THE IMPACT OF THE OCEAN SHIPPING REFORM ACT OF 1998

FEDERAL MARITIME COMMISSION
SEPTEMBER 2001

CONTENTS

INTRODUCTION

It now has been two years since the implementation of the Ocean Shipping Reform Act of 1998 ("OSRA") -- a sufficient period of time for those in the industry to begin to adjust to the new regulatory environment and for the Federal Maritime Commission ("FMC" or "Commission") to make an initial candid assessment of how the impact of the legislation appears to be unfolding. While there may be divergent views ripe for intriguing debate on various issues, the focus of the following pages is to provide objective, impartial findings on the regulatory and commercial impact of OSRA to date. We have relied on a broad range of sources in collecting information on how the legislation has played out across the industry. Representatives of all sectors of the industry have provided the Commission with their views and comments throughout this two-year period. The responses to the Commission's Notice of Inquiry ("NOI") on OSRA's impact were voluminous. An in-house review of hundreds of service contracts provided a rich source of information, as has our continued monitoring of carrier activity exercising statutory antitrust immunity. We also have drawn on the Commission's numerous and varied experiences in dealing with all aspects of this new law over the past two years. Taken together, this information provides a wealth of insight on the state of US ocean shipping under OSRA.

It is important to emphasize that this report concentrates on the impact of OSRA -- we have not undertaken to present a general trade study on everything that has occurred in US liner shipping since May 1, 1999. Our focus is the manner in which OSRA has shaped or affected operations and developments in that time frame. As indicated throughout the report, OSRA does appear to be achieving its primary policy objectives. However, several areas do present significant issues that the Commission must continually assess to determine if responsive action becomes warranted.

This study is divided into five topics: service contracts, agreements, ocean transportation intermediary ("OTI") licensing and bonding, tariffs, and a grouping of other relevant issues. The views of the various sectors of the industry, as well as an assessment of OSRA's impact on these groups, are reflected throughout each section. We have focused on what we believe to be more significant points or developments so as to offer a streamlined report. Nonetheless, we have cited some particular details or nuances to clearly convey OSRA's impact on those who participate in US liner shipping.

EXECUTIVE SUMMARY

General

- The major regulatory changes made by OSRA were aimed at promoting a more market-driven, efficient liner shipping industry. After two years of operations under this statute, indications are that it generally is achieving this objective.

- The liner shipping industry has been experiencing dynamic structural changes over the past several years. OSRA was enacted in full recognition of these changes, and has helped to foster their continuing evolution.

- Developments in US liner shipping in the past two years, while occurring in large measure due to the interplay of market forces, were impacted by the changed business environment brought about by OSRA.

- While there is no industry-wide consensus on most specific issues involving the impact of OSRA, this disparity of views has not had a major negative effect on business relationships or ongoing arrangements among industry participants.

- The FMC developed comprehensive regulations to implement OSRA, and has altered its approach to industry oversight to facilitate the attainment of OSRA's basic policy direction.

Service Contracting

- Numerous pro-competitive reforms enacted under OSRA to increase industry market responsiveness focused on service contracting. The ability to deal with individual carriers, the elimination of the "me-too" requirement for similarly situated shippers, and the confidentiality of certain commercially sensitive service contract terms have fostered a shift to contract carriage -- carriers generally report that 80 percent or more of their liner cargo currently moves under service contracts.

- The 200 percent increase in the number of service contracts and amendments filed since May 1999, as well as the increase in the volume of cargo moving under service contracts is due, in part, to the flexibility and confidentiality of individual service contracting.

- Most shippers presently are negotiating one-on-one with individual carriers for confidential service contracts, instead of negotiating with rate-setting conferences or groups of carriers.

- Many service contracts continue to be linked to tariffs for accessorial charges, surcharges, and certain rules.

- Responses to the Commission's NOI contained no allegations that shippers could not secure service contracts.

- Non-vessel-operating common carriers ("NVOCCs") would like to have the authority to engage in service contracting with shipper customers, so as to put them on equal footing with vessel-operating common carriers ("VOCCs").

Agreements

- The emergence of global markets, the improved service of non-conference carriers, and the deregulatory nature of OSRA are catalysts that have contributed to the restructuring of the liner shipping industry. This has led to a de-emphasis of traditional conferences and a dramatic increase in efficiency-enhancing operational types of agreements, such as vessel-sharing and space charters.

- While there were 35 conference agreements on file with the Commission in 1998, there were only 19 as of June 1, 2001. Operational agreements made up 58 percent of all effective agreements as of June 1, 2001. Internet portal agreements, basically "one-stop shopping" Internet sites, are innovative agreements that promise to further improve operational efficiencies.

- Carriers continue to use supply-side operational agreements, including global strategic alliances, to expand service and geographic coverage, while limiting individual risk and capital. Industry reports indicate that in the main east-west trades, alliances now account for between 60 to 65 percent of all capacity deployed, and have, along with the use of new technologies, enabled ocean carriers to reduce their average cost by more than $260/TEU over the past four years.

- Broad-based discussion agreements with non-binding rate authority have become the primary forum for carriers to exercise their antitrust immunity with regard to rate levels. Attention has focused on agreement members' adoption of and adherence to voluntary service contract guidelines affecting individual service contracts. These guidelines must be strictly voluntary and are non-enforceable by the agreement.

- At present, the Commission receives confidential guideline submissions from 19 agreements. The guidelines establish objectives for general rate increases ("GRIs"), minimum rate levels, or rate increases for specific major-moving commodities, surcharges, or accessorials. A Commission audit of 2000 and 2001 service contracts indicated that carrier success in gaining guideline adherence generally depended upon overall market conditions.

OTI Licensing and Bonding

- Since OSRA's implementation, the number of individual NVOCCs and ocean freight forwarders has declined slightly, whereas the number of OTIs that are both NVOCCs and freight forwarders more than doubled.

- Consolidation among OTIs, similar to that occurring elsewhere in the liner industry, and the merging of NVOCC and freight forwarding functions into one firm, help explain the decrease in the number of NVOCCs and freight forwarders.

- OSRA requires that NVOCCs in the US now be licensed. Additionally, the Commission's rules implementing OSRA subjected all NVOCCs and ocean freight forwarders to a higher bonding level than pre-OSRA. OTIs generally have not objected to these additional licensing and bonding requirements, nor is there any evidence that these new requirements have had a significant effect on OTI operations.

- OTIs voiced concern over what they perceive to be a closer FMC scrutiny of their activities vis-a-vis those of VOCCs. Similarly, NVOCCs in the US pointed to the significant and unfair advantage enjoyed by unlawfully-operated NVOCCs who do not establish or adhere to published tariffs.

Tariffs

- The Commission's proposed tariff publication rules sought to implement OSRA's requirements and enable the industry to take advantage of existing technology. Based on comments received, the Commission significantly altered its proposal so as to reduce compliance burdens further, and to provide carriers with additional flexibility in publishing their tariff systems.

- The Commission continues to monitor accessibility of tariffs, and works with tariff publishers to ensure an effective and efficient tariff publication system. Systems that do not achieve statutory compliance are subject to appropriate enforcement action as circumstances warrant.

- NVOCCs are of the opinion that they are at a competitive disadvantage in relation to VOCCs because they must make all of their rate information publicly available, while VOCCs are free to enter into confidential service contracts with their shipper customers.

Other Issues

Unfair Foreign Shipping Practices

- OSRA amended section 19 of the Merchant Marine Act, 1920, and the Foreign Shipping Practices Act of 1988 ("FSPA") to clarify that pricing practices are among the types of activities that create unfavorable conditions to shipping in the US foreign trades.

- Most commenters to the Commission's NOI believe that OSRA did not materially impact this area. The Commission remains active in monitoring and addressing unfair shipping practices as they arise. Periodic reports from carriers in specified trade areas are used when appropriate to monitor developments.

- The Commission has established a permanent Task Force that meets regularly to exchange information about new and continuing areas of concern, and to formulate recommended approaches to restrictive foreign shipping practices that may require Commission action.

Controlled Carriers

- OSRA expanded the definition of a controlled carrier by deleting the previous limitation that an entity can be a controlled carrier only when it operates vessels registered under the government that controls the carrier. This change removed a potential loophole that may have enabled a controlled carrier to "flag-out" or register its vessels under the laws and regulations of another country, and thereby avoid the controlled carrier provisions.

- The Commission's OSRA rules require an ocean common carrier controlled by a government in any manner to provide the Commission with immediate written notification to that effect. The recent addition of China Shipping Container Lines Ltd. ("CSCL") to our controlled carrier list was accomplished after that carrier advised us of its controlled status.

- OSRA also removed three conditions that previously qualified as exceptions from controlled carrier provisions: agreement membership, operations in a controlled carrier's bilateral trade with the US, and signatory status to the Organization for Economic Competition and Development ("OECD") shipping policy.

- The Commission actively monitors controlled carrier practices to ensure continuing statutory compliance. The Commission intends to intensify its efforts in order to preserve fair competition and promote international trade.

Port Trucking Issues

- The International Brotherhood of Teamsters, Port Division ("Teamsters") raised several issues not addressed by others. The Teamsters believe that OSRA permits ocean common carriers, through their agreements' voluntary guidelines, to establish harmfully low, "anti-competitive ceiling rates" for through and inland transportation. They contend that port driver wages have declined, driver bankruptcies and truck repossessions have increased, and working conditions for port drivers are generally "abusive."

- A comprehensive examination of voluntary guidelines on file with the Commission did not reveal any indication that inland carriers are unable to negotiate inland rates with ocean carriers, as alleged by the Teamsters. Further, the Commission reviewed the confidential minutes of meetings of conferences and discussion agreements on file and found no indication of discussions among the respective agreement members concerning the negotiation of US inland divisions with motor carriers. Additionally, agreement representatives confirm that no arrangements involving motor carriers have been implemented pursuant to agreements that authorize joint negotiation of inland divisions with motor carriers.

E-Commerce

- Although the emergence of e-commerce in the ocean shipping industry is not a direct result of OSRA, the new law did create a more competitive, market-oriented environment in which "dot-com" businesses have grown in importance. Since an explosion in the number of transportation-related e-commerce companies in 1999, many such sites have been bought or gone out of business due to a lack of shipper interest and carrier cooperation.

- Track-and-trace technologies, as well as cargo-based e-commerce portals, are the current trend and are receiving much support from the major carrier companies. The concept of "supply-chain collaboration" also has been gaining attention in the industry and promises to streamline the logistics process significantly.

- The Commission will continue to address the question of how these entities fit within the Shipping Act of 1984 ("1984 Act"), as well as the appropriate extent of Commission oversight they warrant.

Continuing Regulatory Issues

- The FMC recognizes the dramatic changes taking place in international trade against the backdrop of OSRA. The Commission is committed to fulfilling its statutory responsibilities in a manner that gives deference to market processes while defending against market-distorting abuses.

- Notwithstanding the apparent widespread general satisfaction with the current US regulatory framework for ocean shipping, the Commission will be focusing on several major aspects of US shipping laws that cause concern for those less than fully satisfied with OSRA's changes.

- The Commission will continue to evaluate the impact of discussion agreements on rates. It is incumbent on those who participate in the ongoing debate to address the effects of discussion agreements within the context of the current regulatory environment.

- While the Commission's analyses and the comments of parties suggest that discussion agreements are not utilizing service contract voluntary guidelines to unreasonably increase rates, the issue merits ongoing close attention as the industry evolves in the post-OSRA environment.

- The Commission's requirements for electronic tariff systems imposed a minimum of restrictions and requirements, so as to maximize carriers' flexibility in meeting their obligation to maintain accurate and accessible tariffs. Although the regulations themselves have generated few complaints, the adequacy of compliance remains a concern, which necessitates continuing review of carrier systems.

- Given that service contracts have become the overwhelmingly predominant rate-setting vehicle, the Commission will continue to employ techniques such as random sampling to evaluate trends and activities in this area and to identify any market-distorting practices that arise.

- While the Commission intends to encourage the advantages and efficiencies obtained via e-commerce innovations, it will continue to evaluate this area to ensure that any regulatory issues of concern are addressed as appropriate.

- Experience in administering the 1984 Act as revised by OSRA, leads the Commission to suggest that several provisions could be revised for greater clarity or to eliminate ambiguities. These provisions include those dealing with controlled carriers, freight forwarder compensation, new or initial tariff rates, civil penalties, and the definition of an ocean common carrier for certain purposes.

REGULATORY AND ECONOMIC OVERVIEW

Regulatory Overview

Service Contracts

OSRA's amendments to the Shipping Act of 1984 ("1984 Act") are dramatically altering the way business is conducted in the ocean liner industry. Nowhere is this more evident than in the material changes made to the service contracting process. The opportunity for shippers and carriers to enter into individual, confidential service contracts, and the inability of carrier agreements to prohibit or directly interfere in that process, are the cornerstones of the new statute. Under OSRA, fewer service contract essential terms and no rates are made public. Shippers no longer have "me-too" rights to obtain the same essential terms as similarly situated shippers, but for the first time, unrelated shippers have the option to collectively enter into service contracts. OSRA also extended the authority to offer joint service contracts to any agreement among ocean common carriers, not just conferences.

- OSRA has dramatically altered the way business is done in the ocean liner industry.
- OSRA has given shippers and carriers the ability to enter into individual, confidential service contracts.
- OSRA maintained antitrust immunity for ocean carriers, but limited the scope of permissible concerted activities.
- Tariffs no longer are filed with the FMC, but must be made publicly available.
- OSRA has strengthened the Commission's ability to address unfair foreign trade practices.
- Under OSRA, freight forwarders and NVOCCs in the US must be licensed and bonded. NVOCCs outside the US must be bonded and tariffed, and have the option of obtaining a license.

Agreements/Voluntary Service Contract Guidelines

OSRA has greatly affected the functions of traditional liner conferences. While OSRA maintained antitrust immunity for concerted carrier activities, agreements no longer may prohibit service contracting by their members, or require members to disclose the details of their service contract negotiations. An agreement may establish voluntary service contract guidelines applicable to members' individual service contracting practices, but they are non-enforceable by the agreement. Additionally, notice of independent action on tariff rates or charges was reduced from 10 to 5 days.

OSRA did not alter the 45-day period for Commission review of agreements -- they continue to become effective in that time absent Commission action to reject, request additional information, or seek to enjoin an agreement. And, while OSRA made no changes to the general standard for opposing substantially anti-competitive agreements, a Senate Commerce Committee Report accompanying OSRA urged the Commission to take a more active and vigilant role in administering it.

Tariffs

OSRA eliminated the requirement that tariffs be filed with the Commission, requiring instead that carriers develop individual electronic tariff systems available to the public for a reasonable access charge. The Commission is mandated to prescribe conditions for the accessibility and accuracy of these systems, and to review them periodically.

Restrictive Foreign Practices

OSRA gave the Commission greater ability to guard against predatory pricing by clarifying that pricing activities are among the practices that may constitute a condition unfavorable to shipping. OSRA also made the suspension of service contracts available as a remedy to address unfair foreign practices.

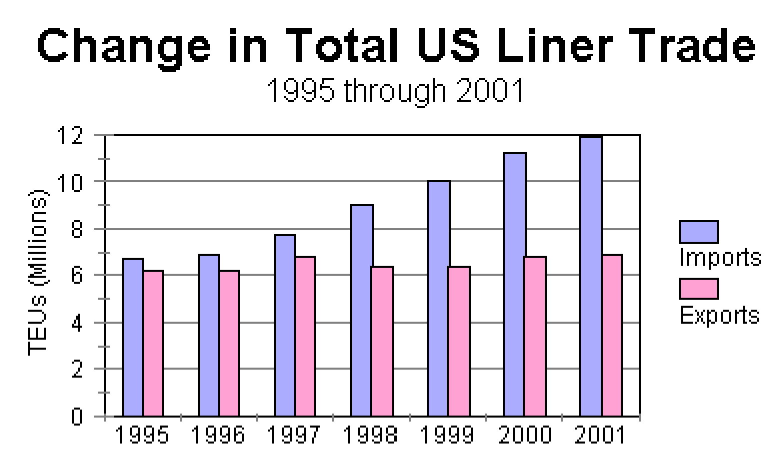
OTI Licensing and Bonding

OSRA has grouped both ocean freight forwarders and NVOCCs under the heading of OTI. NVOCCs in the US now join ocean freight forwarders in being required to obtain a license -- the Commission's implementing regulations also permit NVOCCs outside the US to apply for a license if they so choose. OSRA also requires that every OTI have a bond or other financial security on file with the Commission. The bond amounts are $50,000 for freight forwarders, $75,000 for NVOCCs in the US, and $150,000 for non-licensed foreign NVOCCs.

Economic Overview of US Trades

Competitive Conditions

The US liner trades continue to reflect the ebbs and flows of the world's economy which distinctively play out in specific trade areas. US international trade volumes continue to grow, with predictions that cargo volume will double over the next ten years. In the near term, US containerized imports and exports for 2001 are forecasted to grow at a slower rate of approximately 5.7 and 1.4 percent, respectively, over last year's totals.



Source: Journal of Commerce/PIERS - *Trade Horizons*

***Transpacific - Inbound*:** The Transpacific Stabilization Agreement ("TSA") is the prime example of a discussion and policy-setting agreement with voluntary pricing authority. The members exchange information and discuss proposed GRIs, standardized surcharges, and other pricing-related issues in the US inbound Far East trade.

TSA members were largely successful in implementing proposed GRIs and peak-season surcharges during 1998 and 1999, a period during which demand consistently outstripped the supply of vessel capacity. More recently, members of TSA have been less effective in implementing proposed pricing objectives. The cohesiveness of TSA and its ability to implement rate increases have been reduced by several changes in underlying competitive trade and market conditions: an increase in the number of carriers serving the trade; an increase in vessel capacity deployed; a reduction in import cargo growth; and a shift to individual, confidential service contracting. Nonetheless, the group still enjoys a high market share, *i.e.,* approximately 80 percent at the end of the first half of 2001. During the latter half of 2000 and into early 2001, carriers and shippers reported declining rates and vessel oversupply following declines in retailers' orders from Asia and rising unemployment rates in the US.

TSA has adopted and filed with the Commission voluntary service contract guidelines that the members may use in their contract negotiations. A review of TSA members' individual service contracts shows that, in general, TSA's ability to effectively implement GRIs and peak-season surcharges appears to have diminished considerably due to enhanced competition between members in a new individual, confidential service contracting environment ushered in by OSRA. Negotiations for annual contracts in May 2000 often resulted in lower rates and, generally, proposed increases were not achieved. In light of increases in vessel capacity (10 percent) and soft economic trade growth (4-5 percent) during the first half of 2001, it was no surprise that carriers were unable to obtain the May 2001-announced GRI.[1]

- Competitive trade and market conditions -- more competing carriers, excess vessel capacity, lower import cargo growth, and the shift to individual, confidential contracts -- appear to be the main driving force behind liner pricing in the Asia to US trades since the latter half of 1999.
- The individual, confidential service contracting environment resulting from OSRA has diminished TSA's ability to implement GRIs and peak-season surcharges.
- Despite earlier failure to achieve rate increases, the WTSA members were able to achieve some success in increasing rates between October 1999 and September 2000.

***Transpacific - Outbound*:** The Westbound Transpacific Stabilization Agreement ("WTSA") is the outbound counterpart to TSA and, likewise, provides a forum for the exchange

[1] The Commission's observations regarding guideline adherence discussed in this section are based on research described in the Agreement Activity/Voluntary Service Contract Guidelines section of this study.

of information (including pricing) among its members. WTSA became the primary pricing forum in the westbound transpacific trade following the demise of the outbound conference, the Transpacific Westbound Rate Agreement, on May 1, 1999.

Despite the growing post-OSRA prominence of discussion agreements in the transpacific, WTSA, for the most part, was unable to implement relatively minor rate increases as market conditions prevented members from becoming a cohesive group on pricing. The dramatic trade imbalance (with vessels reportedly operating at approximately 50 percent of capacity) significantly contributed to the failure of WTSA members to achieve proposed rate increases. However, between October 1999 and September 2000, the members of WTSA began to experience higher vessel capacity utilization as demand increased. Even though the inbound and outbound trades remained imbalanced, WTSA members were able to achieve some measure of success in increasing rates.

WTSA has adopted and filed voluntary service contract guidelines that the members may use in their contract negotiations. A review of a sample of WTSA members' individual 2000 and 2001 service contracts reveals that, in general, WTSA's relative success in 2000 appears to have been temporary. Declining trade growth, coupled with expanding capacity, precluded achievement of rate increases during the first half of 2001. Carriers, however, were more successful in implementing a chassis usage charge during the first half of 2001.

- TACA's market share has dropped from 80 percent to about 50 percent, and its membership has declined from 17 to 7 carriers.
- Of over 1,000 service contracts entered into by TACA members in 1999, only 30 were conference service contracts. By 2000, conference service contracts had dwindled to 3.

***Transatlantic Trade*:** From the early 1990s to the present, rate-related agreement activity in the transatlantic trade primarily focused on the major conference between the US and North Europe. At present, the Trans-Atlantic Conference Agreement ("TACA") faces a much higher degree of rate competition from independent carriers than in the past. In addition, the authority the conference once exercised over its members' service contracts has eroded. A combination of regulatory actions both in the US and Europe dramatically altered the structure and influence of the conference. The conference declined both in market share and membership. From its initial formation in 1992, the collective market share of the conference dropped from close to 80 percent to roughly 50 percent at present. In terms of conference participants, TACA's membership has fallen from a high of 17 carriers to a low of 7 carriers.

Starting in 1999, TACA amended its service contract provisions to comply with OSRA, and to resolve legal issues before the European Commission ("EC"). As such, TACA revised its authority to permit TACA members to enter into non-conference service contracts.[2] By the EC's directive, TACA members are prohibited from adopting voluntary service contract guidelines that affect their non-conference service contracts. Further, the EC restricts TACA members from discussing their non-conference service contracts, and no data or information on such contracts may be submitted to, or collected by, the conference. TACA, however, may establish a model conference service contract and rate matrices, provided such information is publicly available. TACA members are permitted to refer to and adopt such information in their non-conference service contract negotiations, if they so choose.

Prior to the foregoing changes, a major portion of the trade's cargo moved under TACA's conference service contracts. For instance, TACA reported in its NOI response that nearly 600 conference service contracts were entered into in 1998. In 1999, however, with OSRA becoming effective and competition accelerating in the trade, TACA members actively entered into non-conference service contracts. By the end of 1999, TACA members reported that upwards of 80 percent of their cargo moved under non-conference service contracts. Of over 1,000 service contracts entered into by TACA members in 1999, only 30 were conference service contracts. In 2000, TACA entered into only 3 conference service contracts. Thus, the decline in TACA's direct authority over its members' service contracts, and hence pricing, was precipitated by OSRA and the directives of the EC.

