationsystem.pdf>

competitive sensitive information such as price should not be exchanged between competitors, information regarding technical aspects might be procompetitive. The block exemption should be given only when a VDA is limited in scope and participants and there is no competitive concern.¹²² VSAs and consortia are similar. Although operational cooperation agreements among liner shipping companies are likely to have a procompetitive effect by enabling them to achieve economies of scale, greater connectivity and further investment in the ships, such arrangements also create competitive concerns as described earlier.¹²³

Meanwhile alliances, unchecked by the competition authorities, are forming in a sector with a long history of rate-making and information exchange agreements. For a few years after the regime transformation, the alliances should be scrutinised closely, including the way GRI is used.¹²⁴ Mandatory notification of operational cooperation arrangements and reviews of existing contracts are worth considering. Enhancing the competition authority's capacity to monitor the pricing algorithm should also be required.

4.3 Extraterritorial Application and International Cooperation

The need for international cooperation in enforcing competition rules is great in the liner shipping sector, where liners are based and active throughout the world. The citizens of a particular jurisdiction are harmed not only by anticompetitive practices occurring on the route to and from the jurisdiction but also those on the routes connecting foreign ports. Although in

¹²² Although repealed and replaced with generally applicable horizontal cooperation guidelines, the relevant part of the European Commission guidelines, the idea that information exchanges should be permitted under competition laws, can be found in the Guidelines on the Application of Article 81 of the EC Treaty to Maritime Transport Services (2009 OJ C 245, 2-14)

¹²³ See HKCC (n 14) para 4.20-57; JFTC 2016 (n 11) 45-47. See also Commission Regulation (EC) 906/2009 on the Application of Article 81(3) of the Treaty to Certain Categories of Agreements, Decisions and Concerted Practices between Liner Shipping Companies (Consortia), 2009 OJ L 256 preamble para 5

¹²⁴ The European Commission has found evidence of anticompetitive usage of the GRI. See Container Shipping (Case. COMP/AT.39850)[2016]

theory, such issues may be resolved unilaterally by extraterritorial application of the country's competition law,¹²⁵ an international cooperation agreement would be a better approach as it avoids diplomatic conflict.¹²⁶

For now, this would be achieved through bilateral international agreement.¹²⁷ These agreements must be intragovernmental, not between competition authorities, as the relevant information and competence may be held by sector regulators and other governmental bodies where the issues relate to the maritime transport services. Under such agreements cooperation mechanisms for investigation should be established and jurisdictional issues resolved, including clarifying to what extent domestic competition law would be applicable: Would it only be when the ship departs or arrives at its national ports, or would it apply to any ship carrying a substantial number of containers addressed to, or that originated in, that nation?

The bilateral cooperation network amongst Pacific Rim countries is weak. For instance, Japan concluded international cooperation agreements with Canada and the US and the economic partnership agreements containing competition provisions with Australia,

¹²⁵ For example, Japanese AMA may be applied. In 2017, the Supreme Court of Japan ruled that when trade is partly with companies based in Japan and is affected by the agreement in question, the relevant market in relation to the trade includes Japan and thus the system of fair and free competition in the relevant Japanese market becomes distorted by the agreement. The Supreme Court went on to state that the AMA of Japan is applicable to such an agreement. Supreme Court judgement of 12 December 2017 (Heisei 28 (Gyo hi) 233), available at <http://www.courts.go.jp/app/hanrei_jp/detail2?id=87299> (Japanese). This case implies the AMA may be applicable to, for example, the Shanghai—US route where certain carried freight is addressed to Japanese companies and shipping services are procured by them.

¹²⁶ US extraterritorial application of domestic antitrust law in the ocean maritime sector once triggered counter-extraterritorial legislation in the UK. See Protection of Trading Interests Act 1980 (UK) c 11

¹²⁷ Although multinational cooperation or coordination is preferred, regional cooperation among the Asia-Pacific countries is limited, whether in the Association of South East Asian Nations (ASEAN) or the Asia-Pacific Economic Cooperation (APEC). See Maher M Dabbah, *International and Comparative Competition Law* (CUP 2012) 393-94, 396; OECD (Secretariat) 'Report on the OECD/ICN Survey on International Enforcement Co-operation' (2013) 92

Chile, India, Indonesia, Mexico, Malaysia, Mongolia, Peru, the Philippines, Singapore, Thailand and Vietnam.¹²⁸ The network needs to be expanded and deepened.

4.4 Joint Advocacy Activities

Another area where closer international cooperation is necessary is advocacy. Overreaching exemption not only harms foreign consumers where the ultimate consignees or indirect purchasers are abroad, but also can facilitate the collusion in foreign jurisdictions. They can also jeopardise the effectiveness of antitrust enforcement in other jurisdictions. The impact of the European Commission's enforcement against liners' collusion on routes to and from European ports,¹²⁹ where the same liner companies meet regularly and discuss routes under the exemption system abroad, may reasonably be questioned. International cooperation among competition authorities is unlikely under the circumstances, where the over-reaching exemption system is maintained in several jurisdictions. For these reasons, a framework under which governments may request others to review and revise existing regulations should be implemented immediately.¹³⁰

It has been pointed out that the joint enforcement of competition laws would be beneficial to evidence collection, allow for necessary expertise and knowledge and send a

¹²⁸ JFTC, 'International Relations' <http://www.jftc.go.jp/en/int_relations/index.html> accessed 15 May 2018. Although it has signed memorandums of understanding with the competition authorities of China, South Korea and Brazil, it is not sufficient as the maritime ocean trade is regulated by the other administrative body in several jurisdictions. See 2.2 above. Further there is no agreement with Hong Kong, New Zealand, Taiwan and the majority of Central and South American countries.