In general, freight rates have reflected market conditions in the transatlantic trade. Over the past several years, a trade imbalance has resulted from higher cargo growth in the inbound direction from North Europe to the US. Consequently, freight rates for inbound cargo have increased steadily in response to higher demand, while outbound freight rates have remained unchanged or fallen due to weaker European demand for US exports. In 2001, TACA implemented moderate tariff GRIs in both trade directions, and plans to introduce further tariff GRIs toward the end of the year. The direct impact of TACA's tariff GRIs is limited, however, since the amount of cargo moved under the conference's rates has diminished. Recently, TACA reported that only about 10 percent of the cargo carried by TACA members moved under conference rates. To further gauge the prevailing trends in freight rates, the Commission examined a limited number of 2000 and 2001 non-conference service contracts for TACA members. The Commission found that contract rates in the inbound direction increased moderately from the 2000 contract period to the 2001 contract period. In the outbound direction, however, the majority of contract rates remained unchanged and, in some cases, declined in 2001. These results tended to correspond to the overall market trends in the trade.

***Mediterranean/Middle East Trade*:** The Mediterranean is a logical collection point for in-transit cargo. This area attracts a number of carriers outside the direct US/Mediterranean and Middle East trade, which contributes to available cargo space. It also has seen numerous types of

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[2] The EC specifically considers conference service contracts to be those contracts negotiated directly through the conference secretariat on behalf of the TACA members. The EC considers all other contracts negotiated outside of the conference secretariat by TACA members to be non-conference service contracts. OSRA, however, distinguishes between agreement service contracts and individual carrier service contracts. Agreement service contracts under OSRA are those contracts negotiated pursuant to the agreement's rate authority, which are not necessarily administered through an agreement secretariat.

arrangements focused on bringing stability to a heavily imbalanced trade, with imports into the US far exceeding US exports.

Like the trade between the US and North Europe, rate-related agreement activity in the US/Mediterranean trade is focused primarily on the major conference serving the trade. The United States South Europe Conference ("USSEC") covers the trade between ports and interior destinations in the US, and South European countries on the Mediterranean. USSEC has three carrier members with a collective market share of less than 50 percent as of the first half of 2001. As is the case in the transatlantic trade, the EC prohibits USSEC members from adopting voluntary service contract guidelines that affect their non-conference service contracts, discussing their non-conference service contracts, and sharing information or data on such non-conference service contracts through the conference secretariat. USSEC members advise that they have increased their use of individual service contracts substantially since the enactment of OSRA. The convenience of one-on-one negotiations with shippers is specifically noted as a driving factor for this increase. The intense competitive economic environment in the US/Mediterranean trade has kept freight rates low, especially in the outbound trade from the US. However, conference members are attempting to implement rate increases in the relatively stronger inbound trade – announcing a tariff GRI in January 2001 and a subsequent tariff GRI in May 2001.

The Eastern Mediterranean Discussion Agreement (formerly the Israel Discussion Agreement), which covers the trade between the US and Israel, Egypt and Turkey, has adopted and filed voluntary service contract guidelines. However, given the current overall competitive trade conditions, adherence appears to be limited.

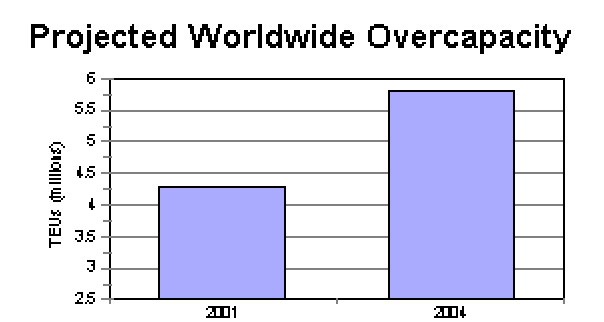
***South American Trade*:** Changing competitive trade conditions in South America, along with regulatory changes under OSRA, have resulted in the demise of the major conferences that once dominated the South American trades. Joint carrier activity now is accomplished pursuant to two rate discussion agreements: the East Coast of South America Discussion Agreement ("ECSADA") and the West Coast of South America Discussion Agreement ("WCSADA"). The members of both discussion agreements have commanded a high market share of at least 90 percent in each trade direction from 1999 through the first half of 2001. Whereas the predecessor conferences had hundreds of conference service contracts, the only collective contracting taking place under either discussion agreement at present involves a number of members contracting jointly without the involvement of the others. Virtually all service contracts in both agreement trades now are negotiated by the member lines on an individual basis. ECSADA and WCSADA have adopted and filed voluntary service contract guidelines that the members may use in their individual contracts. It appears that members are more likely to follow the voluntary service guidelines when the market is tight, *i.e.*, when demand is high and capacity tight, than during slack-demand periods with overcapacity. For example, during 2000 and the first half of 2001, ECSADA members appear to have adhered closely to their respective commodity-specific service contract guidelines most of the time.

***Central American and Caribbean Trades*:** The Central America and Caribbean trades have undergone significant changes since the passage of OSRA. Beginning in 1999, the economies of the region slowed, with a concomitant decline in cargo, causing excess capacity and falling rates. These depressed trade conditions were further compounded by the entry of five new carriers in the trade during 1999.[3] Rate instability forced as many as six carriers to either scale back services or leave the trade, contributing to the demise of three conference agreements. Although there remain two conferences serving the Central America and Caribbean trades, as in other trade areas, discussion agreements are now the main forum for rate and policy discussions. Both trades also have witnessed a growth in operational agreements -- mostly two-party vessel-sharing arrangements.

The Central America Discussion Agreement ("CADA") and the Hispaniola Discussion Agreement are the predominant agreements now operating in the trades. Over the past several years, CADA's membership and market share have fallen. As of the first half of 2001, CADA's membership stood at five, down from nine in 1999. However, while CADA's outbound market share to the US remained relatively flat from 1999 through the first half of 2001, its outbound market share from the US fell from 73.5 percent in 1999 to 62 percent as of the first quarter of 2001. Individual service contracting by the members of these two agreements since OSRA became effective appears to have increased, although many of the service contracts are for small volumes, often as little as one twenty-foot equivalent unit ("TEU"). While CADA has adopted and filed voluntary service contract guidelines, a review of its members' service contracts shows that they rarely follow them.

Concentration

Like other transportation industries, international liner shipping has been undergoing major structural changes for several years. Liner companies are being driven by the same fundamental forces: the ongoing globalization of manufacturing, technological innovations (especially those that support vertical integration of transportation services, *e.g.*, electronic communications, automated data systems, larger/faster vessels, *etc.*), intense competition and relatively low profit margins, development of global service networks, deregulation, and privatization. Carriers have responded to these pressures in several ways, including engaging in a rash of mergers and acquisitions and forming global strategic alliances.

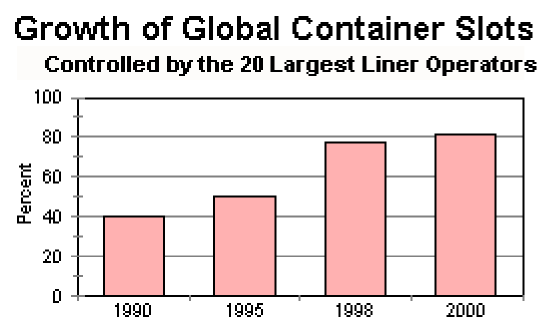


Source: *Drewry Shipping Consultants, Ltd.*

Since 1994, nearly all principal global containership operators have grouped themselves into alliances. Through operational cooperation, carriers have the opportunity to reduce costs and business risks, while offering a broader range of improved customer service options. The

[3] During 1999, American President Lines, Ltd. ("APL"), Evergreen Marine Corp. (Taiwan) Ltd. ("Evergreen"), Maersk Line, P&O Nedlloyd, Limited ("P&O Nedlloyd"), and Mitsui OSK Lines (America), Inc. ("MOL") entered the trade in an effort to expand their separate global services.

formation of global strategic alliances arguably has slowed the pace of concentration in liner shipping because they offer a number of the benefits associated with mergers (*i.e.,* economies of scale, expansion and improvement of services, *etc.*) while limiting members' exposure to investment risk. Some carriers have chosen to venture beyond alliances and have engaged in mergers or acquisitions that increase their size and expand their scope of operations. Since 1995, seven principal mergers and more than 30 acquisitions have taken place.



Source: *Containerisation International and The Drewry Container Market Quarterly - September 2000*

As a result of this increased merger and acquisition activity, the liner shipping industry has become more concentrated over the last decade. In 1990, the 20 largest liner operators controlled approximately 40 percent of the global container slots. In 1995, their share grew to 50 percent; three years later it jumped to 77 percent. By 2000, the top 20 operators controlled 81 percent of the worldwide fleet.[4] While the industry is still highly fragmented -- with several hundred companies (including feeder operators) offering regular liner services -- the largest operators clearly dominate current container supply.

Industry reports suggest that over the next three years, more than 1.5 million additional TEUs will be deployed, representing an increase over current worldwide fleet capacity of nearly 35 percent, or an annualized growth rate of more than 12 percent.[5] In contrast, worldwide trade growth is expected to increase by less than 9 percent. While the long-term effect of continued industry consolidation remains uncertain, some industry representatives believe that under these pressures, renewed merger/acquisition activity can be expected.

[4]Various issues of *Containerisation International*, and Drewry Shipping Consultants Ltd., *The Drewry Container Market Quarterly*, September 2000.

[5]Ibid., Note 4: Drewry Shipping Consultants Ltd., *The Drewry Container Market Quarterly*, September 2000.

CHANGES IN SERVICE CONTRACTING

Statutory Changes

- Freight rates and other unpublished terms now can be structured in confidence between the contracting parties.
- Service contract guidelines may be adopted by agreements so long as they are voluntary and unenforceable on members, and confidentially submitted to the Commission.

Before the OSRA amendments, the 1984 Act permitted only individual carriers and conferences to enter into service contracts. Conferences had the authority to regulate or prohibit their members' use of service contracts. Except for brief periods, conferences rarely permitted their members to engage in any form of independent service contracting.[6] The statute required service contracts to be confidentially filed with the Commission, and rates and other essential terms to be made available to the public in tariff format. To discourage any undue discrimination, carriers and conferences were required to make the same essential terms available to similarly situated shippers for a period of 30 days. This requirement was known as the "me-too" provision. In 1993, the publication of tariffs and essential terms was computerized with the introduction of the Commission's Automated Tariff Filing and Information ("ATFI") System.

Numerous pro-competitive reforms enacted under OSRA to increase the market responsiveness of the industry were aimed at service contracting. Under OSRA, only certain essential terms now are required to be published; significantly, freight rates are among the non-published terms. Consequently, freight rates and other unpublished terms now can be structured in confidence between the contracting parties. In addition, the "me-too" requirement for similarly situated shippers was eliminated.

Significant reforms relating to service contracts were directed at reducing the collective control of conferences. For one, all agreements now are permitted to enter into service contracts, not just conferences, as was the case under the 1984 Act before amendment. With this change, however, strict statutory prohibitions were placed on the contracting authority of agreements. OSRA prohibits agreements from restricting the right of their members to independently negotiate and enter into individual service contracts. Moreover, agreements cannot require members to disclose their individual service contract negotiations or unpublished terms, nor adopt mandatory rules affecting such contracts. Voluntary service contract guidelines, however, may be adopted by agreements so long as they are unenforceable and confidentially submitted to the Commission.

Individual carriers and agreements still are required to file their service contracts confidentially with the Commission under OSRA. For ease of filing, the Commission replaced its

[6]Exceptions to this occurred just prior to the implementation of OSRA when a number of conferences, in anticipation of OSRA's reforms, relinquished their control over individual member service contracting.

former paper-format filing system with the electronic Service Contract Filing System ("SERVCON"). The Commission placed SERVCON into operation when OSRA became effective on May 1, 1999.

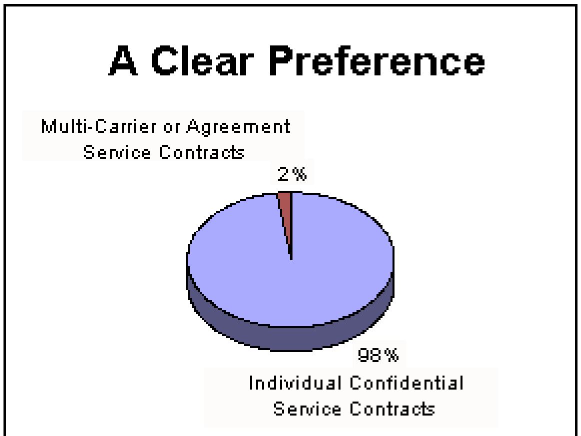
The NOI and the Random Sample of Service Contracts

In order to identify pertinent developments concerning service contracting under OSRA, the Commission's NOI solicited comments from carriers and shippers on specific issues. In addition, the Commission conducted a comprehensive service contract survey. As discussed in Appendix II, the Commission's survey was based on two computer-generated random samples of original service contracts on file in SERVCON. Each random sample contained 500 contracts, so that a total of 1,000 separate contracts were reviewed. Relevant information from each contract was entered into a unique database for each sample. This approach allowed the Commission to analyze and compare the survey results of the two separate random samples. A high degree of consistency existed between the two samples on most of the issues examined, which added confidence to the survey results. (See Appendix II.)

- The number of service contracts and amendments filed with the Commission since May 1999 has increased by 200 percent.
- In certain of the major trade lanes, some shippers now are moving nearly 100 percent of their cargo under service contracts.

Overall, the use of service contracts has increased significantly under OSRA. According to NOI comments, this increase in contracting was due primarily to the change from conference control of service contract availability to easily obtainable and flexible individual service contracts. The 200 percent increase in the number of service contracts and amendments filed with the Commission since May 1999 bears witness to the fact that service contracting is now overwhelmingly the primary rate-setting vehicle. As noted below, however, most service contracts are linked to tariffs for accessorial charges, surcharges, and certain rules. To effect changes across numerous contracts, it is more expedient for carriers to make a single tariff change than amend multiple service contracts. Carriers also use tariffs to publish the required service contract essential terms.

The increase in individual contracting also has altered the structure of the industry. In their NOI comments, carriers related that the high demand for individual contracts led to the termination or suspension of major conference agreements in such trade areas as the transpacific and South America. In their place, carriers have structured their collective associations more loosely under discussion agreements with voluntary rate authority and service provisions. In trades where conferences remain, agreement contracts among conference members have fallen



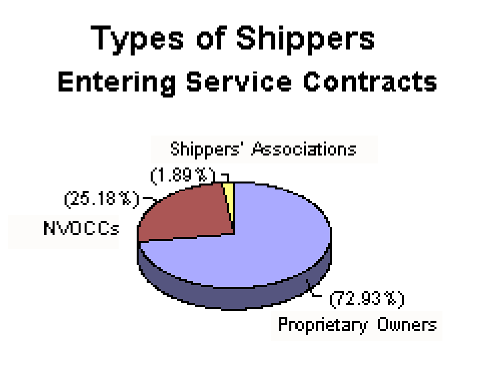
Source: Federal Maritime Commission

significantly. In comparing calendar years 1998 and 2000, conference service contracts fell from 596 to 3 for TACA, and from 125 to 7 for the US Australasia Agreement. Former and present conference carriers in these trades now are entering into a greater number of service contracts on an individual basis with shippers outside the direct control of their respective agreements.

Service contracts also are being used to ship a greater volume of cargo as a result of OSRA. NOI commenters revealed that substantial portions of cargo shipped under tariffs prior to OSRA shifted to individual contracts. In certain of the major trade lanes, some shippers now are moving nearly 100 percent of their cargo under service contracts. This shift is due primarily to the confidentiality and flexibility achieved through individual contracts. In several trades where the volume of service contract cargo had been 50 to 60 percent, some carriers indicated that the volume jumped to 80 percent and greater under OSRA.

The preference for individual contracting clearly was discernible from the Commission's random sample survey. Of the 1,000 separate contracts surveyed, 98 percent were individual contracts. In their responses to the NOI, carriers and shippers reported numerous advantages of contracting on an individual basis, but acknowledged an increased administrative burden in managing the contracts. The main advantage was the ability to engage in one-on-one negotiations with greater flexibility to structure contracts as needed. Overall, shippers have found carriers more responsive in meeting their specific contract requirements under OSRA. The process of obtaining and amending individual contracts also was reported to be easier and more efficient than in the past when dealing with conference contracts. No longer are extended delays incurred in seeking the approval of contracts and amendments through the conference's voting procedures. Consequently, individual contracts are amended more frequently to reflect changing market conditions.

Specific changes in contracting included a trend toward smaller minimum volume commitments. The Commission's survey showed that roughly 60 percent of the contracts sampled had minimum volume commitments of 100 TEUs or less -- commitments ranged from one TEU to 68,000 TEUs. The willingness of carriers to allow smaller minimum volume commitments was recognized in the NOI comments as a new development attributable to OSRA. Contract duration, however, has remained predominantly within a one-year period as before OSRA. The survey revealed that 90 percent of the contracts had durations of 11 months or less, with a range from a few days to upwards of two years. So far, contracts with smaller cargo commitments and limited durations seem to be the market preference. Several commenters noted, however, that such terms frequently are expanded through amendments beyond those initially agreed to in the original contract.



Source: Federal Maritime Commission

The Commission's survey found no significant changes from the results of past studies on the division of contracts between proprietary owners, NVOCCs, and shippers' associations. Of the contracts sampled, over 70 percent were with proprietary owners, roughly 25 percent were with NVOCCs, and 2 percent were with shippers' associations. No shippers complained of an inability to obtain contracts. However, some shippers' associations noted that since OSRA, carriers have tried more aggressively to solicit independently their individual members. To prevent this, some associations have included specific clauses addressing such solicitation in their contracts.

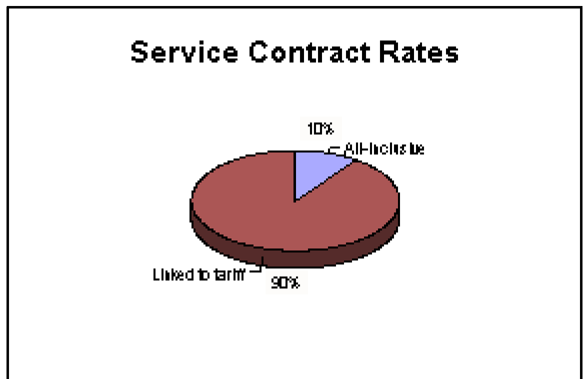
OSRA also increased the ability of carriers and shippers to expand contract scopes by including multiple US trades and adding foreign-to-foreign trades. Combining more trades and cargo within a single contract gives shippers greater leverage in their negotiations with carriers. While most NOI respondents reported some expansion of contract scopes, the Commission's survey results revealed that the majority of contracts had scopes confined to one US trade or geographic area, particularly in the US/Asia trade. Ten percent of the total contracts sampled had scopes with multiple US trade lanes, and 8 percent had global scopes -- *i.e.,* scopes which included foreign-to-foreign trades. Shippers that conduct a broader and more varied range of business worldwide may take advantage of contracts with expanded scopes. Such shippers include large multi-national companies, NVOCCs, and shippers' associations. Some NOI commenters related problems with the regional dispersion of operations among both shippers and carriers, which complicated structuring multi-trade and global contracts. Carriers further noted a reluctance among some shippers to include their foreign-to-foreign arrangements in US trade contracts.

Changes to the content of contracts have been moderate thus far under OSRA. Carriers commented that the approach to adding contract clauses has been gradual and cautious, with shippers preferring as much contract simplification as possible. Recent developments show a compromise between contracting parties, with some clauses favoring shippers and others benefitting carriers. The most common changes include the addition of confidentiality clauses, specific vessel space guarantees, advance booking notices, slack-season volume guarantees, and certain standard or model contract terms. An increase in the use of vessel space guarantees in contracting occurred post-OSRA, particularly in the inbound transpacific as a result of tight demand during 1998 and 1999. Carriers also mentioned more service guarantees for equipment and set transit times. On the other hand, some shippers expressed concern over the use of service commitment disclaimers to cover cases where the carrier uses chartered vessel space. Shippers also mentioned their interest in increasing carrier liability for cargo loss and damage beyond that provided in the standard bill of lading. The Commission's survey examined contracts specifically for such provisions as equipment guarantees, transit times, and increased carrier liability. Less than 10 percent of the contracts sampled contained any of these provisions. While such provisions are not widespread

- The most common changes in service contracts since OSRA include the addition of confidentiality clauses, specific vessel space guarantees, advance booking notices, slack-season volume guarantees, and shipper boiler-plate contract terms.
- In their NOI responses, carriers consistently maintained that rate levels are determined by market forces, and contended that individual contracting has created more rate competition.

as yet, both carriers and shippers foresee many of these issues as areas of future contract development over the next five years.

Under OSRA, the prevailing rates no longer are transparent and contracting has become more customized. In their NOI responses, carriers consistently maintained that rate levels are determined by market forces, and contended that individual contracting has created more rate competition. NVOCCs complained that their inability to contract as carriers places them at a rate disadvantage under OSRA. At the same time, NVOCCs acknowledged that carriers are more agreeable to establish "bullet rates"[7] in contracts, enabling them to amend their contract rate levels with carriers more easily and frequently. Some shippers commented that GRI clauses and other such tariff links in contracts which allow for the pass-through of rate increases and surcharges that are difficult to anticipate or ascertain are antithetical to the purpose of contracting for a specified rate. Carriers maintained that such tariff references and links make drafting and managing contracts easier.



Source: Federal Maritime Commission

The Commission's survey revealed that roughly 10 percent of the contract rates were completely all-inclusive, while approximately 90 percent were linked or referenced to a tariff. The survey defined completely all-inclusive as single rates inclusive of freight and all other applicable charges for a fixed duration. Many contracts contained rates inclusive of specific surcharges for fixed durations, with the proviso that any other charges in the governing tariff would apply. Such contracts, however, did not meet the survey's definition of completely all-inclusive. In addition, the survey found that 36 percent of the contracts contained GRI clauses or other such provisions for the general increase of freight rates connected to tariff rate increases. Some GRI clauses directly passed through the tariff rate increases, while others gave the shipper the option to terminate the contract. While tariff references in contracts are not new, their use under OSRA has created some controversy regarding the carriers' ability to influence contract rate levels and terms collectively.

Thus far, OSRA's reforms have increased the use of contracting both in terms of the number of service contracts and cargo volume. New options in contracting are available, and business relationships are evolving as contemplated. OSRA has reduced the direct control of conferences, with greater freedom and flexibility of contracting on an individual basis, while preserving the option for agreement contracts. With contract rates and certain service terms no longer published, parties are free to privately structure their contracts in accordance with their individual business requirements. Service contracts are easier to obtain and amend. For the most part, OSRA has enabled contracts to be fashioned and consummated in a more market-responsive environment as intended.

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[7] Bullet rates are specific commodity rates that are added to a service contract after its original effective date. (This is a publication feature which is similar to adding specific commodity rates to an existing tariff.) In effect, bullet rates provide the flexibility of tariff rates and the confidentiality of service contracts.

SERVICE CONTRACT CONFIDENTIALITY

OSRA's Changes

As previously discussed, OSRA's changes regarding the confidentiality of service contracts have had a significant impact on the way service contracts are developed and negotiated. OSRA discontinued the publication of rates and certain other terms -- published essential terms now are limited to the origin/destination port ranges, commodities, minimum commitments, and durations of service contracts. All other essential terms now can be kept confidential between the contracting parties. In this new environment, added measures to preserve confidentiality in contracting have evolved. Specific clauses and provisions have been included in contracts to restrict the disclosure of unpublished terms to third parties. In some cases, contracting parties have entered into agreements to ensure confidentiality prior to negotiations, or added penalty provisions for breach of confidentiality. The Commission specifically explored the effects and use of contract confidentiality in both its NOI and its survey of service contracts randomly selected from SERVCON.

Prior to OSRA, carriers and shippers could access the contract rates and terms of their competitors directly, and relied heavily on the published essential terms of service contracts as benchmarks in their own negotiations. Contract terms achieved by a particular shipper were published and made available to any similarly situated shipper through the "me-too" provision. Accordingly, carriers were more reluctant to grant specific contract concessions for a particular shipper since their other customers could request equal treatment. The transparency of information constrained the commercial benefits of contract specialization for both carriers and shippers.

- Overall, enhanced confidentiality under OSRA has provided shippers and carriers with an environment that is conducive to effective business transactions.
- Specific clauses and other internal measures have evolved to require negotiations and unpublished contract terms to remain confidential.
- As a result of OSRA's confidentiality requirements, closer attention now is given to internal cost factors and individual service requirements in contracts.
- NVOCCs concurred with the general view that confidentiality has improved the contracting process, but commented that tariff publication puts them at a competitive disadvantage relative to VOCCs.

Industry Experiences

The confidentiality of information under OSRA has altered the process of negotiating contracts considerably. Comments in response to the Commission's NOI indicate that contract negotiations are less focused on meeting a market-rate benchmark, or matching the terms of competitors, and more attention is given to internal cost factors and individual service requirements in contracts. Shippers and carriers advise that they can discuss and address commercially sensitive issues more freely, and privately structure their contracts accordingly. Respondents note that greater emphasis is placed on the skill of conducting negotiations to achieve business objectives. In their comments, shippers and carriers reported that confidentiality has created a more favorable contracting process in which it is easier to accommodate specific rate discounts and terms. NVOCCs concurred with the general view that confidentiality has improved the contracting process, but commented that tariff publication puts them at a competitive disadvantage relative to VOCCs.

Since OSRA, more attention must be devoted to evaluating market conditions through other sources of information. Carriers commented that internal contract accounts and rate bids from shippers constitute their main sources of market information. They contended that some shippers use rate quotes from competing carriers as leverage for better rate offers. Carriers noted, however, that such rate information is hard to validate, and added that tariffs generally are not reflective of market rates. Shippers commented that a wide range of published information and data including tariffs is used in their market evaluations. They disclosed that carrier sales representatives also provide a certain amount of market information. Shippers' associations support their shipper members by collecting and distributing market information.

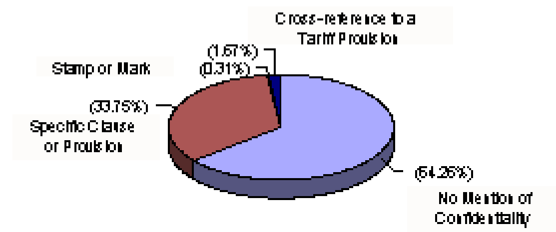
Shippers claimed to be at a disadvantage relative to carriers in terms of market knowledge, noting that carriers can make broader observations due to their greater access to information about the overall market. Further, shippers complained that voluntary service contract guidelines adopted by agreements allow carriers to share contract rate information at agreement meetings. Carriers and agreements acknowledged that some contract rate information is shared at agreement meetings, but stressed that carriers must honor the confidentiality provisions of their individual contracts. Carriers pointed out that much less specific contract information is made available to agreement secretariats as a result of OSRA. They also questioned the accuracy of contract rate information shared by competing carriers at agreement meetings. Clearly, reliable rate information now is more valuable and increasingly sought throughout the industry.

However, confidentiality clauses and provisions increasingly are being added to contracts to restrict the disclosure of unpublished contract terms. The Commission's survey specifically reviewed the texts of the contracts for any of the following forms of confidentiality between the parties: (1) a specific confidentiality clause or provision, (2) a cross-reference to a tariff provision that describes the parties' obligations with respect to confidentiality, or (3) a stamp or mark of confidentiality within the contract. The survey revealed that just over 35 percent of the contracts sampled contained one of the aforementioned forms of confidentiality stated within their texts.[8] For the most part, the confidentiality clauses found in the survey stipulated that neither the carrier party nor the shipper party could disclose unpublished contract information to third parties. In some cases, clauses were less restrictive and allowed the carrier party to share

[8] The actual use of confidentiality provisions may be understated since the survey confined its examination to the texts of the sampled contracts. Certain governing tariffs of carriers and conferences contain general confidentiality provisions which apply to service contracts and which may not be cross-referenced in the contract. Further, some industry participants have indicated that confidentiality agreements may be reached prior to the negotiation of the service contract.

unpublished information with an agreement secretariat or other carrier members of an agreement without identifying the shipper party.

Confidentiality in Service Contracts



Source: Federal Maritime Commission

Certain carriers disclosed in their NOI comments that internal controls and new procedures were developed to limit the exposure of confidential contract information within their companies. On the use of confidentiality in contracting, roughly half of the carrier respondents indicated that standard confidentiality clauses automatically are included in 100 percent of their contracts. Those carriers also reported that shippers requested specifically crafted confidentiality clauses or language in about 5 percent of the carriers' contracts. Such requests were acceptable to the carriers so long as the confidentiality terms were reciprocal. Other carriers stated that as a matter of policy, confidentiality clauses are added to contracts only at the shipper's request. Further comments disclosed that some of the larger shippers sought confidentiality agreements prior to conducting contract negotiations. Such agreements usually were initiated by shippers, and here again, carriers found them acceptable as long as the terms were reciprocal.

On a related issue, the Commission's survey showed that only 2 percent of the contracts sampled contained penalty provisions for breach of confidentiality. The breach penalties predominantly focused on the recourse of legal action with court remedies. Most NOI comments voiced no significant concern with respect to breach of confidential information. Carriers stated that cases of suspected breach usually were treated by limiting the number of participants in future negotiations. Certain carriers recognized that sales representatives and shippers exchanged market information in the course of making contract proposals, but did not characterize breach of confidential information as a problem. Another shippers' association expressed concern over the possible breach of confidentiality given non-contract parties' broad access to rate information on bills of lading.

Overall, the responses reflect that confidentiality under OSRA has provided shippers and carriers with the privacy they deem necessary to freely transact business. With the ability to shield such information, the contracting process is not constrained by the previous standards of meeting benchmarks and matching terms identically. Commercially sensitive issues and business requirements can be discussed more freely and accommodated more easily with specific contract terms. Carriers and shippers are more focused on achieving their individual rate and business objectives through contract negotiations. Specific clauses and other internal measures have evolved to ensure that negotiations and unpublished contract terms remain confidential.

AGREEMENT ACTIVITY/VOLUNTARY SERVICE CONTRACT GUIDELINES

Industry Structure Overview

While liner operators have enjoyed antitrust immunity since 1916, the last decade has seen dramatic changes in their exercise of this privilege. No longer can the structure of liner shipping be viewed as fifty or so major carriers operating autonomously. It is more appropriate to view the industry as blocs of operational partnerships with crisscross ties via space charters between and among different members of different partnership blocs. Such arrangements are important to understand when reviewing the use of antitrust authority. The Commission is acutely aware of the growing mosaic of vessel-sharing, alliance, and space-chartering configurations that can form a web, often with a discussion agreement bringing all involved carriers together. An economic understanding of a trade no longer can be garnered merely by focusing on a single agreement -- the competitive impact of carrier behavior across a myriad of interconnected relationships must be assessed.

- To gain an economic understanding of a trade, one now must assess the competitive impact of carrier behavior across a myriad of interconnected arrangements.
- Members of discussion agreements are not bound to specific rate levels, and are attracted by the opportunity to exchange information and the ability to agree voluntarily on pricing policy.

The emergence of global markets and anticipated deregulation under OSRA were the twin catalysts that triggered de-emphasis on traditional conferences and the continual migration to operational agreements. In 1996, one observer opined that "[a]ny history of the industry will have to distinguish between 'Before Global Alliance' and 'After Global Alliance,' so radical are the changes which the new structure promises."[9] The story of the use of antitrust immunity under OSRA is the progressive shifting from a demand-side focus to a realization of the considerable possibilities to be gained from a supply-side focus.

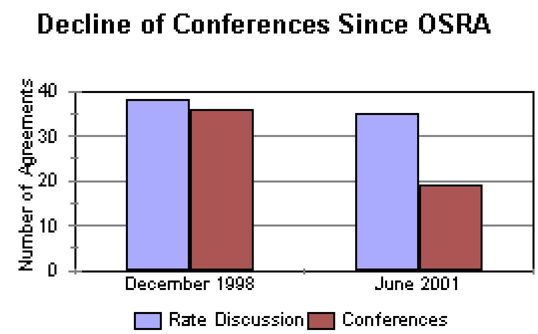
Discussion Agreements

During the 1980s, the traditional demand-side preoccupation was with rate stability, and the vehicle to address this single concern was the stereotypical, binding-ratemaking conference. The emergence of strong non-conference carriers, bringing a homogeneity of services across most liner operators, fractured the existing industry structure of strong conferences and weak non-conference carriers. The conference system was unable to deal with outsiders that provide a similar level of service, traditionally the exclusive domain of conference carriers. Given continued price-spread tensions between conference and committed non-conference carriers, in

[9] Drewry Shipping Consultants Ltd., *Global Container Markets*, July 1996.

the face of endemic overtonnaging, there was pressure for some forum to mitigate rate competition between these two groups. The Eurocorde Discussion Agreement in the transatlantic and TSA in the US inbound Far East trade emerged in response to these forces. While the conference carriers were unable to entice the committed independents to become conference members and engage in binding ratemaking, they were able to bring them under the discussion agreement umbrella of voluntary ratemaking. Furthermore, during the late 1980s, carriers realized that supply-side control could be extremely powerful in curtailing destructive rate competition and consequently turned to capacity management in discussion agreements.

With the demise of the conference system, the discussion agreement, by default, became the sole forum for collective carrier pricing activity in most US liner trades. In the major trades, it is able to attract key players by being less bureaucratic and autocratic than the traditional conference. Members are not bound to specific rate levels, and among the variety of their features found attractive, the opportunity to exchange information and the ability to agree voluntarily on pricing policy are paramount. Although a discussion agreement's ratemaking may not be on the rigid, enforceable scale of the traditional conference, the ability of the members to share commercial information and formulate pricing policy can have a considerable demand-side influence under certain economic conditions.



Source: Federal Maritime Commission

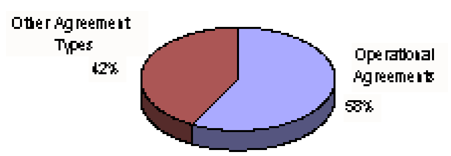
Unlike conferences, which saw a marked decline in their numbers (almost one-third either disbanded or were suspended about the time OSRA became effective in May 1999), the number of rate discussion agreements has remained somewhat stable during the first two years of OSRA. As of June 1, 2001, there were 19 conferences and 36 discussion agreements in effect. Further, consistent with the decline in the number of conferences, the number of discussion agreements that include a conference as a member has likewise fallen. The Commission's June 2000 Interim Status Report noted that there were 18 such agreements at that time. Currently, there are only four such agreements.

Operational Agreements

The demand-side demise of the traditional conference system and the emergence of discussion agreements undoubtedly are major hallmarks of the OSRA era. But the bigger headline is on the supply side, where carriers have turned to operational agreements to achieve significant efficiencies and global service expansion.

Globalization requires carriers to expand into new markets, and deregulation made it unlikely that strong conferences would be the vehicle for such expansion. The global strategic alliance soon emerged as the key vehicle for a carrier's entry into new markets by offering the ability to expand service and geographic coverage, while limiting individual risk and capital.

Alliances, like globalization and deregulation, developed gradually. Upon recognizing the advantages of operational cooperation, carriers initially ventured into space-chartering, joint services, and vessel-sharing arrangements that were typically confined to a single trade lane. Positive experiences in deployment and vessel-sharing cost savings led to more involved cooperation, and ultimately to the global strategic alliance as we know it. Alliances essentially strove to maximize the advantages of operational cooperation while maintaining individual marketing. Alliance partners worked to capture efficiencies across the entire gamut of shared operational assets such as vessels, containers, marine terminals, equipment, and inland facilities.



Operational Agreements Outnumber All Other Agreement Types.

Source: Federal Maritime Commission

Operational agreements comprised 58 percent of all effective agreements on file with the Commission as of June 1, 2001. They range in scope and complexity from simple space-sharing arrangements (for example, one carrier selling to another 25 TEUs of space on one vessel operating in a single trade), to the highly integrated multi-carrier, multi-trade lane, global strategic alliances (typically, 3-5 carriers coordinating the services of numerous -- often as many as 80 -- vessels calling at ports worldwide). Although global alliance agreements are not numerous,[10] reports indicate that in the main east-west trades, alliances now account for between 60 to 65 percent of all slots deployed. Moreover, alliances and the use of new technologies have enabled ocean carriers to reduce their average cost by more than $260/TEU over the past four years.[11]

While operational agreements such as global alliances and basic space-chartering/vessel-sharing arrangements have the potential to reduce costs and expand the service network of each participant, there may be down sides to such supply-side forms of cooperation. Some shippers pointed out in their NOI responses that, in certain cases, carriers that are party to these integrated operational arrangements no longer have complete control over assets and, therefore, are unable to guarantee vessel space.[12] There also may be instances in which service levels (*i.e.,* capacity and number of vessel calls) are reduced as a result of carrier cooperation because the service is "shared" among carriers.

On the other hand, operational agreements offer an alternative to consolidation through mergers and acquisitions. These operational agreements arguably provide shippers with more

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[10]Only four were on file with the Commission as of June 1, 2001.

[11]*Containerisation International*, November 2000, p.14; "Drewry predicts better times ahead," The Drewry Shipping Consultants, *The Drewry Annual Container Market Review and Forecast 2000.*

[12]Other shippers stated that, while there may be some service problems during the initial process of merging or coordinating different services and organizations, financially stronger and, therefore, more stable carriers with improved services are the long-run result.

service choices and the possible preservation of competition with respect to price and ancillary or related services, as compared with the results of mergers and acquisitions.

Internet Portal Agreements

Like most other industries, ocean shipping is adapting to the age of the Internet. A new carrier innovation that improves operational efficiencies and financial results is the formation of Internet portal agreements. Two portal agreements have been filed with the Commission that provide "one-stop shopping" Internet sites. Under these agreements, the participating carriers have established a common Internet portal and platform through which the carriers and other transportation service providers interact with shippers through a common set of transactions covering tracking and tracing, booking, and the like. The portals also contain links to the individual carriers' own web-sites.

Voluntary Service Contract Guidelines

With the proliferation of individual service contracts since OSRA, greater scrutiny has shifted toward determining the degree of influence agreements are able to exert on the contracting practices of their agreement members. As broad-based discussion agreements evolved in many trades, attention has focused on the agreement members' adoption of and adherence to voluntary service contract guidelines affecting individual service contracts. The extent to which agreement members adhere to voluntary service contract guidelines, especially on rate matters, gives an indication of the agreement's collective influence or market power in its respective trade. Under OSRA, agreements that adopt guidelines are required to submit them confidentially to the Commission. Because of the confidential nature of the guidelines and the service contracts actually filed, the results of our review of the nature of and adherence to voluntary service contract guidelines may be reported only in general terms. At present, the Commission receives guideline submissions from 19 agreements.

Guideline Content

The guidelines adopted by the respective agreements vary considerably. It is evident in some trades that agreement members actively discuss, and set or amend their guidelines, on a regular basis. Activity often centers on very specific rules or charges for particular countries within the geographic scopes of the agreements. Conversely, in other trades, agreement members set very basic guidelines on an infrequent or sporadic basis. Most of the guidelines establish objectives for GRIs, minimum rate levels, or rate increases for specific major-moving commodities, surcharges, or accessorials. One particular set of guidelines recommended that agreement members use time-volume rates rather than service contracts. Many guidelines encouraged open communication

- At present, the Commission receives guideline submissions from 19 agreements.
- In some trades, agreement members actively discuss, and set or amend their guidelines, on a regular basis.
- Most of the guidelines establish objectives for GRIs, minimum rate levels, or rate increases for specific major-moving commodities, surcharges, or accessorials.

between members on information relating to proposed or effective individual service contracts, provided that no confidentiality agreements are breached. Other guidelines discouraged rate discount mechanisms in their contracts, and instead recommended including automatic GRI clauses. Some guidelines further recommended using prescribed confidentiality clauses, as well as establishing specific dollar limitations for cargo loss or damage in line with the Carriage of Goods by Sea Act.

Adherence to Service Contract Guidelines

> Carriers' success in gaining guideline adherence generally tracked overall market conditions.

To measure guideline adherence, the Commission undertook an audit of service contracts for the 2000 and 2001 contract periods. While all guidelines are reviewed, the audit focused on major agreements in various US liner trades including: the transpacific, transatlantic,[13] Australia/New Zealand, and South and Central America. The Commission selected a range of service contracts on file with the Commission for major commodities moved by a variety of agreement carriers in each trade. Rate levels in each contract were examined to determine whether agreement members were able to implement and/or sustain the rate objectives specified in each agreement's guidelines. In the case of GRIs, contracts and amendments for 2000 were matched with the corresponding 2001 contracts for each identical shipper and carrier to gauge the level of rate change. The rates were evaluated from 2000 through the start of the 2001 contract renewal period to determine whether carriers were able to implement increased rates by the full or partial GRI amount, or not at all. Where guidelines set commodity rates at specific levels, contracts for the same commodities were retrieved for 2000 and 2001 to determine whether the rates adhered to the guideline criteria. Adherence to the commodity rate guidelines was considered to be affirmed if the contract rates were at or above the specified levels. Other common guidelines regarding additional charges also were evaluated. If applicable, contracts were reviewed to determine whether carriers adhered to the guidelines by assessing a peak-season or equipment imbalance surcharge, and/or a chassis usage charge.

The results of the Commission's review of over 600 individual service contracts and rate observations confirm that carriers' success in gaining guideline adherence generally depended upon overall market conditions. For example, it appears that guideline adherence in 1999, when high demand kept inbound Far East vessels relatively full, was greater compared to 2000 and 2001. The current weaker US trade conditions, with anticipated additions in capacity, resulted in actual rate erosion in the inbound Far East trades in the face of guidelines calling for rate increases. However, the audit found that carriers in the inbound Far East trades were more

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[13]The transatlantic is distinct from other US liner trades regarding guidelines. As previously mentioned, the EC prohibits carrier agreements that include European Union nations from setting voluntary service contract guidelines. Moreover, the EC significantly restricts any discussion or collection of information on service contracts negotiated outside of an agreement secretariat. Such agreements, however, are permitted to establish a service contract rate matrix that must be made publicly available. By the terms of their agreement, conference members may refer to and adopt such rates in their individual contract negotiations, if they so choose. Nonetheless, the transatlantic was included in the audit because of its commercial significance.

successful with adherence to surcharge guidelines than those pertaining to GRIs. This result was similar across the other trades audited.

The degree of adherence to voluntary service contract guidelines is routinely reviewed by the Commission. In sum, our findings were consistent with the preliminary findings made in the Commission's June 2000 Interim Status Report on OSRA: ". . . overall carrier compliance with [the guidelines] has been limited, depending on the trade in question . . . . The most important factor [to adherence] is the general economic conditions in the trade." While these findings remain true, the results of this audit yielded additional information with respect to adherence. Overall, the percentage of contracts adhering to guideline recommendations on surcharges and/or accessorials was mixed, ranging from 34 to 100 percent depending on the trade. Given the extensive impact of surcharges on a shipper's bottom-line costs, a high degree of adherence on such items merits the continued close attention of the Commission in evaluating the anticompetitive effects of an agreement under the section 6(g) standard. Adherence to guideline-recommended GRIs and commodity-specific rate increases was less successful, ranging from none to upwards of 60 percent.

Agreement Issues Noted in NOI Comments

A number of commenters raised issues concerning agreements, with a particular focus on discussion agreements, agreement filings, and monitoring reports.

Discussion Agreements

There were numerous comments and suggestions for future Commission action regarding agreement structure and activities. Carriers emphasized the necessity for discussion agreements and the benefits of exchanging information, *i.e.,* a more stable environment which benefits shippers and provides carriers with the security to make additional financial investments. Shippers suggested that the anti-competitive effects of discussion agreements should be examined by the Commission. Many believed that voluntary service contract guidelines are not voluntary and that carriers use them, as well as their exchange of information on capacity and surcharges, to increase freight rates. A number of shippers contended that discussion agreements contravene the pro-market thrust of OSRA. (See Appendix I: questions 14-17.)

As noted above, the Commission thoroughly reviews all agreements, with a particular emphasis on discussion agreements. Under the Commission's monitoring program, the activities of discussion agreements and the web of agreements that make up the structure of agreement activity are evaluated through examination of confidentially-filed monitoring reports, agreement minutes, service contracts and other trade sources. The information contained in the Commission's service contract database is evaluated continuously, along with voluntary service contract guidelines, to determine whether there is abuse of antitrust immunity. This

- Carriers emphasized the necessity for discussion agreements and the benefits of exchanging information.
- Shippers emphasized the anti-competitive effects of discussion agreements in increasing freight rates.

information is analyzed in conjunction with other pertinent data, including agreement monitoring reports and minutes of meetings.

Agreement Filings

Several commenters suggested that the Commission consider exempting certain carrier agreements from filing and waiting requirements. For example, commenters variously proposed that agreements regarding specific aspects of space-charter arrangements (*i.e.,* operational matters), changes to space allocations, and the expansion of the geographic scope of agreements, be allowed to become effective on filing or effective on less than 45-days' notice (*e.g.*, effective after five business days). These agreement-related issues, as well as others, currently are being reviewed by the Commission's staff, and proposals are being developed in connection with a Notice of Inquiry - Docket No. 99-13 - *The Content of Ocean Carrier and Marine Terminal Operator Agreements Subject to the Shipping Act of 1984*, August 3, 1999, 64 FR 42057.