¹²⁹ European Commission (n 122)

¹³⁰ Ultimately international organisations should assume a greater role in regulatory reform of the liner sector. Although the OECD and UNCTAD have been involved in policymaking, their efforts have been limited to studies and reviews. The impact of the APEC guidelines is negligible and their substance needs review. While the World Trade Organisation has not turned its attention to competition policy, it has potential to do much more. See Anila Premti, 'Liner Shipping: Is There a Way for More Competition?' (UNCTAD Discussion Paper No 224, March 2016) 8-11, 29 <http://unctad.org/en/PublicationsLibrary/osgdp2016d1_en.pdf>

convincing message to large multinational large companies.¹³¹ Joint advocacy, too, would have these merit; the evidence to establish the need for abolishing the exemption system should be more easily assembled when the competition authorities act in cooperation, the expertise and knowledge held by a particular competition authority may be shared with other competition authorities and negotiation power against global companies would be greater when the competition authorities act together.

Liner shipping companies often allude to not maintaining their current service standards if their exemptions are not granted.¹³² However, if the need for price fixing is supported neither theoretically nor empirically, such claims should be viewed as empty threats. Yet these claims appear to deter policymakers in Pacific Rim countries from moving forward. These concerns are evident in statements made by authorities when granting or maintaining an exemption, in which they indicate that the legal regime should be consistent throughout the world,¹³³ or that antitrust exemptions remain the global norm.¹³⁴ In countries

¹³¹ Michal S Gal, 'International Antitrust Solutions: Discrete Steps or Causally Linked?' in Josef Drexl and others (eds), *More Common Ground for International Competition Law?* (Edward Elgar 2011) 253-56

¹³² Asian Shipowners' Forum (ASF), 'Submission of the Asian Shipowners' Forum Consultation on the CCS's Proposed Recommendation to the Minister with Respect to the Competition Law Block Exemption for Liner Shipping Agreements', 4 <<https://www.cccs.gov.sg/public-register-and-consultation/public-consultation-items/2015-public-consultation-on-proposed-recommendation-to-extend-beo-for-liner-shipping-agreements>>; International Chamber of Shipping (ICS), 'Proposed Block Exemption for Vessel Sharing Agreements and Voluntary Discussion Agreements in Respect of Liner Shipping Services' (8 June 2017) para 18 <[http://www.ics-shipping.org/docs/default-source/Submissions/Other/ics-submission-to-malaysia-competition-commission-\(mycc\).pdf?sfvrsn=0](http://www.ics-shipping.org/docs/default-source/Submissions/Other/ics-submission-to-malaysia-competition-commission-(mycc).pdf?sfvrsn=0)> (ICS Malaysia); ICS, 'Australian Competition Policy Review International Chamber of Shipping Comments on the Draft Report' (17 November 2014) para 17 <<http://www.ics-shipping.org/docs/default-source/Submissions/Other/australian-competition-policy-review---international-chamber-of-shipping-comments-on-the-draft-report.pdf?sfvrsn=0>>. See also Japan Maritime Centre, 'Gaiko Kaiun ni kakaru Dokusen Kinshi Ho Tekiyo Jogai Seido ni kansuru Kaiun Keizai Mondai Iinkai Hokokusho' [Maritime Economy Committee Report on AMA Exemption System Concerning Oceanic Shipping] (14 June 2016) 20 <<http://www.jpmac.or.jp/research/pdf/443.pdf>>

¹³³ MLTI (n 77)

¹³⁴ Singapore Competition Commission (n 103) para 18. See also Malaysia Competition Commission (n 103) 12. The justifications provided by the relevant policy makers for the exemption tend not to be detailed and sometimes appear to copy the shipping companies' allegations. In relation to the point, see Luis Ortiz Blanco, *Shipping Conferences under EC Antitrust Law: Criticism of a Legal Paradox* (Hart 2007) 573-74 for the situation in Europe with the conference exemption. Although appraising the dynamics behind maintaining or granting the exemption system is beyond the scope of the article, a textbook example of the theory of collective action in the liner sector is evident; while the abolishment of the antitrust system is in many actors' interest, the

where maintaining competitiveness of the maritime transport industry is believed to be vital to the national economy, it would be hard for policymakers to risk major liner shipping companies abandoning their ports.

Policymakers can overcome this concern by acting together. Liners must call at several ports around the Pacific Ocean; therefore, once most countries exempt neither rate-making agreements nor anticompetitive VDAs, the companies will not be able to limit their service to exempting countries. Liner shipping companies often stress the internationally harmonised regulatory environment;¹³⁵ ; the policy makers can deliver this by acting together and abolishing the overreaching exemption system in the liner sector.

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actors do not work together and do not invest time in pursuing a competitive market. On the other hand, liner shipping companies and their collectives, namely conferences and business associations, have a great interest in maintaining the exemption.

¹³⁵ ASF (n 132) 4-5; Japanese Shipowners' Association (JSA), 'Submission of the JSA Consultation on CCS's Proposed Recommendation to the Minister with Respect to Liner Shipping Agreements' (15 June 2015) <<https://www.ccs.gov.sg/public-register-and-consultation/public-consultation-items/2015-public-consultation-on-proposed-recommendation-to-extend-beo-for-liner-shipping-agreements>>; ICS, 'Consultation on CCS's Proposed Recommendation to the Minister With Respect To Liner Shipping Agreements' para 6 (June 2015) <<https://www.ccs.gov.sg/public-register-and-consultation/public-consultation-items/2015-public-consultation-on-proposed-recommendation-to-extend-beo-for-liner-shipping-agreements>>; ICS Malaysia (n 132) para 21