Agreement Monitoring Reports

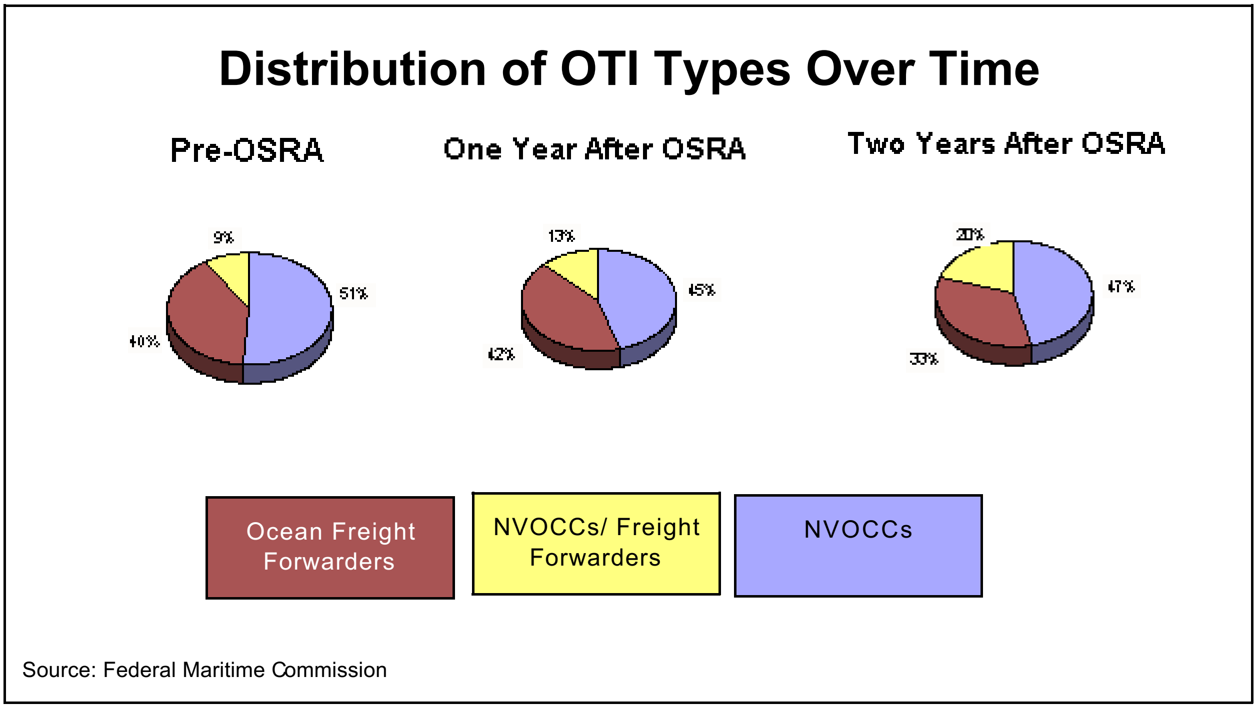
A number of carrier commenters raised a variety of concerns regarding the Commission's monitoring report program. They suggested that the Commission review, revise, or reduce its monitoring report requirements in light of the changes brought about by OSRA. The commenters acknowledged that some reporting is necessary in order for the Commission to fulfill its regulatory responsibilities. However, they noted that the present reporting requirements "pre-date" OSRA and argue that they are not well suited to a regulatory system in which a majority of cargo moves under the confidential terms of individual service contracts. Several carriers questioned the necessity of having any monitoring report requirements on various types of agreements such as operational agreements which are entered into for efficiency purposes and to meet the specific needs of customers. Carriers made a number of other suggestions for streamlining the reporting process which many found burdensome and costly.

Based on the Commission's experiences with monitoring reports over the last several years, and in light of the reforms introduced under OSRA, the Commission has begun to consider possible changes to the agreement information form and monitoring report requirements. Any proposed changes to these requirements would be addressed at some future date in a proposed rulemaking.

OTI LICENSING AND BONDING

The OTI Industry at a Glance

OSRA, together with the continuing logistics and supply-chain evolution, is bringing about significant change in the structure of the OTI industry. Since OSRA became effective, the number of NVOCCs has decreased by almost 15 percent and ocean freight forwarders by 21 percent; however, the number of OTIs that are both NVOCCs and ocean freight forwarders has more than doubled. Overall, the total number of OTIs has fallen by about 6 percent, but the number of foreign NVOCCs keeps rising.



There are several possible explanations for the decrease in the total number of OTIs. One is the increasing consolidation among OTI firms, similar to that occurring elsewhere in the liner industry. Second, as just cited, is the increase in the number of OTIs adding freight forwarding or NVOCC activities to their existing functions. This increase in the number of OTIs that are both NVOCCs and ocean freight forwarders was explained by some commenters to the Commission's NOI as an effort to remain competitive by offering a wide variety and level of services. These intermediary respondents noted that ocean carriers also are diversifying operations by developing and offering their own value-added services and performing traditional OTI activities. With the increased awareness of efficiencies from, and customer demand for, supply-chain management, carriers are developing and selling services traditionally offered by OTIs and logistics providers. Confidential contracting between shippers and carriers has fostered the rapid growth in carriers providing logistics and value-added services. Through the confidential contracting process, carriers and shippers jointly can customize service packages that include both ocean transportation and logistics services.

Licensing/Bonding and Tariff Publication

OSRA requires that NVOCCs in the US now be licensed by the Commission. Additionally, the Commission's rules implementing OSRA increased the bond amount required from all NVOCCs. Ocean freight forwarders, while already licensed and bonded, also are subject to a higher bonding level under the Commission's implementing regulations. The vehicle for insuring financial responsibility to date has been surety bonds exclusively. (See Appendix III.) OTIs generally have not objected to these additional licensing and bonding requirements, nor have there been indications that these new requirements have had a significant impact on OTI operations. However, OTIs have raised various concerns since OSRA became effective. They are troubled that their regulatory burden increased, and consistently have questioned the regulatory need for NVOCC tariff publication. They also believe that they are subjected to more FMC oversight -- tariff publication, adherence to tariffs, and common carriage provisions of the 1984 Act -- than vessel operators. Similarly, OTIs in the US contend that they have a significant and unfair competitive disadvantage since they face closer FMC scrutiny regarding statutory compliance. Some commenters suggested a relaxation, simplification, or elimination of applicable requirements and/or a reduction of enforcement activities directed at NVOCC compliance with tariff and common carriage provisions of the 1984 Act.

Competitive Activity

As mentioned, many shippers' associations and OTIs expressed concern with the greater level of regulation of OTIs relative to VOCCs. They point to the fact that NVOCCs still must make their rates publicly available, while VOCCs are free to sign confidential service contracts. In their opinion, this gives ocean common carriers a commercially competitive advantage over NVOCCs, who cannot protect their customers' rates and terms of service from public scrutiny via confidential service contracts. They submit that ocean carriers are using all the competitive tools at their disposal, including confidential contracting and antitrust immunity, to compete head-to-head with transportation intermediaries, both on the ocean side and in market sectors such as logistics and supply-chain management. Several intermediary commenters indicated that VOCCs are able to provide a bundling of services from warehousing, to customs brokerage, to ocean shipping all in one confidential package, and therefore have a substantial advantage over OTIs who are legally prohibited from offering confidential "one-stop" transportation packages to shipper-clients. Some commenters believe the Commission should examine more closely carriers' concerted activities and allegedly unfair shipping practices.

- OTIs are troubled that their regulatory burden increased, and consistently have questioned the regulatory need for NVOCC tariff publication.

- OTIs in the US contend that they have a significant and unfair competitive disadvantage since they face closer FMC scrutiny regarding statutory compliance.

While the Commission does not have evidence of specific harm to OTIs vis-a-vis ocean carriers due to OSRA's changes, OTIs as a group have voiced their concerns at the highest national levels. And as previously mentioned, the doubling in the number of OTIs that are both NVOCCs and ocean freight forwarders can be attributed to a perceived need to offer more service to customers in an effort to strengthen competitive position under what is seen as a more difficult operating environment under OSRA. The FMC recognizes the importance of the interplay between the VOCC and OTI sectors, and will monitor future activities closely.

TARIFF PUBLICATION

Tariff Publishing Under OSRA

Tariff publication was the area affected the most by OSRA's regulatory approach. Effective May 1, 1999, OSRA eliminated the requirement that carriers and conferences file their tariffs and essential terms publications with the Commission. OSRA requires carriers and conferences to publish their tariff rates and services in automated systems to be made available to any person, without time, quantity, or other limitation, through appropriate access from remote locations. OSRA also authorizes assessment of a "reasonable charge" for tariff access. Additionally, with respect to service contracts, OSRA removed rates and charges, service commitments, and any liquidated damages from the essential terms required to be made public. Instead, public essential terms of service contracts now are: the origin and destination port ranges; commodity or commodities; minimum volume or portion; and the duration of the contract. OSRA also provides that marine terminal operators ("MTOs") may publish schedules of their rates, regulations, and practices, if they so choose.

- OSRA eliminated the requirement that carriers and conferences file their tariffs and essential terms publications with the Commission.
- The FMC continues to review on-line tariff systems to ensure statutory compliance.
- Most ocean carriers use tariffs not only to publish rate information, but to link their service contracts to basic terms and conditions that are spelled out in tariffs -- particularly GRIs, surcharges and accessorial charges.
- NVOCCs, on the other hand, view tariffs as burdensome because they retain the pre-OSRA format which includes the publication and maintenance of all rate line items.

OSRA mandates the Commission to prescribe the requirements for the accessibility and accuracy of carrier automated tariff systems ("CATS") and, after periodic review, to prohibit the use of any automated tariff system that fails to meet these requirements. The Commission issued a proposed rule to implement OSRA that covered all relevant aspects of tariff publication. Based on public comments received from affected parties, the Commission significantly altered its proposal to reduce further the burdens of compliance, and to provide carriers with more flexibility and options in publishing their CATS. All conferences, VOCCs and NVOCCs are required to publish the services they offer.

Following the implementation of OSRA, the Commission reviewed a number of tariff systems and found that many appeared to limit the public's access to tariff information. The Commission contacted carriers and publishers in an attempt to rectify significant problems. The Commission consistently concentrated on compliance with OSRA's requirements that tariffs be accessible to the public and accurate -- a number of questions were asked and clarifications sought.

After several failed attempts to obtain overall industry statutory compliance, the Commission issued *Circular Letter No. 00-1*, *Public Access to Tariffs and Tariff Systems Under the Ocean Shipping Reform Act of 1998,* on April 6, 2000. The circular letter, addressed to carriers, conferences, and tariff publishers, indicated that a number of tariff systems failed to provide adequate user instructions, had no commodity index or failed to provide a commodity search feature, had no historical data search capability, required a considerable time to download or move from one function to another, and had access fees and/or monthly minimum requirements that appeared to discourage public use. The Commission urged publishers to correct access deficiencies and advised public users to notify the Commission of any problems that might be experienced in accessing tariff systems. The circular letter also expressed the Commission's desire to work with the industry to address any problems that limit public access to tariff systems. The letter concluded with the admonition that, if the problems were not remedied voluntarily, the Commission would consider other remedial actions to ensure public access to tariffs in accordance with the Congressional mandate contained in OSRA.

The Commission also issued an Advance Notice of Proposed Rulemaking addressing the issues of access fees and monthly minimum charges, seeking input from all interested parties on the reasonableness of such fees and charges. Based on a review of the comments, the Commission determined not to proceed with a rulemaking and instead issued *Circular Letter No. 00-2, Charges Assessed for Access to Tariffs and Tariff Systems,* on October 6, 2000. The Commission stated that while it was not promulgating regulations governing tariff access charges, it was providing guidance with respect to access fees and monthly minimum charges assessed by carriers, conferences, and tariff publishers, as well as certain costs and expenses that should not be recovered when establishing charges for tariff access. The Commission indicated that voluntary adherence to the guidelines mentioned in the circular letter would obviate the need for further Commission action.

No written complaints have been received by the Commission concerning the issues addressed in the two circular letters. The Commission's staff, however, has received informal inquiries from members of the public requesting assistance in retrieving tariff information. During the course of these communications, allegations have been made that some carriers' tariff access fees are too high, hence the request for staff assistance. Such inquiries generally involve only a minor amount of tariff research.

The Commission will continue its monitoring efforts so as to ensure equitable, uniform compliance with OSRA's requirements. Given the various uses of tariffs, particularly their applicability to service contracts, fair and effective administration of this responsibility is important. Additionally, since OSRA, and the Commission's implementing regulations, greatly reduce the burden of publishing tariff information, compliance should not be difficult to achieve. Naturally, our efforts will continue to seek voluntary compliance. However, more formal action may need to be instituted for those who refuse to comply or are involved in particularly egregious activity.

The NOI and Tariff Use Under OSRA

Comments received in response to the Commission's NOI expressed varying opinions concerning the accessibility and accuracy of tariffs. (See Appendix I, summary of responses to questions 24 through 29.) Most ocean carriers use tariffs not only to publish freight rate information, but to link their service contracts to basic terms and conditions that are spelled out in tariffs -- particularly GRIs, surcharges and accessorial charges. The carriers indicated that the linkage between tariffs and service contracts relieves them of the burden of repeating these common service contract provisions separately in each contract. It would also appear that linking service contracts to these tariff terms and conditions makes it easier for carriers to take such items out of the negotiation process. Consequently, most ocean carriers are satisfied with present-day tariff publication requirements.

NVOCCs, on the other hand, view tariffs as burdensome because they retain the pre-OSRA format, which includes the publication and maintenance of all rate line items. NVOCCs also are of the opinion that they are disadvantaged because most of the active VOCC rates are contained in confidential service contracts, and therefore NVOCCs are precluded from reviewing them. They point to the fact that VOCCs individually have access to specific commercial information, and depending on specific agreement authority, may collectively exchange this information as members of discussion or other types of agreements (within the restrictions of any service contract confidentiality requirements). In addition, many NVOCCs want the tariff requirement removed entirely. They believe this would put them on equal footing with VOCCs.

Ocean freight forwarders generally stated that they had no real difficulty in accessing tariff systems, although one forwarder group advised that the lack of appropriate standards made access difficult for its members. Many OTIs viewed tariffs as very useful for inland rate information, which they said can be incorporated in their rate quotes. Other OTIs contended that tariff information was not relevant in the current trading environment.

Shippers varied in their views on the ease of access to, and overall usefulness of, tariffs. Some stated that they had no difficulty in accessing carrier systems and found the published data informative. Others indicated that they had no occasion to refer to tariffs. And still others referred to them as too cumbersome, or complained that they did not have adequate guidance on how to access linked tariffs which are issued by different publishers. Certain shippers advised that they contacted carriers directly for rate and rate-related information. Shippers' associations reported that they referred to tariffs regularly since their contracts so often were linked to them. They accessed tariffs to verify charges, obtain rates for service contract movements, or for general market information. One association emphasized that the publication of a commodity index and bottom-line rates would increase tariffs' utility.

Maintaining public tariffs and adherence to specific publication requirements continue to be a contentious issue. Despite OSRA's deregulatory changes in this area, debate still persists on the usefulness of tariffs, the burden of applicable statutory and regulatory requirements, and tariffs' overall impact on industry operations. Not only do the different sectors of the industry disagree, but there is far from unanimity within sectors. Often, a company's views on tariffs are dictated as much by its internal circumstances and general approach to business, as they are by the competitive consequences of pricing services. Clearly this issue is far from resolved, and indications are that it may be presented in some form for Commission consideration in the future. The Commission will continue to fulfill its oversight role with the aim of assisting the industry in achieving compliance as efficiently as possible, while helping to create the trade environment envisioned by OSRA.

OTHER ISSUES (CONTROLLED CARRIERS, FOREIGN SHIPPING PRACTICES, TRUCKING, AND E-COMMERCE)

Controlled Carrier Oversight

The 1984 Act defines a controlled carrier as an ocean common carrier whose operating assets are, directly or indirectly, owned or controlled by a government. Due to a controlled carrier's close national ties, profit cannot always be assumed to be the chief motivation for its operations. To address this concern, Congress enacted the Controlled Carrier Act (section 9 of the 1984 Act), to prevent controlled carriers, whose marketplace decision-making can be influenced by governmental priorities or by their access to non-market sources of capital, from engaging in unreasonable below-market pricing practices that could disrupt trade or harm privately-owned shipping companies.

A number of changes instituted under OSRA strengthened the controlled carrier provisions. OSRA expanded the definition of a controlled carrier by deleting the previous limitation that an entity can be a controlled carrier only when it operates vessels registered under the government that controls the carrier. This change removed a potential loophole that may have enabled a controlled carrier to "flag-out" or register its vessels under the laws and regulations of another country, thereby avoiding the controlled carrier

- OSRA expanded the definition of a controlled carrier by deleting the previous limitation that an entity can be a controlled carrier only when it operates vessels registered under the government that controls it.

- OSRA removed three conditions that previously qualified as exceptions from controlled carrier provisions: agreement membership, operations in a controlled carrier's bilateral trade with the US, and signatory status to the OECD shipping policy.

- OSRA clarified the types of foreign activities that create unfavorable conditions to shipping in the US foreign trades, and enumerated pricing practices as among those activities that may create unfavorable conditions.

- OSRA also authorized suspension of service contracts as a remedy available to the Commission to address unfavorable conditions and restrictive foreign practices.

provisions.[14] In addition, OSRA removed three exceptions from the controlled carrier provisions: agreement membership, operations in a controlled carrier's bilateral trade with the US, and OECD signatory status. Prior to OSRA, the rates, charges, classifications, rules, *etc.*, of a controlled carrier were exempt from the controlled carrier provisions when they were pursuant to a conference tariff. The removal of the second exception now brings cargo in a controlled carrier's bilateral trade under the controlled carrier provisions of OSRA. The last change regarding OECD signatory status appears to have had minimal impact.

Over the past several years, carriers of the People's Republic of China ("PRC") have been the largest group of controlled carriers.[15] Currently there are five PRC-controlled carriers. COSCO North America, Inc. ("COSCO"), the largest of the group, has grown from a very modest beginning to become one of the largest carriers in the world -- during 2000 it ranked as one of the top five carriers serving the US trades.[16] COSCO's fleet consists of more than 500 ships which call at ports in approximately 180 countries. It also is a very diversified company, offering non-shipping services such as real estate, finance, and insurance. CSCL, one of the newest controlled carriers, has grown considerably. It currently has more than 100 ships and has embarked on a building program to further expand its fleet. CSCL's market share in the trade between the US and the rest of the world increased from .02 percent (2,707 TEUs) in 1999 to 1.1 percent (205,616 TEUs) in 2000. During the same period, it increased its market share in the trade between the US and the PRC from 0.1 percent (1,328 TEUs) to 3.9 percent (139,947 TEUs).[17]

In response to the Commission's NOI, COSCO reiterated some of its earlier comments made in a petition for regulatory relief before the Commission.[18] In its latest petition, COSCO requested the Commission to expand its current exemption from the Controlled Carrier Act (as amended by OSRA) to permit COSCO to publish tariff rate decreases in the US foreign

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[14]To improve the process of identifying controlled carriers operating in the US trades, the Commission's rules implementing OSRA provided that an ocean common carrier that is owned or controlled by a government, in any manner, must furnish the Commission with immediate written notification as to its status as a controlled carrier.

[15]There are currently 13 carriers on the Commission's list of controlled carriers. Two of the most recent additions include CSCL and China National Foreign Trade (Group) Corporation ("SINOTRANS").

[16]COSCO's volume in the trade between the US and the rest of the world increased from 4.9 percent (847,688 TEUs) in 1999 to 5 percent (962,995 TEUs) in 2000. During the same period, while the volume of cargo carried by COSCO in the bilateral trade between the US and the PRC increased, its market share decreased from 13.9 to 12.1 percent. Source: Journal of Commerce ("JOC") PIERS.

[17]Source: JOC PIERS.

[18]*Petition of China Ocean Shipping (Group) Company for a Partial Exemption from the Controlled Carrier Act*, Petition No. P3-99, March 31, 1999.

commerce that would be effective upon publication, without regard to competing carrier rates.[19] In both the petition and in its response to the Commission's NOI, COSCO contends that it lost its short-term flexibility to price tariff cargo freely in the trade between the US and the PRC due to the repeal of the bilateral trade exception to the Controlled Carrier Act; therefore, it contends its burden of regulation has increased under OSRA. COSCO has found this burden especially difficult with regard to oversized project and forwarder-controlled cargoes that need quick (often one-day) tariff publication. COSCO would like to see the 30-day notice requirements for its tariff publications dropped. The merits of the specific regulatory relief sought by COSCO will be evaluated by the Commission in the proceeding that considers Petition P3-99. The Commission also will increase its focus on controlled carrier activities to ensure that the Controlled Carrier Act objectives of preserving equitable competition and promoting international trade are being met.

Unfair Foreign Shipping Practices

OSRA amended section 11a of the 1984 Act (FSPA), and section 19 of the Merchant Marine Act, 1920, to add the suspension of service contracts to the remedies available to the Commission to address unfavorable conditions, and to clarify the types of foreign activities that create unfavorable conditions to shipping in the US foreign trades, enumerating pricing practices as among those activities that may create unfavorable conditions.

The majority of those commenting on this issue in response to the NOI believed that OSRA had no impact on potentially unfair shipping practices. Several commenters stated that it was beneficial for the FMC to have authority to take action against foreign restrictive practices and noted their concern regarding such practices in particular US foreign trades. (See Appendix I, question 30.)

The Commission continues to address unfair shipping practices as they arise. The Commission requires periodic reports from carriers in specified trade areas, when appropriate, to monitor developments. Further, the Commission has established a permanent Task Force on Restrictive Foreign Practices, chaired by the General Counsel, with representatives from a number of bureaus and offices. The Task Force meets regularly to exchange information about new and continuing areas of concern, and to formulate recommended approaches to restrictive foreign shipping practices which may require action under the Commission's statutory authorities. Since the implementation of OSRA, the Commission has continued to address unfair shipping practices under existing proceedings and continuously monitors new developments in this area.

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[19]In October 2000, SINOTRANS filed a petition (*Petition of China National Foreign Trade Transportation (Group) Corp. (SINOTRANS) for Exemption from Section 9(c) of the Shipping Act of 1984*, Petition No. P2-00) with the Commission requesting the same relief granted to COSCO in an earlier proceeding. This was an exemption from the requirements of section 9(c) to allow it to lower tariff rates to exceed or meet competitors' rates, but not to undercut them. Both P3-99 and P2-00 are pending before the Commission.

Port Trucking Issues

Question 23 of the Commission's NOI asked: "What impact, if any, has the implementation of OSRA had on the port trucking industry?" In responding to this question, the International Brotherhood of Teamsters complained that port driver wages have declined, driver bankruptcies and truck repossessions have increased, and working conditions for port drivers are generally "abusive." The Teamsters believe that OSRA permits ocean common carriers, through their rate agreements' voluntary guidelines, to keep inland rates harmfully low by setting anti-competitive and unreasonable "ceiling" rates for both through and inland transportation. Further, they claim that the inland transportation rates "dictated by ocean common carriers and shippers" to trucking companies are non-negotiable rates and prohibit trucking companies from providing a living wage to port drivers. The Teamsters provide several examples of poor working conditions in the container hauling industry, including port congestion, unpaid waiting time at ports, unroadworthy chassis, overweight containers, and improperly labeled hazardous materials.

Because the purpose of the Commission's NOI proceeding was to examine the impact of OSRA, the Commission is not treating the Teamsters' comment as a petition for formal action, nor is the Commission addressing whether the Teamsters' concerns would be remediable by the Commission were a complaint or petition filed. It does not appear, however, that the Teamsters' concerns are occasioned by the passage of OSRA. Rather, its comments reflect longstanding difficulties faced by the port trucking industry in its relationship to the ports and ocean carrier industry. One apparent change in the law related to the Teamsters' concerns is found in section 10(c)(4). Prior to OSRA, section 10(c)(4) prohibited concerted action in negotiating with non-ocean carriers on "rates or services provided to ocean common carriers within the US by those non-ocean carriers." OSRA amended the prohibition to allow for such concerted action if "negotiations and any resulting agreements are not in violation of the antitrust laws and are consistent with the purposes of this Act." The Teamsters do not cite specifically to this change in the law and do not provide specific facts alleging unlawful concerted action in negotiating with inland providers. Furthermore, the Commission has no information to indicate that this particular change in the law has had a detrimental effect on the port trucking industry.

- The Teamsters believe that OSRA permits ocean common carriers, through their rate agreements' voluntary guidelines, to keep inland rates too low by setting anti-competitive and unreasonable "ceiling" rates for both through and inland transportation.
- The Teamsters' concerns, as opposed to being occasioned by the passage of OSRA, appear to reflect longstanding difficulties faced by the port trucking industry in its relationship to ports and ocean

Voluntary guidelines for service contracting are filed confidentially with the Commission pursuant to 46 C.F.R. § 535.802(e). These were examined carefully to determine which guidelines could affect port trucking. Some guideline provisions were found that could theoretically impact inland truckers and port drivers. Certain of the voluntary guideline provisions would appear to aim at relieving port congestion, one of the Teamsters' significant concerns, and thereby would benefit port truck drivers. Nothing in the voluntary guidelines, however, substantiates the Teamsters' apparent claim that they allow carriers to jointly negotiate inland divisions, defined in section 3 (11) as "the amount paid by a common carrier to an inland carrier for the inland portion of through transportation offered to the public by the common carrier." Section 7(b)(2) establishes that antitrust immunity is not extended to discussion agreements or conferences for the purpose of discussion or negotiation regarding the "inland divisions." The inland division is specifically distinguished in section 7(b)(2) from the inland portion, or the amount charged by the common carrier to its customer for inland services. Nor do the voluntary guidelines indicate that carrier practices with regard to agreements affecting the inland portion of through rates have changed as a result of OSRA: carrier antitrust immunity for such activities by conferences and rate agreements existed under the 1984 Act prior to the passage of OSRA. Its extension by OSRA to voluntary rate discussion agreements does not appear to have any connection to the Teamsters' concerns as they were presented; no specific allegations or evidence was provided to suggest such a connection. Further, the voluntary guidelines do not provide any indication that inland carriers are unable to negotiate inland rates with individual ocean carriers, as alleged by the Teamsters. In sum, the Commission is unaware of any agreements which, through their voluntary guidelines, permit concerted activity with regard to inland trucking in contravention of the 1984 Act.

In addition to the examination of voluntary service contract guidelines, the Commission also identified several agreements that contain language authorizing the respective members to jointly negotiate inland divisions with motor carriers. Agreement representatives, however, confirm that no arrangements involving motor carriage have been implemented. The Commission also reviewed the confidential minutes of meetings of conferences and discussion agreements on file with the Commission and found no indication of discussions among the respective agreement members concerning the negotiation of US inland divisions with motor carriers. The Commission will continue to review guidelines, minutes, and agreement provisions to ascertain whether agreement authority is occasioning any adverse effects on port and trucking operations.

- Traditional information management dot-com companies, either independently or in cooperation with liner shipping firms, have entered the liner shipping arena, offering an array of automated, value-added service packages.

- Cargo-based, e-commerce portals, which provide a centralized location for "one-stop shopping" for various participating carrier services, are the current trend and are receiving much support from major liner companies.

- The concept of "supply-chain collaboration" has been gaining attention in liner shipping and promises to streamline the process significantly.

E-Commerce

Prior to the passage of OSRA, transportation-related, e-commerce businesses had already started appearing on the liner shipping scene. Many of the original Internet-based companies focused specifically on developing automated services (including e-commerce auction sites) tailored to the business of liner shipping. Many of these start-ups were founded by carrier and shipper executives displaced as a result of industry down-sizing that occurred during the 1990s. These former carrier and shipper executives have combined their extensive industry expertise with today's high-tech capabilities to advance industry automation. Traditional information management companies, either independently or in cooperation with liner shipping firms, also have entered the liner shipping arena, offering an array of automated, value-added service packages.

While OSRA is not directly responsible for the emergence of these dot-com businesses, it arguably has created a more competitive, market-oriented environment in which these companies have grown in importance. For example, 1999 saw an explosion in the number of dot-com companies focused on the design and promotion of automated services customized for liner shipping. Since then, however, liner shipping dot-com firms have generally followed the same consolidation trends of those in other industries -- by January 2001, many firms that partially were labeled as "Internet auction" companies had been bought or gone out of business. The surviving companies have changed their emphasis drastically from auction sites to focus on more fundamental, practical applications.

For example, track-and-trace technologies, which provide visibility, are gaining in popularity. Cargo-based, e-commerce portals are the current trend and are receiving much support from major liner companies. These Internet portals provide a centralized location for "one-stop shopping" for various participating carrier services and obviate the need for shippers to refer to numerous individual carrier web-sites. INTTRA and Global Transportation Network, two ocean carrier-backed Internet portals, focus on track-and-trace systems as a core capability. Extensive carrier collaboration is expected to continue in this area. In addition, one carrier recently unveiled six products that it will provide shippers, along with a track-and-trace feature. These products include: vessel schedule information, on-line booking capability and shipping instructions, ability to print remote bills of lading, automated shipment tracking, and a complete on-line invoicing and payments system.

E-commerce for value-added services was seen by the NOI commenters as something that was likely to prove more useful than e-auctions, both in allowing carriers and shippers to reduce costs, and improving carrier-shipper relationships. E-auctions, however, received very little support from vessel operators because the auctions are meant to fill unused capacity by auctioning-off unused slots at reduced rates. Carriers generally believed that participation in e-auctions only hurts their operations by further lowering rates. It is no surprise that those companies who concentrated on this type of service largely were unsuccessful. Shippers additionally noted that they are looking for applications that go beyond ocean carriage to include middleman functions as well. Some also contended that because many lines offer their own systems, the complexity of dealing with multiple systems makes the current offerings less useful than otherwise might be the case. The new portals look to ease this complexity.

A relatively new development in the area of logistics and e-commerce also may address the problem of multiple, complex systems. The concept of "supply-chain collaboration" has been gaining attention in liner shipping and promises to streamline the process significantly. True collaboration involves two or more companies working jointly to develop shared information, design and execute a logistics supply-chain plan, measure performance, and share equally in the rewards. In essence, collaboration involves the supply-chain partners sharing commercially sensitive, customer-demand forecast information, and using it throughout the supply chain, to ensure the correct and timely delivery of products. Collaboration is considered so critical in today's highly competitive environment that many of the largest US-based shippers (including Wal-Mart, K-Mart, Eastman Kodak, *etc.*) formed a group known as VICS -- Voluntary Interindustry Commerce Standards -- to develop uniform documentation and standards for supply-chain collaboration.

The advent of auction dot-coms, transportation exchanges, Internet portals, and similar e-commerce entities has increasingly blurred the distinction between forwarding (OTI) and other value-added services. Some commenters to the Commission's NOI believe these new entities should be reviewed to determine how they fit within the 1984 Act, as amended. The Commission recognizes the important role that these entities play in the efficient movement of goods in the US-foreign commerce, as well as in reducing operational costs. The question of the rights and responsibilities of these entities under OSRA and the role, if any, of the Commission in regulating their activities is an issue that the Commission will continue to evaluate. In the meantime, it is likely that transportation exchanges and similar e-commerce firms will continue to evolve and provide cost-saving solutions to the industry.

CLOSING OBSERVATIONS

Snapshot of Findings

The changes in the liner shipping industry, and OSRA's impact over the past two years, can be characterized as significant, but are not totally unexpected. Certainly the dissolution of the traditional conference system in most major trades, and the ascendency of discussion agreements, was anticipated. The wholesale reshaping of carrier supply-side operations, replete with various types of partnering and vessel-sharing arrangements, continued a trend that had begun several years ago. And the across-the-board surge in service contracting (as reflected in the number of contracts, the cargo volume, and the percentage of cargo moved under such contracts), while greater and more sudden than most expected, was consistent with the anticipated decline in tariff movements as a result of individual confidential contracting and the removal of conference oversight authority.

But these changes over the past two years nonetheless have been noteworthy. The high percentage of service contracts entered into by individual carriers (98 percent of all contracts in the Commission's 1,000 contract random sample) is remarkable. The confidentiality, flexibility, and lack of conference control over these instruments have made them attractive to carriers and shippers alike, who share the desire to find cost savings and efficiencies through individualized arrangements. The portal for tariff information has migrated from the FMC's ATFI System to the Internet. And while the preponderance of service contracts refer to the respective carrier tariff for accessorial and GRI information, tariffs are far different from those of a mere two years ago. They no longer are the center stage for rate information, but more the coordinating link across most service contracts. Of course, NVOCC rate information still is contained in published tariffs. Consolidation is also taking place in the OTI sector as more traditional freight forwarders and NVOCCs seek to wear both hats; this is consistent with attempts to respond to customer demand for more integrated logistic services.

OSRA specifically amended the 1984 Act to encourage the growth of US exports through ". . . a greater reliance on the marketplace." The changes in service contracting and the rise in carrier efficiency-enhancing agreements suggest that OSRA has achieved this objective. Many see the replacement of the conference system with discussion agreements as resulting in a less rigid form of carrier control over the liner trades. Others, however, remain concerned with the degree to which such agreements are able to achieve adherence to voluntary service contract guidelines. As indicated earlier, the

- It is now the Internet, not the FMC's ATFI System, that is the portal for tariff information.
- Tariffs are no longer the center stage for ocean carrier rate information, but more the coordinating link across most service contracts.
- The changes in and popularity of service contracting, and the rise in carrier-efficiency-enhancing agreements, suggest that OSRA has brought greater

Commission's confidential review of carrier service contracts found limited adherence to contract guidelines, although carrier actions in this regard appear to be dictated by prevailing market conditions.

Ongoing Evolution of the Industry

- Instantaneous electronic information exchange has ushered in the era of globalization, breaking down traditional national and market boundaries.
- Participants in various sectors of the ocean shipping industry now seek to redefine themselves beyond their traditional transportation sector.

OSRA is but one factor in the ongoing reshaping of worldwide distribution (in which liner shipping is one component). This evolution is driven by the powerful and recent economic forces of technology, partnering, globalization and process integration. The fundamental concept behind these forces is as old and unchanging as the market itself: buyers looking for the most advantageous deals and sellers striving to provide a service that attracts and retains customers.

Limits on the speed and accuracy of information exchange historically have constrained efficient market processes. The rapid availability of electronic information has radically eased such limits and helped to promote globalization. No longer do companies confine themselves to their service segment, when it has become clear that significant efficiencies are to be captured from integration across all segments. Supply-chain management, which integrates traditionally independent processes, has led to efficiencies in each link of the chain, from product inception to delivery. Sellers of goods must partner with their customers and work with others in the supply chain to realize and share available economic benefits. Hence, liner operators, middlemen, third-party logistics providers, consolidators, and others all now seek to redefine themselves beyond their traditional transportation sector. More than one liner operator's mission statement, for example, has been revised to indicate a broader distribution and logistics focus than just liner movements.

When viewed from the broad perspective of worldwide distribution, OSRA was a clear response to calls for an institutional scheme that was more adaptive to the emerging economic order of integrated, information-intense, supply-chain processes. This is nowhere more evident than in the rush of carriers and shippers to enter into one-on-one service contracts that accommodate broader and more customized distribution arrangements. As shown, there has been a surge in individualized contracting, a transformation in the manner by which ocean carriers in any given trade collectively address pricing and service matters, and a proliferation in efficiency-enhancing operational carrier arrangements.

One issue worth noting is the apparent impact of OSRA on limitations of carrier liability for cargo loss or damage. As our report reflects, both shippers and carriers reported to us that some shippers are seeking service contract provisions which would raise carriers' liability, and that certain carriers are seeking to address the issue collectively through discussion agreement service contract guidelines. While the issue of carrier limitations of liability for cargo loss or damage is not addressed in the 1984 Act, the availability of confidential, individual carrier service contracts pursuant to OSRA appears to be providing a new medium in which shippers and carriers will address such matters. To date the FMC has not received formal complaints or requests for action under the statutes it administers to address this issue. We intend to monitor ongoing developments in this important area.

By any standard, OSRA is still in its infancy. Clearly, its impact on liner shipping and worldwide distribution will continue to unfold. As this occurs, and those in US ocean shipping further adapt to a new trade environment, its direct effects should be even more discernable.

Continuing Regulatory Issues

The dramatic changes taking place in international trade against the backdrop of OSRA, and the issues they raise, are focal points for the Commission. The FMC is committed to fulfilling its statutory responsibilities in a manner that gives deference to the market process while defending against market-distorting abuses. Its mission statement and strategic goals are based on this underlying premise.

Despite what appears to be widespread general satisfaction with most aspects of the current US regulatory framework for ocean shipping, a number of issues remain as points of contention. Some of these issues stem from changes made by OSRA; others include policies which preceded OSRA but which OSRA left unchanged, or policies which OSRA did not amend as radically as some proponents had advocated during the legislative process. There appear to be several major aspects of the US shipping laws which are generating the most expressions of concern among those less than wholly satisfied with the 1984 Act as amended by OSRA.

- The FMC is committed to fulfilling its statutory responsibilities in a manner that gives deference to the market process while defending consumers against market-distorting abuses.
- Notwithstanding general satisfaction with the current regulatory framework for US ocean shipping, issues of concern remain which require ongoing Commission assessment.

The first of the issues is the aforementioned concern with the rise of discussion agreements and the relative merits of antitrust immunity for rate-setting forums. While the 1984 Act's section 6 provisions for FMC action on agreements remained unchanged, the OSRA amendments included refinements to the section 4 provisions describing the agreements within the scope of the 1984 Act, as well as the section 5 provisions prescribing independent action and the rights of agreements in addressing service contract matters. Thus, Congress reaffirmed the general principle of limited antitrust immunity for rate-setting arrangements, while amending the scope and conditions of that immunity. Therefore, the validity and appropriateness of continued limited antitrust immunity must be evaluated in the context of the changes effected by OSRA. Among the factors relevant to such an assessment are the decline in conference power and influence, the proliferation of individual carrier contracts, the freight rate levels predominating in the trades, the impact of discussion agreement rate discussions and information sharing as well as voluntary guideline authority, and the other services, charges, innovations and developments, for better or worse, brought about via concerted carrier activity under the post-OSRA regulatory scheme. Moreover, the effects of immunity under a variety of economic and trade conditions would provide the best means of fully evaluating its impact. The overall low freight rates prevailing in most US trades may appear to suggest that agreement and conference authority has limited impact at the present time, but under trade conditions more favorable to the carrier sector, the newly amended authorities may prove less benign from the shipper perspective. Thus, it is incumbent on the Commission to continue to assess and evaluate the impact of discussion agreements on rates, in order to assess more accurately the OSRA amendments' influence on the role and effects of immunity for ratemaking. Similarly, as the debate continues, it is of paramount importance that the participants address the alleged benefits and harm resulting from immunity for ratemaking under the current revised regulatory scheme, rather than to reiterate the arguments pro and con expressed over the last decade.

Of particular relevance is OSRA's authorization of voluntary guidelines for discussion agreements and the degree of adherence to such guidelines among agreement members. Critics argue that such authority has vested in discussion agreements effectively the same authorities that the now weakened or defunct conferences had once wielded. This is another issue of continued spirited debate, and the subject demands ongoing attention on the part of this agency. As noted *supra*, an agreement's cohesiveness on service contract matters varies with the trade and particular market influences. The fact that guidelines are "voluntary" and unenforceable does not render those guidelines and the discussion agreements ineffectual; on the other hand, the fact that the carriers are occasionally, frequently or regularly cohesive does not suggest that they are abusing that authority or that the guidelines are violative of the 1984 Act merely because they are having the intended consequences. When the Commission promulgated its regulations implementing OSRA, one of the more challenging undertakings was in fact the regulations corresponding to the voluntary guidelines language of OSRA's addition to section 5(c)(3) of the statute. The Commission retreated from its earlier, more restrictive reading of those provisions enunciated in its proposed rule, and instead adopted in its final rule a more permissive approach toward voluntary guidelines that was, the Commission majority concluded, consistent with the new language of the statute. The Commission's own analyses and the comments in response to our NOI suggest that the dire predictions that discussion agreements would abuse this authority to effect unreasonable rate hikes have not, to date, been realized. However, as noted above, the issue merits continuing close attention as trade conditions change and as the industry evolves in the post-OSRA environment.

Tariff publication is another matter generating some controversy within the industry. OSRA eliminated the responsibility to file tariffs with the Commission, substituting a responsibility merely to publish tariffs electronically. OSRA clearly reflected a compromise between the competing interests in transparency on the one hand (a seemingly necessary component of common carriage), and flexibility and competition on the other. In promulgating implementing regulations, the Commission imposed a minimum of restrictions and requirements, opting instead, as an initial approach, to maximize the carriers' flexibility in meeting their obligation to have accurate and accessible tariff publications. The regulations themselves have generated few complaints, although the Commission has some concerns about the adequacy of compliance, particularly as to accessibility. However, the underlying statutory mandate for some form of public rate information continues to be challenged by some as unnecessary in light of the overwhelming predominance of shipments which are now rated under service contracts in lieu of tariffs.

The question of the usefulness of tariff publication requirements takes on additional nuances in that those challenging tariff publication tend primarily not to be ocean common carriers, but rather the NVOCC-OTIs. The OTI complaint generally is that the NVOCCs bear the burden of being treated as a common carrier when it comes to tariff publication, but that NVOCCs do not enjoy the privilege afforded to ocean common carriers of offering service contracts to their shipper customers. Thus, a common grievance expressed in the course of this Inquiry was that even under the OSRA amendments, the 1984 Act continues to provide NVOCCs all the obligations of being a common carrier but few of the advantages (some citing as well the new requirement for NVOCCs to be licensed as well as bonded, neither of which requirements applies to ocean common carriers). Whether to confer upon NVOCCs the right to enter into service contracts in their carrier capacities is peculiarly a legislative prerogative and is not a matter subject to administrative discretion. The Commission is aware that some in the NVOCC community have proposed petitioning the Commission for an exemption from the statutory tariff publication requirement under the Commission's section 16 exemption standards. It would be premature, therefore, for the Commission to address this issue further in advance of an anticipated petition, and without the input of other interested persons who have the right to offer comment on any petition that is filed.

The foregoing represent what appear to be the major contentious issues arising from or continuing beyond the passage of the OSRA amendments to the 1984 Act. They are by no means the only regulatory issues which may be debated. Other topics of increasing interest may include the proliferation of e-commerce companies and how they fit into the current regulatory scheme. Technological advances are thriving in the OSRA environment and are creating new and evolving efficiencies. While the Commission wants to encourage the advantages and efficiencies gained through these innovations, it must further evaluate this area to address any regulatory issues of concern.

Additionally, service contracts have become the overwhelmingly predominant rate-setting vehicle, and as carrier/shipper cooperation increases, they no doubt will become even more important. With confidentiality and streamlined contracting, it is all the more critical that smaller-volume shippers receive fair treatment. The Commission will continue to employ techniques such as analysis of random samples of service contracts to evaluate trends and activities in this area.

While the Commission's experience under OSRA to date, and the industry's account of its own experiences since May 1999, have not demonstrated an obvious or compelling need for revisions in the foregoing areas at this time, they remain the matters on which the Commission intends to focus its attention and resources in the immediate future.

In sum, OSRA thus far has accommodated the ongoing process of industry transformation. As liner operators vie with other participants in the distribution industry to serve as supply-chain managers/collaborators, only time will tell how successful they will be and how much further OSRA can accommodate such directions. Clearly, the industry as we know it today will not look the same in the future. It is within this context that the Commission will continue to encourage a free-market environment which enhances the ability of the shipping industry to operate as efficiently and effectively as possible.

Suggestions for Further Legislative Consideration

In the course of administering the OSRA-amended 1984 Act over the past two years, the Commission has identified several provisions in the statute which are either ambiguous or could be revised in order better to effect the intentions of Congress. To this end, the Commission suggests that Congress might wish to consider certain amendments and clarifications, addressing the following matters.

Freight Forwarder Compensation

Section 8(a)(1)(C) of the 1984 Act, 46 U.S.C. app. § 1707(a)(1)(C), requires that a tariff state the level, if any, of freight forwarder compensation to be paid by a carrier or conference. Section 19(e)(4), 46 U.S.C. app. § 1718(e)(1), provides that no conference or group of two or more carriers authorized to agree on the level of compensation, may either deny any member or group the right to take independent action on the level of compensation to be paid, or agree to limit that compensation to less than 1.25 percent of the aggregate of the applicable rates and charges. The level of freight forwarder compensation is now being included as a negotiable term in many service contracts, independent of the level set forth in the applicable tariff.

Congress may wish to clarify whether, under sections 8(a)(1)(C) and 19(e)(4), the level of freight forwarder compensation paid for shipments moving under a service contract may be different from the level of compensation paid for shipments rated according to a tariff rate. That is, did Congress intend that parties to a service contract be permitted to negotiate the level of freight forwarder compensation to be paid on shipments moving under the service contract?

Tariffs

Section 8(d) provides that

> No new or initial rate or change in an existing rate that results in an increased cost to the shipper may become effective earlier than 30 calendar days after publication. The Commission, for good cause, may allow such a new or initial rate or change to become effective in less than 30 calendar days. A change in an existing rate that results in a decreased cost to the shipper may become effective upon publication.

46 U.S.C. app. § 1707(d). Prior to OSRA, carriers and conferences were required to obtain "Special Permission," granted upon the showing of good cause, to file new or initial rates on less than 30 days' notice. However, since OSRA, the Commission has, in practice, allowed such rates to become effective immediately, rather than on 30 days notice, and without the filing of a special permission request, to better serve the shipping community.

We suggest that section 8(d) be amended to reflect this policy. Changes in rates or charges that result in an increased cost to the shipper would still require a 30-day publication period before becoming effective.

Level of Civil Penalties and Monetary Sanctions

We suggest that the following sections be annotated to indicate that the amount of the civil penalty set forth therein has been adjusted for inflation by the Federal Civil Penalties Inflation

Adjustment Act of 1990, 46 U.S.C. 2461, as amended by the Debt Collection Improvement Act of 1996, Pub. L. 104-134, and further, that such adjustment will continue to be made every four years.

United States Code Citation	Civil Monetary Penalty description
46 U.S.C. app. sec. 817d	Failure to establish financial responsibility for death or injury
46 U.S.C. app. sec. 817e	Failure to establish financial responsibility for non-performance of transportation
46 U.S.C. app. sec. 876	Failure to provide required reports, etc. -- Merchant Marine Act of 1920
46 U.S.C. app. sec. 876	Adverse shipping conditions/Merchant Marine Act of 1920
46 U.S.C. app. sec. 876	Operating after tariff or service contract suspension/Merchant Marine Act of 1920
46 U.S.C. app. sec. 1710a	Adverse impact on US carriers by foreign shipping practices
46 U.S.C. app. sec. 1712	Operating in foreign commerce after tariff suspension
46 U.S.C. app. sec. 1712	Knowing and willful violation/ Shipping Act of 1984 or Commission regulation or order
46 U.S.C. app. sec. 1712	Violation of Shipping Act of 1984, Commission regulation or order, not knowing or willful
31 U.S.C. sec. 3802(a)(1)	Program Fraud Civil Remedies Act/giving false statement
31 U.S.C. sec. 3802(a)(2)	Program Fraud Civil Remedies Act/giving false statement

Definition of "Ocean Common Carrier" as it Affects the Scope of Agreements and Service Contracts

Another matter which has arisen in connection with the Commission's implementation of the OSRA amendments relates to the 1984 Act's definition of an "ocean common carrier." Section 3(16). That term, by incorporating the more general definition of common carrier at section 3(6)(B), provides that an ocean common carrier is "a person holding itself out . . . to provide transportation for passengers or cargo between the United States and a foreign country [utilizing] . . . a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country." In applying that definition in the context of agreements within the scope of section 4 of the 1984 Act, which are exempt from the antitrust laws once filed and effective, the Commission ruled that a conference could not include in its filed agreement any provision authorizing rate setting for calls between foreign ports. In *Transpacific Westbound Rate Agreement v. FMC,* 951 F.2d 950 (9th Cir. 1991) ("*TWRA*"), the Ninth Circuit Court of Appeals upheld the Commission's ruling declining jurisdiction over foreign-to-foreign portions of mixed foreign and US-trade agreements and found the Commission's regulatory power over common carriers is limited to the US trades. The Commission's and the Court's interpretation turned on the 1984 Act's definition of the term "common carrier by water."

The agreement at issue in *TWRA* was a rate-setting agreement. However, industry developments in the intervening years, including the proliferation of new forms of operational and cooperative working arrangements among carriers, such as the VSAs and global alliances discussed in this study, as well as the new authority under OSRA for ocean common carriers to enter into individual service contracts pursuant to collectively established voluntary guidelines, have led to the filing of agreements and service contracts which are of global scope or whose terms are applicable, in part, to service between foreign ports. In many such agreements, sanitization of the parties' actual agreement or contract to omit or delete portions affecting non-US service is impracticable or would result in less than a full reflection of the parties' arrangements affecting the US trades. As a practical matter, the Commission has permitted the filing of agreements whose reach extends beyond the US trades when the agreement parties recognize and acknowledge that no antitrust immunity or Commission jurisdiction attaches to foreign-to-foreign provisions or activities by virtue of the filing and effectiveness of the agreement. Nevertheless, we recognize that carrier agreements and service contracts may have terms which affect US trades by including trade-offs of services and prices in one trade for another. While we might view such agreements as falling within the scope of section 4 in their entirety by virtue of their inclusion of terms affecting the US trades, the status of such agreement terms under the antitrust laws might be called into question in light of the 1984 Act's ocean common carrier definition and the *TWRA* decision. Moreover, in view of the increasing frequency with which carrier agreements include supply-side arrangements of multi-trade or global scope, as well as the authorization of multi-trade and global service contracts pursuant to OSRA, it might be useful for Congress to re-examine these issues.

Service Contract/Bill of Lading Inconsistency

Section 8(a)(1)(E) of the 1984 Act requires that carrier tariffs "include sample copies of any loyalty contract, bill of lading, contract of affreightment, or other document evidencing the transportation agreement." As indicated in our study, many carrier tariffs now serve as the source of common elements affecting or incorporated by reference in service contracts. The 1984 Act does not specifically address the relationship between tariffs or boilerplate bills of lading issued by ocean common carriers and their service contracts. Many carrier service contracts provide that, where service contract terms conflict with bill of lading terms, the bill of lading will prevail. However, absent such provisions, there may be instances in which carrier bills of lading issued for shipments of cargo booked pursuant to a service contract include terms which are not consistent with particular service contract terms, such as those relating to carrier liability for loss or damage. In such instances, it may be unclear which document would govern. This may be an issue appropriately addressed through legislation.

Controlled Carrier Issues (Section 9)

When the Controlled Carrier Act (now section 9 of the 1984 Act) originally was adopted by Congress in 1978, it was done in the context of an industry which operated much differently than it does today.

Service contracts: Although section 9 was amended by OSRA to recognize that service contract rates provide another vehicle by which controlled carriers may unreasonably underprice their competition, Congress may again wish to consider section 9 in light of the fact that service contracts have become the primary measure for, as well as method to implement, changes to pricing. Congress may wish to give the Commission greater authority to address unjust and unreasonable rates contained in service contracts filed by controlled carriers by:

- Providing explicit authority for the Commission to impose further form and manner requirements for the filing of service contracts of controlled carriers to facilitate review of their rates; and

- Revising section 9(c) to include a thirty-day delay for the imposition of service contract rates which result in lower rates (section 9(c) currently applies only to reductions in tariff rates).

Taking cost into account: OSRA made the Commission's examination of costs an issue which the Commission must, rather than may, take into account in an assessment of a controlled carrier's rate. Prior to OSRA, below-cost pricing was just one of several factors the Commission could consider when it examined controlled carriers' rates. As revised, section 9(b) requires the Commission to

> take into account whether the rates or charges which have been published or assessed or which would result from the pertinent classifications, rules or regulations are below a level which is fully compensatory to the controlled carrier based upon that carrier's actual costs or upon constructive costs.

In prior proceedings, the Commission had found it necessary to examine costs only when a controlled carrier's "overall rate structure" was at issue; when the examination concerned an individual commodity rate, the Commission's analysis focused on the extent to which the rate caused disruptive effects on the trade. OSRA's revision to section 9(c) appears to invalidate this distinction, and may have been intended to create a presumption that a controlled carrier's use of a particular commodity as a "loss leader" makes that rate unjust and unreasonable. However, the revision also appears to impose the extraordinary, perhaps unintended burden on the Commission of undertaking a cost analysis when it seeks to address individual commodity rates of controlled carriers even though there may be other sufficient bases to establish whether particular rates are not just and reasonable. Congress may wish to clarify this matter.

Some may also contend that the Commission must take such costs into account in any case *before* it requests a statement of justification from the controlled carrier under section 9(c).

Congress may wish to clarify that the Commission need not make an initial finding (akin to a probable cause showing), that the rates in question are below cost and therefore unreasonable before the Commission may require the controlled carrier to justify those rates. Conversely, Congress may wish to direct the Commission that the initial assessment may be based on factors other than a price/cost comparison.

***Definition of controlled carrier to include NVOCCs*:** Controlled carriers are currently defined by section 3(8) of the 1984 Act as ocean common carriers owned or controlled by a government. Congress may wish to consider expanding the application of the prohibitions and limitations on controlled carriers to all common carriers, whether they be ocean (and therefore vessel-operating) or non-vessel-operating common carriers, owned or controlled by a government.

***Remedies to address violations of section 9*:** It appears that the only applicable remedies to address unjust or unreasonable rates under section 9 are prospective: suspension or prohibition of the use of those rates. Because of the time-consuming nature of determining if the controlled carrier is engaged in predatory pricing, the remedies may be moot as the rates may no longer be in effect by the time such findings are made (when, for example, the service contracts containing those rates have expired or will soon expire). It appears that no retroactive penalties, *i.e.,* the assessment of fees, are presently available under the statute. Thus, Congress may wish to consider giving the Commission the authority to impose retrospective penalties. Congress may also wish to clarify whether any person may bring a complaint under section 11 alleging violations of section 9, and if so, what penalties or damages would be available to a successful complainant.

APPENDICES

APPENDIX I
NOI REVIEWS BY QUESTION

NOI General Description

The FMC's NOI was issued on January 22, 2001, with comments to be returned to the Commission by March 12, 2001. On March 7, 2001, a Notice of Extension of Time was issued which extended the comment date through March 22, 2001. The Commission asked thirty-five questions concerning the impact of OSRA on all sectors of the international ocean liner transportation industry. Several key areas are addressed in the NOI, including service contracting, the activities of carrier agreements, the impact of OSRA on OTIs, shippers' associations and other affected parties, and tariff accessibility and accuracy. Of the sixty-one responses that the Commission received, twenty-one came from individual carriers, eleven from freight forwarders and NVOCCs, ten from shippers and shippers' associations, eight from various industry groups, seven from discussion agreements, and four from carrier conferences. These comments have assisted the Commission's analysis and evaluation of the new Act's effects during its first two years in force, and have been incorporated in the present study. The following is a list of the commenters:

A.N. Deringer, Inc.
American International Freight Association & Transportation Intermediaries Association
American President Lines, Ltd.
Americana Carriers (Lykes Lines Limited, LLC and Mexican Line Limited, LLC)
Atlantic Container Line
Australia-New Zealand Direct Line
Australian Peak Shippers Association
Central America Discussion Agreement
Contship Containerlines Limited
COSCO North America, Inc.
Crowley Liner Services, Inc.
Dryvit Systems, Inc.
DuPont Co. (USA)
East Coast of South America Agreement/West Coast of South
America Discussion Agreement
Evergreen Marine Corp. (Taiwan) Ltd.
Gemini Shippers' Association, Inc.
Globe.Com Lines, LLC.
Hamburg Süd Group (Columbus Line, Inc., Crowley American
Transport, and Alianca Lines, Inc.)
Hanjin Shipping
Hapag-Lloyd Container Line
Hayleys Export Shipping Department

Hispaniola Discussion Agreement
Hyundai Merchant Marine Co., Ltd.
Importers Association of Australia
International Transportation Group of ATOFINA Chemicals, Inc.
International Brotherhood of Teamsters
Israel Trade Conference
Judy July
"K" Line America
LTD Shippers Association
M. G. Maher & Company, Inc.
Maersk Sealand
Mediterranean-North Pacific Coast Freight Conference
Middle East Indian Subcontinent Discussion Agreement
Mitsui OSK Lines (America), Inc.
National Customs Brokers & Forwarders Association of America, Inc.
National Industrial Transportation League
National Unaffiliated Shippers' Association
New York/New Jersey Foreign Freight Forwarders and Brokers Association, Inc.
Nippon Yusen Kaisha Line
North Atlantic Alliance Association, Inc.
Orient Overseas Containerline Limited
Orion Marine Corp.
P&O Nedlloyd, Limited
Roadway Express, Inc.
Samuel Shapiro & Company, Inc.
South Florida NVOCC - NAOCC Association, Inc.
Toy Shippers Association, Inc.
Trans Service Line, NVOCC
Trans-Atlantic Conference Agreement
Transpacific Stabilization Agreement
Tucker Company
US Shippers Association
United States South Europe Conference
United States Australasia Agreement and US/Australasia Interconference and Carrier Discussion Agreement
Wallenius Wilhelmsen Lines AS
Westbound Transpacific Stabilization Agreement
Westwind International Inc., Westwind Maritime International Inc. and Westwind NVOCC Inc.
World Shipping Council
Yang Ming Line
Zim-American Israeli Shipping Co., Inc.

The following are summaries of the responses to the NOI. Unless specifically noted, comments attributed to "shippers" include comments of shippers' associations. The variation in detail provided in the summaries reflects in large measure the various degrees of explanation, illustration and argument provided in the comments themselves. Anyone interested in reviewing a particular respondent's actual submission should contact the Commission's Office of the Secretary. In several instances our questions called for differentiation and specificity in responses. When our summaries do not reflect such differentiation and specificity, it is because it was not provided by the respondents. It should also be noted that in a number of instances our summaries reflect inconsistencies in responses, for example, where a single respondent or group of respondents pointed to favorable impacts of certain types of agreements in one question and detrimental impacts of the same type of agreements in other questions.

Service Contracting

1. Has your company's use of service contracts expanded under OSRA? Why or why not? If so, please include the approximate increase (by volume of cargo shipped) of such use, by relevant trade lane.

Most carriers commented that OSRA has significantly expanded both the use of service contracts and the volume of cargo moving under service contracts. Common reasons given for the increase in service contracts were customer demand and preference for a contractual relationship that preserves the confidentiality of the terms of the contract without fear of competition undercutting contract deals, as well as the opportunity for shippers and carriers to build a working relationship or partnership. Carriers that were previously members of conferences reported the largest increase in usage of service contracts, as the number of conference service contracts drastically diminished or have been completely eliminated. All or most contracts are now executed by individual lines. However, independent, non-conference carriers reported that their use of service contracts had not significantly expanded, as they were using service contracts to meet their objectives prior to OSRA. Hamburg Süd Group ("Hamburg Süd"), while reporting an increase in service contracts, noted that overall volume had not changed significantly due to more small-volume contracts with minimum commitments of 25 TEUs or less.

Most shippers and shippers' associations reported that the number of contracts increased following OSRA. DuPont Co. (USA) ("DuPont") pointed out that OSRA has allowed for more freedom and flexibility in contracting. However, some shippers reported that OSRA's impact has been mixed regarding the overall volume of cargo moving under service contracts; *e.g.*, Gemini Shippers' Association ("Gemini") believes that cargo volumes have expanded dramatically, while the Toy Shippers Association, Inc. ("Toysa") advised that overall volumes have not increased.

The majority of OTIs/NVOCCs/freight forwarders and their associations reported an increase in the use of service contracts. The National Customs Brokers & Forwarders Association of America ("NCBFAA") and the New York/New Jersey Foreign Freight Forwarders and Brokers Association, Inc. ("NY/NJ Forwarder Group") pointed out that this increase is due to the dissolution of conferences and the rise of one-on-one contracting with individual carriers. Orion Marine Corp. ("Orion") explained that its use of service contracts has not expanded because it can obtain "ad hoc" terms of carriage under tariff rates that are more favorable than fixed contract provisions. Trans Service Line, an NVOCC, contended that the use of service contracts has increased due to market conditions rather than a result of OSRA. M. G. Maher & Company, Inc. ("Maher"), a licensed OTI and customs broker, stated that OSRA has not detracted from nor enhanced its business opportunities, but that it is "handicapped" without the ability to sign service contracts as a carrier.

2. Has OSRA changed the way you negotiate contracts? If so, in what ways (for example, shifting from conference contracts to individual contracts, or changes in the negotiating process itself)? If no, why not? Are your contracts being amended more frequently under OSRA? If so, why?

With the exception of two independent carriers, carriers and carrier agreements opined that OSRA has changed the way contracts are negotiated, noting that prior to OSRA many contracts were negotiated through a conference structure. They pointed out that now contracts are, for the most part, negotiated directly between a shipper and a carrier, allowing for "tailor-made solutions" to meet shipper requirements. Moreover, carriers and conferences noted that this flexibility and efficiency extends to rate and non-rate parts of the service contract. APL advised that there is now an increased customer demand for multi-trade and global service contracts. Further, many carriers reported a sizable increase in the number of contract amendments, while a few noted minimal or no changes to amendment volumes or changes only in certain trades. Hapag-Lloyd Container Line ("Hapag-Lloyd") added that through amendments the parties can address changing business requirements without fear of competitors finding out.

Shippers noted that they now are able to work more closely with individual carriers as opposed to conference members. Shippers also pointed out that, due to the confidentiality aspects of OSRA, carriers are more willing to customize contracts to suit individual shipper needs, allowing shippers to better meet their requirements. Most shippers stated that negotiations have become faster with carriers being more responsive. Toysa thought the negotiation process had become more complicated and time-consuming.

Most OTIs responded that OSRA has changed the way contracts are negotiated. As a result of the one-on-one negotiation process, contracting is more rapid and flexible. Samuel Shapiro & Company, Inc. ("Shapiro") also points out that carriers now are willing to sign contracts for smaller volume commitments.

3. Have the types of contracts your company signs (single trade, multi-trade, global, multi-shipper, multi-carrier) changed under OSRA? [Note: A *multi-trade* contract is one that covers multiple US trade lanes in one contract, but no foreign-to-foreign trades. A *global* contract is one that covers multiple trades, including foreign-to-foreign trades.]

Most carriers reported increases in the number of global and multi-trade contracts. While many reported only modest increases, APL indicated that global and multi-trade contracts together now represent 48 percent of its total service contract volume. A reason given for the increase was shippers' apparent preference to deal with selected global carriers to meet all of their requirements, which is seen as improving the bargaining power of the shipper while simplifying the negotiation process. Still other carriers advised that there has been no (or at least no significant) increase in these types of contracts. "K" Line America ("K Line") indicated that multi-carrier contracts are not popular because they are more cumbersome than individual contracts. K Line also stated that multi-shipper contracts, though increasing somewhat, still are not widely used. Other carriers also reported very few multi-carrier contracts.

___Many shippers noted that global contracts are more accessible when negotiating with an individual carrier as opposed to negotiating with a conference. OTIs pointed out that carriers are offering various incentives to be flexible in their contracts, allowing OTIs to expand their opportunities under OSRA. Also, NVOCCs believed that various types of contracting and negotiating options now are available to them since they no longer are restricted to dealing through the conference secretariat.

4. Has the content of your service contracts changed (for example, the inclusion of new types of clauses) under OSRA? If so, what are those changes? Why have they occurred?

Carriers agreed that under OSRA the content of service contracts has changed to fit the needs of both shippers and carriers. Carrier and carrier agreements commented that there has been an increase in unique and customized service contracts. The most significant changes include an increased demand for special clauses. For example, many service contracts now include confidentiality clauses, service commitment clauses, performance guarantees (which include penalty and liability clauses, space and equipment guarantee clauses), GRI clauses, and transit time guarantees. K Line stated that "[t]hese changes have occurred because shippers are seeking to protect their legal interests [by shifting liability to the carrier and/or increasing the limits of the carrier's liability]."

Most shippers agreed that rates were the primary focus of contracts prior to OSRA, and that service issues now have become more important. Shippers also noted that one of the developments in service contracts was the increase in carrier liability.

5. Have OSRA's service contracting provisions (for example, the end of public filing of rates and certain terms, the removal of conference authority to regulate members' contracts, allowing explicit confidentiality agreements in contracts) had any impact on your contract rates? Please explain, and include relevant illustrative examples where possible.

Most carriers agreed that market conditions of supply and demand continue to be the most critical factor in determining rates. Although most felt that OSRA has had little to do with rates, some carriers added that identifying market-rate levels has become increasingly more difficult, which has given the shipper an edge in obtaining lower rates. Several carriers noted that OSRA's service contract provisions have made rates more competitive, with a clear downward pressure on rate levels. Yang Ming Line ("Yang Ming") added that ending the public filing of contract rates has made its pricing policy more flexible and more attractive to its customers.

All shippers commented that OSRA's service contracting provisions have had an impact on contract rates. Some believed OSRA's service contracting provisions have created a more competitive and more market-based environment with lower rates. They emphasized that one-on-one relationships between a carrier and a shipper have improved, particularly in previously conference-dominated trades. Others voiced the view that OSRA has not removed the carrier-collusive nature of the business, since carriers have antitrust immunity and engage in discussion agreements.

OTIs generally believed that OSRA has resulted in lower rates, creating competition among the carriers. However, Westwind International Inc., Westwind Maritime International Inc., and Westwind NVOCC Inc. ("Westwind International") pointed out that individual shippers often receive rates from carriers much lower than what NVOCCs can negotiate, even when the latter guarantee significantly more TEUs per annum. NCBFAA contended that although OSRA initially had an impact on rates, it is too soon to determine the true extent of the effects.

6. Are there any service contract issues that you believe are likely to become of increasing importance in the next 5 years? For example, issues concerning space guarantees, service commitments, standardization of contract formats, or liability clauses. Please explain.

Most carriers reported that contracts are now fairly uniform, with clauses added as necessary to meet specific needs of the shipper or the carrier. The contract issues that carriers believe to be increasingly important include: space guarantees; electronic information (e-business) requirements and resulting protective clauses; liability clauses; service commitments; further globalization of service contracts; rate structures, *i.e.*, "all-in rates" versus port-to-port rates plus surcharges; and contract clauses dealing with the application of GRIs. Carriers most frequently cited liability clauses, with one carrier noting that increasing carrier liability can have negative effects on carriers that lack adequate insurance coverage. Carrier comments also mentioned the increasing importance of "tailor-made" contracts. Crowley Liner Services, Inc. ("Crowley"), noted the importance of incorporating ocean shipping services into supply-chain logistics packages.

The most common issues reported by shippers were: more flexibility in contracts in regard to pricing and service; contract volume commitments (with shortfall penalties being cited as counter-productive to contract flexibility); and penalties for service incidents along with rewards for good service. OTIs recognized the increasing importance of commitment to service.

7. *<u>For shippers, shippers' associations, and NVOCCs</u>*: For the following categories of contract terms, please indicate the type of change, if any, that has occurred in the contracts you have signed since the implementation of OSRA (May 1, 1999).

Respondents were asked to indicate their degree of satisfaction with the following contract terms: space guarantees, service commitments, liquidated damages, breach of contract, range of commodities included, and level of rates and charges. Each term was to be characterized as "less satisfactory," "unchanged," or "more satisfactory" since OSRA. The following chart reflects the percentage of respondents selecting the degree of satisfaction for each contract term listed -- 13 parties responded to this question.

Contract Term	Less Satisfactory	Unchanged	More Satisfactory
Space guarantees	23%	54%	23%
Service commitments	8%	62%	31%
Liquidated damage terms	0%	54%	46%
Breach of contract terms	0%	67%	33%
Range of commodities included	0%	54%	46%
Level of Rates and Charges	23%	54%	23%

For each of the identified contract terms, a majority of respondents stated no change since the implementation of OSRA. Nevertheless, 46 percent of respondents indicated that they were more satisfied with the changes they have experienced in liquidated damage terms and the range of commodities included in service contracts, while approximately one-third indicated more satisfaction with contract terms relating to service commitments and breach of contract. Responses pertaining to space guarantees and level of rates and charges were split, with 54 percent citing no change, 23 percent less satisfied, and the remaining 23 percent more satisfied.

8. *For VOCCs and NVOCCs*: In their role as shippers, have NVOCCs been able to use (a) the initial contract negotiation process, and/or (b) the ability to subsequently amend contract rates (*e.g.*, use "bullet" rates), to benefit from OSRA's contracting reforms? Please explain your response (referring to specific trade lanes where relevant).

A number of VOCCs reported that NVOCCs have benefitted from OSRA's contracting reforms as evidenced by the increase in the number of service contracts signed with NVOCCs and subsequent contract amendments. Reasons given for the increase in NVOCC contracts and amendments include the ability to deal with selected global carriers to meet all their transportation requirements, and the freedom to avoid contacting individual conferences covering different trade lanes. K Line reasoned that NVOCCs, more than beneficial cargo owners, need to frequently adjust their contracts to meet market conditions. Several carriers reported that NVOCCs are treated the same as beneficial cargo owners, with an identical contracting process for each. Wallenius Wilhelmsen Lines AS ("Wallenius") added that NVOCCs benefit because they are able to re-market carrier rates and services without significant capital investments.

Most VOCCs also noted the substantial use of "bullet" rates by NVOCCs. Bullet rates are specific commodity rates that are added to a service contract after its original effective date, thereby effectively providing the flexibility of tariff rates and the confidentiality of service contracts. NVOCCs acknowledged that they have benefitted from the ability to obtain "bullet" rates by amending contracts to accommodate specific needs.

Contract Confidentiality

9. What significant effects, if any has OSRA's elimination of public filing of contract rates and services had on the way your company does business? Please explain.

Many carrier comments cited improved carrier/shipper relationships and freedom to negotiate as a positive OSRA effect. Further, without "me-too" clauses, carriers advised that they are now negotiating more individualized and efficiency-oriented contracts. Instead of monitoring filed rates, carriers advised that they now use more market-based approaches for rates. Carriers reported that they now are better able to accommodate niche shippers, and rates can be tailored to the best interests of the carrier and shipper alike. Several carriers mentioned that improved one-on-one relationships between the carrier and shipper encourage long-term partnerships. Carriers also reported that they now dedicate more resources to statistical information and to analyzing market conditions. One carrier added that it now pays closer attention to fixed and variable costs.

Most shippers noted that OSRA has made contracting easier because they can negotiate individual contracts. Shippers added that OSRA has placed greater reliance on the marketplace, which in turn has forced them to improve their market intelligence skills to remain competitive. Most NVOCCs noted that OSRA's elimination of public filing of contract rates and services facilitated negotiation of contracts with increased volumes. NCBFAA pointed out that the confidentiality that the parties to a contract desire may not be achievable because of the reporting requirements of Customs and Census ". . . as well as the reporting obligations that the carriers may 'voluntarily' take on pursuant to their 'voluntary guidelines'."

10. In the absence of public filing of service contract rates and terms, has your company been able to adequately identify the range of ocean shipping rates relevant to your business from alternative information sources? If so, what sources? If not, what has been the effect on your business?

Many carriers pointed out that the absence of public filing has made identifying the range of ocean shipping rates much more difficult and uncertain. Several carriers also acknowledged that in speaking to a variety of customers and monitoring market conditions, they are able to adequately identify ranges of rates. They also noted that with the lack of public filing, and the resultant uncertainty of rates, the focus in contracting has shifted from rates to service issues, requiring greater emphasis on the contract negotiation process. A few carriers stated that the lack of public filing contributed to the deterioration of rates in some trades. MOL noted that it can benchmark requested rates against already existing rates of similar moves within its organization. P&O Nedlloyd's view was that the inability to benchmark rates has not resulted in any significant advantage or disadvantage for carriers or shippers.

Shippers noted that they use a combination of resources in negotiating their rates: NVOCCs, transshipment carriers, direct carriers, trade journals, shipper publications, and Internet sites. NVOCCs' responses varied, with some reporting no problem identifying rates, and others noting the need to make more phone calls. Several other NVOCCs reported that they are unable to identify rates.

11. Has your company sought to negotiate specific confidentiality measures in the contracts you have signed since OSRA took effect? If so, were you able to negotiate what you consider adequate confidentiality measures (including pre-negotiation confidentiality agreements, if sought)? Please explain.

Most of the responding carriers indicated that they include a standard confidentiality clause in their service contracts. Of the carrier respondents that do not, the vast majority stated that they have successfully negotiated confidentiality measures that were agreeable to both the shipper and carrier. Some carriers noted that often the confidentiality measures in their contracts are initiated and encouraged by their customers. COSCO explained that early on in the life of OSRA, shipper-proposed confidentiality clauses were one-sided, but that it had been able to negotiate reciprocal confidentiality commitments in all those cases.

Shippers generally reported that confidentiality agreements are adequate. Some stated that the standard confidentiality agreement is sufficient, thereby making the pre-negotiation confidentiality agreement unnecessary. Others have made it a standard practice to have all contracts covered by a pre-negotiation confidentiality agreement(s). NVOCCs generally reported that they have not sought to negotiate specific confidentiality measures in their contracts since OSRA took effect.

12. Please estimate the percentage of the service contracts that your company signs that (a) include a confidentiality clause or (b) are covered by a pre-negotiation confidentiality agreement. Was the inclusion of such clauses or pre-negotiation agreement, if any, generally made at your company's request or by the other party?

Carrier use of service contract confidentiality clauses was on opposite sides of the spectrum, with eleven carriers indicating that most or all of their contracts contained confidentiality clauses, while seven carriers indicated very little usage of such clauses (less than 13 percent of contracts). A final carrier indicated that 20-25 percent of its contracts contained confidentiality clauses.

While most carriers said that their contracts were not subject to a pre-negotiation confidentiality agreement, other carriers noted: (1) that they do use such agreements in all or a portion of their contracts; (2) that such agreements were not practical and they had received few requests for them; (3) that the use of such agreements is diminishing; and (4) that they enter into a number of pre-negotiation agreements with larger shippers.

Shipper responses to this question were received from US Shippers Association ("USSA"), Toysa, Gemini, DuPont, and International Transportation Group of ATOFINA Chemicals, Inc. ("ATOFINA Chemicals"). Both USSA and ATOFINA Chemicals reported that while all of their contracts include confidentiality clauses, neither used pre-negotiation agreements. Although Toysa, Gemini, and DuPont did not (in their respective responses) provide a separate percentage for (a) the degree to which their contracts contain confidentiality clauses and (b) the degree to which their contracts are covered by a pre-negotiation agreement, they each reported that such clauses and agreements were used "100%" of the time.

13. In your company's experience to date, has breach of service contract confidentiality been a problem? If so, please explain how you dealt with such breaches.

Breach of service contract confidentiality has not been a problem for the vast majority of all respondents. K Line suspected that breaches of confidentiality do occur from time to time, but opined that it is very difficult to verify those instances. APL noted that it takes steps, as a preventative measure in some situations, to reduce the number of participants in negotiations. Two carriers emphasized that by using one carrier's offer as leverage in rate "shopping," customers may undermine contract confidentiality.

Agreement Activity/Voluntary Guidelines

14. In your company's experience, have the rate and/or surcharge activities of discussion agreements (or conferences), under OSRA, generated either significant problems or benefits for your business? Please explain your response and indicate the trade lane(s) to which it applies.

Carriers largely agreed that discussion agreements have provided benefits including: the exchange of information, a common or unified approach on commercial and regulatory issues, and a forum for discussion of rates and trade conditions. Carrier comments maintained that discussion agreements tend to stabilize the commercial trade environment, while noting that supply and demand for cargo still control the market. They further indicated that voluntary service contract guidelines help make the negotiation of rates easier, and provide benchmark rates that can be tailored in order to accommodate their customer relationships. The World Shipping Council ("WSC") submitted that discussion agreements reduce commercial uncertainty and promote further capital investment. It stated that the ultimate benefits to the shipping public are increased rate and service stability, along with continued adequate levels of investment in vessels, equipment, facilities, and communication systems to meet the rapidly growing demand for ocean carriage and related logistics services. P&O Nedlloyd and other carriers noted that there is a greater willingness for carriers to participate in discussion agreements because they are voluntary and non-binding. K Line stated that discussion agreements have had little impact on its business, while Wallenius noted that these arrangements provide a useful buffer against destructive rate competition.

A number of shippers and OTIs voiced concerns that discussion agreements have presented problems to their businesses. Representative comments claimed that discussion agreements:

- Undermine the development of one-on-one relationships between carriers and shippers.

- Obstruct the free market principle of supply and demand and have become very hostile to exporters.

- Limit or eliminate competition on price and capacity by combining conference members and independent operators in any particular trade.

- Are used only to increase freight rates, limit capacity, and create obstacles to multi-year contracts.

- Stifle free-market pricing and contract negotiations, contrary to the spirit of OSRA and confidential contracting.

Many shippers and OTIs were particularly concerned over the actions of the TSA. LTD Shippers Association ("LTD Shippers") stated that the level of price and surcharge increases in the transpacific eastbound trade was due to TSA, which used strong shipping volumes to obscure real price and contract initiatives by all contracting parties.

15. In your experience, has liner shipping consolidation via acquisition, merger, or the formation of operational alliances affected prices and/or service? If so, in what ways and resulting in what benefits or problems?

Carriers generally commented that these consolidations provide increased and improved services at lower costs and better asset management. Some carriers noted that consolidations have resulted in an escalation in global contracting, and allow carriers to achieve a global presence with limited service through alliances. Many shippers, NVOCCs, freight forwarders, and related groups were concerned that consolidation has, in fact, resulted in overall reduced service levels.

Contrary to WSC's assertion that vessel-sharing agreements and space charters improve service to shippers, several commenters reported service failures due to the inability of carriers to guarantee and control space under space-chartering/vessel-sharing arrangements. In fact, NCBFAA, in response to question 4 concerning changes to the content of service contracts, noted that they have seen clauses in contracts that remove carrier space guarantees when space is chartered on a vessel under the control of another carrier. Orion commented that service levels are at their lowest due to the concentration of carriers.

Less clear, however, is the commenters' assessment of the overall effect of consolidations on rates. While Zim-American Israeli Shipping Co., Inc. ("Zim") noted that the improved services and lower operating costs afforded by consolidations appear to result in lower prices to shippers, other carriers believed that rates and prices have not been affected. P&O Nedlloyd noted that consolidations, mergers, and alliances are more beneficial from an expense standpoint than a revenue generation standpoint. The WSC contended that carrier consolidation has not generated the high industry concentration ratios that could lead to negative effects on rates and service, and that global alliances appear to have offset some of the pressure to consolidate. Orion claimed that "mega carriers are most abusive, insensitive and generally inaccessible to small clients." Shapiro, on the other hand, noted that consolidation has brought prices down so low in many cases that carriers cannot afford to provide the service that the marketplace demands. Toysa offered yet another view, stating that consolidation has had no effect on prices. ATOFINA Chemicals observed that initially with carrier consolidations, freight rates go down in an effort to gain market share, but once established, move back up.

DuPont commented that "[g]enerally alliances and mergers result in problems early on as they try to merge different organizations, but long term we believe we will see stronger carriers. Operational alliances generally result in quicker improved services. The big question is whether long term these will lead to monopolistic behaviour."

16. (A) *For VOCCs*: Have (a) discussion agreements, (b) global alliances, and (c) space/sharing agreements led to more efficient use of carrier assets? Produced other benefits? Any problems? Please explain for each category.

Carriers agreed that discussion agreements are beneficial to their operations. WSC commented that the information exchange from discussion agreements "is an important agreement activity that helps member lines improve business planning, encourage better capacity utilization, and develop rational pricing policies as well as strengthening business confidence." Wallenius pointed out that such agreements can assist carriers in making decisions about commercial policy and investment in trade infrastructure. Hamburg Süd noted that "discussion agreements have led to a better understanding of pricing and surcharge ranges, market conditions and port regulations at non-U.S. ports."

There was also a consensus among carriers of the operational efficiencies associated with alliances and space/sharing agreements. P&O Nedlloyd believed that alliances and space chartering are extremely beneficial because they promote efficient use of assets and offer shippers better service from more carriers who are competing with one another. P&O Nedlloyd stated that it can offer 20 sailings per week to North America because of its participation in carrier alliances. Wallenius commented that global alliances can be an effective way to share costs of providing efficient and competitive service, while minimizing the investment risk of trade imbalances or downturns. It also noted that space-chartering/vessel-sharing agreements enable carriers to expand service without added vessel deployment, which also results in environmental benefits.

16. (B) *For shippers, shippers' associations, freight forwarders, and NVOCCs*: In your company's experience to date, what benefits or problems, if any, have (a) discussion agreements, (b) global alliances (c) space sharing/chartering agreements produced? Please explain your response for each category with as much specificity as possible.

Several shippers commented that discussion agreements are detrimental to service contract negotiations because carriers thereby exchange information, and diminish the confidentiality their service contracts call for. NCBFAA commented that it is difficult to see how shippers and OTIs could benefit from discussion agreements, and cited as an example the establishment of a $100 fee for handling paper Shipper Export Declarations that it believed would never have occurred if such arrangements did not exist. DuPont reported that discussion agreements have had no impact on its company, while Australian Peak Shippers Association commented that such discussion agreements are only used to increase freight rates and limit capacity. The National Industrial Transportation League ("NIT League") stated that shippers remain cautious over the operation of discussion agreements, and urged the Commission to continually monitor them.

Several shipper groups noted that global alliances and space-chartering/vessel-sharing agreements have improved services, created efficiencies, and lowered costs.

Shapiro added that VOCCs often have difficulty in preventing cargo from being "rolled" to subsequent vessel sailings because they are not the vessel operator or their space allocation has been met.

17. How has the use of OSRA's authority for VOCCs to agree upon voluntary service contract guidelines affected your company's business, if at all? Please explain.

Carriers generally submitted that voluntary guidelines were not restrictive to individual carriers and that they help promote market stability and avoid destructive rate competition. Rather than being used as a rate-setting mechanism, APL asserted that voluntary guidelines are more relevant to market structure because they may serve to dampen market volatility. Many carriers reported that the guidelines have been useful in establishing benchmark rates and other terms that the parties may use in contract negotiations. MOL remarked that negotiations within a framework created by voluntary guidelines make it less likely that either a carrier or shipper will insist upon or agree to service contract terms that are seriously out of line with market conditions. TSA added that its discussion agreement cannot and does not alter the basic supply and demand factors prevailing in the market, noting that benchmarks reflect the conditions of the market. Conferences and discussion agreements generally reported that there appears to be significant deviation from guidelines and that they are unaware of shipper complaints involving voluntary service contract guidelines. Australia-New Zealand Direct Line ("ANZDL") believed that allowing lines to enter into independent confidential contracts that may vary considerably from the voluntary guidelines has put increased bargaining power into the hands of their customers, and enables each carrier to make decisions based on its own business requirements as opposed to a conference requirement. ANZDL stated that OSRA's provision for "voluntary guidelines" has resulted in a significant decline in its revenues since May 1999. Crowley stated that, ". . . the ability of carriers to adopt voluntary service contract guidelines has helped somewhat in avoiding disruptive and destabilizing rate and service offerings. Because they are voluntary and compliance cannot be monitored, however, their impact on any particular service contract is doubtful."

While NIT League submitted that it has not received any complaints from its members that a discussion agreement member has refused to negotiate on service contract terms, some shippers are very concerned that voluntary guidelines are not truly voluntary and may interfere with individual carriers' pricing and negotiating behavior. The South Florida NVOCC - NAOCC Association, Inc. ("South Florida Association") noted that its members do not believe that voluntary guidelines have been significantly better than the prior system because carriers traditionally have either "cheated" on their conference obligations or abided by them, whichever was in their interest. NY/NJ Forwarder Group claimed that its membership has been subject to discriminatory actions by discussion agreements before and after OSRA, citing specific examples involving guidelines.[1]

Shippers' Associations, Intermediaries and Port Trucking Issues

18. How has OSRA affected shippers' associations (if at all) with respect to membership growth, consolidation among associations, and the development of new activities or membership services?

LTD Shippers, USSA, Gemini, the National Unaffiliated Shippers' Association, and the North Atlantic Alliance Association, Inc. ("NAAA") said OSRA stimulated interest or growth in membership. Toysa, however, indicated that OSRA slowed membership growth of shippers' associations due to carriers' soliciting individual association members to sign their own service contracts.

All three OTI respondents to this question believed that OSRA encouraged the development of shippers' associations. They claimed generally that to remain competitive with larger shippers, small and medium-sized companies must pool cargo to increase their negotiating power.

Contship Containerlines Limited ("Contship") and the Americana Carriers (Lykes Lines Limited, LLC and Mexican Line Limited, LLC) noticed an increased growth in the number of shippers' associations as well as increased membership within existing associations. Nippon Yusen Kaisha Line ("NYK") and Crowley indicated a growth in membership in shippers' associations. These carriers believe shippers' associations allow members to have greater bargaining power and thereby obtain better deals. Hamburg Süd, Hanjin Shipping ("Hanjin") and K Line believe OSRA did not affect or had only a minimal effect on shippers' associations. Conference respondents also indicated that OSRA had minimal or no adverse impact on shippers' associations. Many carriers noted that OSRA did not change the manner in which they deal with shippers' associations.

19. *<u>For shippers' associations and NVOCCs</u>*: In the period since OSRA took effect (since May 1, 1999) has your business grown, declined, or remained largely unchanged? If it has grown or declined, please indicate the percentage change in volumes shipped. Has OSRA contributed to that change? Please explain.

Gemini reported that membership and member business grew and diversified "since the enactment of OSRA." LTD Shippers credited growth to an increase in contracts with individual

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[1] According to the NY/NJ Forwarder Group, several discussion agreements in South America established NVOCC benchmark rates in voluntary guidelines that were adhered to for most of the shipping season. It reported that NVOCCs in the transpacific trades were subject to TSA-agreed to voluntary price and service conditions and that TSA indirectly implemented surcharges applicable to the whole shipping community active in the transpacific inbound trades. With regard to the transatlantic, it stated that an equipment repositioning surcharge that was imposed by TACA and non-conference lines on or about the same day in October 1999, has been rolled into the base ocean freight rates offered to shippers.

lines rather than contracts with a conference. Shapiro and NCBFAA did credit OSRA with fostering a competitive environment which contributed to their firms' growth, brought about by activities such as one-on-one contract negotiations. Dryvit Systems, Inc. ("Dryvit"), USSA and NAAA mentioned no overall change in their level of business.

Trans-Service Line, Orion, and Maher responded that their business grew, though not as a result of OSRA. Rather, in their view, market conditions, currency valuation, and internal company policies such as the focus on developing value-added services were the major factors of this growth.

On the other hand, Globe.Com Lines, LLC ("Globe.Com") and Westwind International indicated that their NVOCC business under-performed, while their firms' other business sectors, such as brokerage and air freight forwarding, grew.

20. *For NVOCCs*: What effects, if any, have the statutory provisions of OSRA, and the commercial environment in which they apply, had on your operations as an NVOCC (including your offering of any value-added services) and/or your clients? Please support your response with as much detail as possible and explain which provisions (or factors) have had the most significant impact on your operations.

Westwind International and Roadway Express, Inc., found more negative impact than positive with the implementation of OSRA. NCBFAA, NAAA, South Florida Association, and NY/NJ Forwarder Group stated that the negative impact is due primarily to two statutory provisions: the licensing requirement for NVOCCs and the continuation of a public tariff requirement. In addition, NAAA, NCBFAA, and South Florida Association saw OSRA as increasing the regulatory burden of NVOCCs since NVOCCs in the US now are required to be licensed in addition to being bonded. They also believe NVOCCs are disadvantaged in competition with VOCCs because they cannot sign confidential service contracts with their shipper customers, while VOCCs can conduct virtually all of their business under confidential service contracts. Orion, A.N. Deringer, Inc. ("Deringer"), Maher, and the American International Freight Association & Transportation Intermediaries Association ("TIA") viewed the requirement for publicly available tariffs as unnecessary, and the cost to maintain tariff systems as burdensome and without benefit to the shipping public. NAAA and NY/NJ Forwarder Group asked the Commission to examine the implementation of the Interstate Commerce Commission Termination Act of 1995 and to determine whether flexibility in tariff enforcement and an exemption for NVOCCs could be employed under OSRA.

NY/NJ Forwarder Group, TIA, NCBFAA, and the South Florida Association noted that the tariff publication and licensing requirements appear to have resulted in an increased level of enforcement activity directed at NVOCCs by the Commission. They were concerned that more significant market-distorting practices, such as carrier behavior as a result of antitrust immunity, are not being investigated more by the Commission. Furthermore, TIA, NY/NJ Forwarder Group and NAAA stated that the air freight industry does not have a tariff filing/publication requirement, which consequently offers more flexibility in meeting customer needs.

21. *For VOCCs*: For the last calendar year, approximately what percentage (by TEUs carried) of your total cargo carried in the US trades (total import and export) was NVOCC cargo? Approximately what percentage of that NVOCC cargo was full-container-load cargo (offered but not consolidated by an NVOCC), and what percentage was less-than-container-load cargo that the NVOCC had consolidated? To the extent that the answers may vary significantly by trade lane, please explain.

The percentages varied by trade lane for many carriers. Fourteen of the 16 carrier respondents provided specific percentages for either certain trades or overall movements. The overall movement percentages with two exceptions were at or below 35 percent. Most of the percentages were in the 15-35 percent range; while one major carrier was as low as 7 percent, two other operators were well over 50 percent. For those carriers who responded, the overwhelming majority of NVOCC cargo was full-container-load cargo rather than less-than-container-load cargo.

22. *For VOCCs*: Has there been a change (increase or decrease) in the percentage of NVOCC cargo carried by your line since OSRA took effect, as compared with pre-OSRA NVOCC carriage? If so, what was the change and was it a result of OSRA's implementation or other factors? Please explain.

Most carrier respondents reported an increase in NVOCC cargo carried since OSRA became effective. Zim and Wallenius attributed the increase to the ability of NVOCCs to negotiate one-to-one confidential service contracts, including multi-trade and global contracts. APL, Zim and Hanjin believed that their entry or expansion into new markets or internal marketing changes, rather than OSRA, explained the increases.

Yang Ming stated that it lost NVOCC cargo to previous conference members because of service contract confidentiality, *i.e.*, because agreement members now tend to offer confidential, individual service contracts (subject to confidentiality provisions) rather than conference service contracts, there is less opportunity to collectively share shipper account information and/or participate in joint/conference service contracts. Evergreen, Hamburg Süd, Orient Overseas Container Line Limited ("OOCL"), Contship, and Crowley noted that there was no significant change in their NVOCC cargo after OSRA came into effect.

23. What impact, if any, has the implementation of OSRA had on the port trucking industry?

The vast majority of respondents did not answer this question. Of those who did, several respondents believe that there was no impact, while others voiced their uncertainty on the matter. The Teamsters contended that OSRA negatively affected the port trucking industry. Specifically, the Teamsters alleged that discussion agreements and voluntary guidelines have had a negative impact on truckers' salaries. A major concern raised by the Teamsters is port drivers' lack of leverage in dealing with carriers who have antitrust immunity. The Teamsters asked the Commission to conduct a comprehensive investigation into carrier rate-setting practices under the discussion agreement umbrella, with the goal of leveling the playing field for port drivers and the inland transport sector of the industry.

Tariff Use, Access, and Accuracy

24. In the last 6 months, has your company tried to access carrier (VOCC and/or NVOCC) tariffs, or MTO schedules? If so, which kind (VOCC, NVOCC, or MTO), for what purposes, and what was your experience? If not, why not?

Almost all carriers reported accessing carrier tariffs in the last six months to check rates, rules, and accessorial charges. Access to VOCC tariffs was more frequent than access to NVOCC tariffs. APL and Hamburg Süd noted the limited need to access other carriers' tariffs because of the amount of cargo moving under service contracts. Hapag-Lloyd reported that it had not accessed carrier tariffs in the last six months because tariffs are not relevant to its decision-making. Crowley, Evergreen, MOL, OOCL, Zim and NYK stated that access to tariffs was considered generally satisfactory. Crowley and NYK reported that access to NVOCC tariffs was somewhat less satisfactory. P&O Nedlloyd and Maersk Sealand stated that successful rate inquiries often require research by a relatively knowledgeable staff member.

ATOFINA Chemicals and DuPont reported that they had not accessed carrier tariffs, but had instead requested rates and rate-related tariff information directly from the carrier. ATOFINA Chemicals, however, noted that carriers have not provided requested assistance on rate-related information "that may be hidden in their tariffs." LTD Shippers reported that it was able to readily and easily access VOCC web-site tariffs, and that those sites are more informative than information available in "pre-OSRA" and "pre-Internet days." NAAA reported that it, as well as its NVOCC members, accessed carrier tariffs on an almost daily basis to obtain surcharges, accessorial charges, and other provisions pertaining to the rates in the service contracts. It reported that typically the required information was published where expected in the tariff. USSA reported accessing both VOCC and NVOCC tariffs and MTO schedules to look for general market information and to gain an understanding of the tariffs, but acknowledged spending little time on the published tariff data. Dryvit indicated that Internet access to carrier tariffs is complicated and cumbersome for the casual user and rules are difficult to find.

OTIs had varied responses to this question. Several OTIs reported accessing tariffs to obtain inland rates. Shapiro noted that its ability to access inland rates increased its efficiency and competitiveness, allowing it to quote rates more quickly and more effectively. NCBFAA reported some of their members accessed VOCC tariffs without any particular difficulty. Deringer believes that the tariff publication requirement should be eliminated. It further advised that anyone requiring a rate quote can call a carrier directly to get a rate without going through access to a published tariff. Maher & Globe.Com found both the carrier and NVOCC tariffs of other carriers difficult to navigate, or had difficulty finding the bottom line because of all of the accessorial charges. The South Florida Association reported that their members found no utility in accessing tariffs because OSRA encouraged widespread use of service contracts, making tariffs meaningless. NY/NJ Forwarder Group commented that it had little-to-moderate difficulty in accessing either VOCC or NVOCC tariffs, but added that enforcement of carrier tariffs under

OSRA was inconsistent with OSRA's stated purpose of encouraging a more market-driven approach to international liner shipping. This association would like the FMC to modify substantially its publication requirements for common carrier tariffs and its enforcement actions targeted at the NVOCC community.

25. Are the VOCC and NVOCC tariffs in which you are interested, if any, currently accessible to you at what you consider a reasonable cost? Please explain and support with specific examples if possible.

The majority of carriers found that the tariffs in which they were interested were available either at a reasonable cost or for no access fee at all. Additionally, arrangements often were available with the tariff vendor to access other carriers' tariffs at a competitive market price. COSCO wished to see the wide range of access costs more standardized; Crowley generally found NVOCC tariffs more difficult to access than VOCC tariffs, and sometimes subject to excessive fees; Hanjin thought more carriers should charge for access to improve the technical problems in their tariff database management systems; and P&O Nedlloyd has limited interest in accessing tariff information in general, and especially avoids accessing tariffs where a fee is required. Israel Trade Conference commented that the cost of accessing some carrier tariffs was prohibitive. The Middle East Discussion Agreement said that its members had generally been able to access one another's tariffs as well as the rate levels in NVOCC tariffs at little or no cost. Crowley and Wallenius specifically commented that some NVOCC access fees were excessive, and NYK and P&O Nedlloyd stated that some companies assessed access charges that they were unwilling to pay.

ATOFINA Chemicals checked prices for certain tariffs and, based on three hours of access time per month, cited costs ranging from a low of $50 to a high of $164 per month. The shipper noted that the $50-per-month cost would have provided access only to a bill-of-lading tariff, and that one tariff service gave no indication of how to sign up for tariff access or what the costs would be. NAAA did not encounter any access fees for tariffs published by any of the carriers with which the association had service contracts. USSA found that many VOCC and NVOCC tariffs seemed to be accessible at no cost, but also found that some tariff sites charged prohibitively high rates for access to tariff data.

Globe.Com found that costs varied widely, from free to an initialization fee as high as $2,000 plus additional annual fees. Orion found carrier tariffs to be accessible with little or no cost, but generally of little value. Shapiro noted that certain carrier tariffs only required access to the Internet and that those costs were already counted as a cost of doing business. NY/NJ Forwarder Group commented that, despite the general accessibility of tariffs, some carrier and conference tariffs were not readily accessible even when the required access payment had been made. NCBFAA also said that a number of its members found the process very difficult and confusing, particularly in ascertaining bottom-line rates. However, according to NCBFAA, the cost and difficulty does not appear to be a significant issue; its members do not have a need to access tariffs.

26. Do VOCC and NVOCC tariffs that you have accessed in the last 6 months, if any, provide accurate and useful information? Please explain and support with specific examples if possible.

Many carriers stated that tariffs provided or appeared to provide accurate information. However, several carriers reported that tariffs were of limited use because the meaningful rate details were in confidential service contracts. Maersk Sealand found accuracy to be a function of the user-friendliness of the tariff site's retrieval system. Some carriers deemed tariff information useful, particularly for trade accessorial charges, surcharges, and the terms and conditions of carriage. Hanjin noted that the time and effort required to retrieve the information from an individual tariff limited the usefulness of that information, and Maersk Sealand noted that the more specific a tariff site's retrieval system was to the particular requirements of a particular carrier, the less user-friendly and useful the tariff information would be. The WSC commented that tariffs remained an important pricing tool for niche trades, reefer and seasonal commodities, benchmark rates, and spot market rates.

NAAA found that tariff information was generally accurate and at times useful, but frequently found that changes/additions made to the rules section of a tariff became effective on less than the required 30 days statutory notice and believed such non-compliance was typical under OSRA. USSA, acknowledging limited experience to judge the accuracy and usefulness of the tariffs it had accessed, found it difficult to be sure that certain movements were covered under the searched items. USSA also believed that a commodity index providing a list of products shipped would be helpful, and added that it also would be helpful if the tariff data showed the "bottom-line" rate first in the summary tables without requiring calculations on each value.

Orion stated it had no occasion to access tariff information. Deringer found tariffs to be too cumbersome to provide accurate and useful information in a service contract-driven market. Several OTIs found carrier tariffs to be extremely useful for determining inland rates and incorporating those rates in their quotes. Several other OTIs believed that they had been able to obtain reasonably accurate tariff information even though they did not believe tariff information to be relevant in the current environment.

27. Are the service contracts that your company has signed, if any, linked to tariffs? If so, please describe the nature of such links and explain briefly their purpose.

Carriers indicated that they linked all or most of their service contracts to their tariffs to simplify the contracts and shorten the contracting process by applying rules of general applicability from a single, readily accessible location where the standard terms and conditions can be specified in full detail. Carriers also indicated that they have linked their service contracts to their tariffs for trade accessorial charges so that the charges for volatile cost items, such as bunker fuel, can float with the market.

ATOFINA Chemicals said that its contracts were linked to carrier tariffs by the contract provision that subjected the contract to the "rules, terms, conditions, charges and surcharges set forth in carriers' governing tariffs and in effect at time of shipment." Several shippers' associations said that their contracts were linked to carrier tariffs for the governing rules; LTD

Shippers indicated that this link resulted in more flexible contract delivery terms and a greater range of prices for the individual members of the association. DuPont noted that, as an exception to general practice, a few of its time-volume rate arrangements were linked to carrier tariffs. USSA advised that it tried to minimize any linkage from its service contracts to the carrier tariffs because it viewed such links as a unilateral opportunity for the carrier to increase rates. The desire for bottom-line service contract freight charges was a major issue of this association, citing its members' need for quick, accurate rates in advance to quote competitively for their export sales. This association believed that links to tariffs complicated service contracts, caused documentation errors, increased the difficulty of auditing and correcting invoices, and added to the time and administrative burden on short-staffed shipper distribution departments.

28. *For shippers, shippers' associations, and NVOCCs*: If your service contracts are linked to VOCC tariffs, do you have adequate access to those tariffs? If not, please explain.

Shippers had a variety of comments on this question. Several shippers reported that Internet access to tariffs varied from carrier to carrier; some tariffs were complicated and cumbersome for the casual user and rules were difficult to find. NCBFAA commented that its members had adequate access but noted that it was difficult to tell in advance what effect any tariff might have on a given contract. Additionally, several shippers commented that they did not have adequate access to linked carrier tariffs because each of their carriers employed a different tariff publisher, and none of their carriers provided information or guidance about how to use the particular tariff publisher's services. NAAA indicated that its members sometimes were unable to easily verify references to the tariff item that provided for a GRI or increase in accessorials, such as equipment imbalance, bunker, and other surcharges. On the other hand, LTD Shippers reported having ready and easy access to linked tariffs.

Several OTIs noted that access to carrier tariffs linked to service contracts varied from carrier to carrier, but generally was adequate. Orion saw little need to access the tariff unless a dispute had arisen. Many OTIs reasoned that their service contracts were linked to carrier tariffs because tariffs were the basis for a service contract; therefore, they must incorporate the pertinent tariff and governing rules provisions. OTIs added that generally this practice might be beneficial when service contracts are linked to non-rate provisions, but consider it unfair and inappropriate when they are linked to rate or rate increases without the consent of the shipper. The South Florida Association thought that carriers were abusing antitrust immunity because they would not negotiate the removal of boilerplate language linking service contracts to tariffs. Orion observed that carriers are free to include provisions in a contract that are unique to the contract. Several OTIs reported that VOCCs can use their knowledge of NVOCC tariff levels to raise their service contract rates. This enables VOCCs to squeeze the profit margins of NVOCCs and unfairly raise the costs of services to the NVOCCs' customers. Shapiro stated that the service contracts it signed as a member of a national shippers' association were often linked to the carrier tariffs for the determination of the inland freight rates, both in the US and overseas. Several NVOCCs said that their service contracts were not linked to tariffs.

29. In general, have you found it (a) easier, (b) about the same, or (c) more difficult to access carrier (NVOCC and VOCC) tariffs, and MTO schedules since OSRA, than prior to OSRA? Please explain.

APL, Crowley and Hanjin responded that it was easier to access carrier tariffs since OSRA, with APL stating that access through the Internet was far superior to the historical use and expense of tariff watching services. Crowley found it easier to access VOCC tariffs, but more difficult to access NVOCC tariffs. Hanjin found access to tariffs over the Internet easier, but retrieval of tariff information more difficult due to the inadequacy of the database search tools at the web-sites.

Evergreen and Maersk Sealand found the ease of access to carrier tariffs to be about the same as before OSRA, although there was more variation from carrier to carrier. Four other carriers indicated that it was more difficult to access carrier tariffs since OSRA. Reasons mentioned for this difficulty were the need to consult more than one web-site and database system, various site navigation rules, and access fees.

Several shippers found it more difficult to access carrier tariffs since OSRA due to access fees and the need to be familiar with the web-sites of several different tariff publishers. Dryvit said that Internet access to carrier tariffs was very complicated and cumbersome for the casual user, and that rules were difficult to find. Several other shippers, however, reported finding it easier to access carrier tariffs since OSRA; LTD Shippers attributed this to the combination of the Commission's regulations implementing OSRA and the dynamics of the Internet. NAAA claimed that in most cases carrier tariffs continued in the pre-OSRA format, thereby facilitating the search for information in the tariff. However, this shipper also found that the information in carrier tariffs was becoming more ambiguous in the post-OSRA environment and that service contracts were less precise when referencing the governing tariff. As an example, NAAA contended that service contracts frequently referred to rules in the tariff that had been deleted and to tariffs that had expired and been replaced; carriers often failed to change the base ports in the respective tariff scope even months after they had discontinued a vessel-sharing agreement for the particular trade lane; and service contracts used new names for certain charges that were in fact the same charges that already were included in the contract. As a remedy, NAAA "believes that the Commission should recognize the congressional intent of OSRA, which is to shift from a highly regulated environment to a more market-driven shipping environment. Thus, the Association requests that the Commission consider relaxing the current regulatory requirements for common carrier tariff publication, especially as it applies to the NVOCC community."

Several OTIs found access to carrier tariffs to be about the same as before OSRA. Shapiro said that it was easier since many carriers provided ready access through the Internet. On the other hand, NY/NJ Forwarder Group indicated that its membership reported access to carrier tariffs to be generally more difficult because of the failure of the FMC to set any standard for accessibility. The association believed that the present situation did not provide for meaningful use of tariffs by the NVOCC community or the shipping public.

30. What impact, if any, has the implementation of OSRA had on potentially unfair foreign shipping-related practices (for example, pricing practices, business restrictions, foreign laws)? Are there any identifiable areas of continuing concern?

A large majority of commenters reported that OSRA has had no impact on potentially unfair shipping-related practices. However, P&O Nedlloyd noted that the deregulatory aspects of OSRA provide arguments against efforts by foreign governments (*e.g.*, the Shanghai Shipping Exchange) to increase regulatory activity. Wallenius added that the Commission's authority under the 1984 Act and OSRA regarding unfair shipping-related practices may deter foreign governments from adopting laws or regulations that might be viewed as detrimental to US commerce. Zim believes that it is beneficial for the FMC to have the authority to intervene when certain foreign governments establish controls, taxes, or regulations that are applied in a discriminatory manner against non-national carriers.

Crowley feared "that OSRA may foster unfair pricing (dumping) by foreign carriers, which in some cases have involved quoting through rates below their inland costs to secure service contracts." Further, Crowley added that it is concerned with certain government restrictions relating to US trade with Central America and Caribbean countries.

31. Has the growth of e-commerce offerings (including, but not limited to, on-line space auctions) created any regulatory concerns for your company? If so, please explain.

Most commenters reported no regulatory concerns with the growth of e-commerce. Although there was concern in the initial start-up stages of the e-commerce offerings regarding spot shipment pricing and services advertised on ad-hoc auction forums, this concern apparently has faded as the on-line space auctions have dwindled over the last year. Maersk Sealand participates in a broad range of e-commerce activities and Hyundai Merchant Marine Co., Ltd. ("Hyundai") performs Internet-based Electronic Data Interchange and cargo tracing, but regulatory issues have not emerged. Commenters indicated that several neutral and multi-carrier portals have been developed. The LTD Shippers noted that e-commerce activities should be reviewed to identify whether the FMC has authority over these transactions before problems arise.

32. In your experience, has the burden of regulation faced by your company been reduced, increased, or been unaffected by the implementation of OSRA? Please explain and give relevant examples where possible.

Most carriers reported that their regulatory burden had been reduced because of the abolition of the formal requirements associated with the ATFI System, notwithstanding that publishing tariff rates, rules, terms, and essential terms electronically has costs associated with it. Some carriers commented that the conference system used to negotiate and handle the administrative costs of service contracting, and that individual carriers now have taken over these functions with a resultant increase in the costs of administering service contracts.

Shippers generally reported that the regulatory burden that they now face has been relatively unaffected. USSA added, however, that the disappearance of the old conferences has had a positive impact on it.

Several NVOCCs indicated that they were dissatisfied with the burden of regulation under OSRA, primarily citing the cumbersome burden of tariff filing. These NVOCCs contended that the increased use of service contracts has resulted in an increased burden for them since they must file a myriad of rates and amendments in their tariffs relating to various billing rates and other amendments that they have negotiated with the carriers. Moreover, they noted that OSRA requires NVOCCs to become licensed, subjecting them to increased scrutiny by the FMC's Bureau of Enforcement. Additionally, NVOCCs believe that they are less competitive with ocean carriers because VOCCs conduct virtually all of their business under confidential service contracts, an option not available to NVOCCs under OSRA. However, NVOCCs believe that being able to enter into confidential service contracts as shippers with carriers has increased their bargaining flexibility.

33. Are there any OSRA-related regulatory issues that you believe should be considered for future Commission review?

The Commission received a wide range of responses to this question, addressing a variety of subjects both OSRA-related and not. Shippers predominantly reported that the anti-competitive effects of discussion agreements should be examined, while a majority of carriers reported that monitoring report guidelines should be streamlined. NVOCCs recommended that the Commission eliminate their tariff publication requirement.

Carriers reported that several Commission requirements should be reviewed and changed, the most important of which are the reporting requirements for discussion agreements. Carriers believed that these reporting requirements are time-consuming and arduous and that the reports should be simplified. Several carriers agreed that the FMC should streamline its procedures for the filing of operational type agreements, as filing creates unnecessary burdens and delays service enhancements in the trade. NYK commented that it would be beneficial to eliminate the requirement to publish service contract essential terms because the FMC receives the entire contract, and because the public does not appear to make use of this information. Another carrier suggested discontinuing confidential service contract filing altogether.

Many shippers contend that discussion agreements are used to increase freight rates and limit capacity, and therefore should be reviewed. ATOFINA Chemicals commented that flexibility, efficiency, and reliance on market forces are difficult to attain when carriers are agreeing on rate levels and service. Several other shippers commented that the Commission should review voluntary service contract guidelines to examine whether they are in fact "voluntary." A number of shippers commented that the FMC should standardize the publishing of tariffs to make them more accessible, accurate, and understandable. Additionally, some shippers believe that accessorials and surcharges are used as revenue enhancers and that the FMC should limit their use.

OTIs stressed that no useful purpose exists for publishing tariffs and that the FMC should eliminate its tariff publishing requirement. NCBFAA commented that the FMC should reconsider the issue of whether a forwarder can act as a shipper, contending that if a forwarder signs a service contract, it does so at the risk of prosecution. NCBFAA believes that this is unreasonable and inappropriate.

Several other miscellaneous OSRA regulatory issues were addressed in the NOI responses. In connection with these issues, commenters suggested that the FMC investigate the following:

- Foreign freight forwarders operating without licenses;
- Auction dot-coms and e-commerce to see how they fit within OSRA;
- Ocean freight forwarder compensation; and
- The compatibility of OSRA and other US shipping statutes with the laws of our trading partners.

34. Overall, has the *net* impact of OSRA on your company been positive or negative? (Circle the most accurate description.) Please explain briefly.

Although responses to this question vary widely, of the 38 responses received, the majority (22) believed that the effect of OSRA had so far been somewhat to very positive.

Nine companies reported that, overall, the net impact of OSRA has been very positive for their companies. Confidential service contracting was viewed favorably by carriers and shippers. As one shipper reported, it is much easier to work with an individual carrier as opposed to a group of carriers. Further, commenters noted that OSRA has improved the speed of the contract negotiation process, simplified the business process, allowed for tailor-made service contracts, increased flexibility in doing business, improved partnering between carriers and shippers, and allowed meaningful commitments to shippers.

Thirteen companies reported that the net impact of OSRA has been somewhat positive for them. These respondents generally listed the same reasons as those cited in the very positive category, *e.g.*, the ease in working with an individual carrier as opposed to a group of carriers, the ability to enter into long-term partnerships, and the ability to tailor contracts. Hanjin commented that OSRA has allowed unrelated shippers to get together and form an association that could potentially reap benefits similar to what large shippers enjoy. Evergreen reported the positive effects of the elimination of “me-too” clauses and the addition of confidentiality clauses in service contracts. NCBFAA agreed that OSRA has somewhat positive benefits for the industry, but added that the Commission needs to do more to help assure that small shippers and OTIs realize the benefits of the legislation.

Nine firms reported that the impact of OSRA on their firms has been neutral. Hyundai commented that it was just too soon to tell what, if any, impact OSRA has had on its firm. An NVOCC commented that OSRA does little to help NVOCCs. Hamburg Süd reported that the value of process streamlining has been offset by more elaborate contract “clausing,” and added that there is a lingering concern over OSRA’s negative impact on rates.

Three firms stated that the effects of OSRA are somewhat negative for them. Orion commented that OSRA does not serve the public interest, while another NVOCC reported that OSRA does not benefit NVOCCs. ATOFINA Chemicals stated that it had anticipated developing long-term relationships with carriers. It noted that carriers initially were receptive, but this willingness decreased as the conferences it dealt with regained their footing.

Three carriers and one shipper reported that the net impact of OSRA has been very negative for their firms. The carriers reported that freight rates have deteriorated between 30 to 35 percent over the last 2 years, with profound negative effects on revenue. Moreover, they contend that unreasonable market-rate erosion caused by excessive rate shopping and leveraging has had a significant impact on bottom-line results and the ability of carriers to invest in enhanced services. Toysa noted that the impact has been very negative for its operations because during the first year of OSRA, a $900 GRI and new surcharges were implemented by TSA. Toysa added its belief that as long as carriers have antitrust immunity, OSRA will not foster competition.

35. Are there any other ways in which the implementation of OSRA has affected your business or industry that have not been addressed in the preceding questions? If so, please explain.

Several representative comments follow:

- If less emphasis were placed on tariff publishing in the US as is customary in Europe, the tendency of many OTIs and NVOCCs to circumvent frivolous regulation would come to an end. (Shapiro)

- OSRA has been a very positive success in moving toward the September 2000 mission statement of the Federal Maritime Commission. We are concerned, however, that discussion agreements may erode the stated goal of the mission statement. In the global export arena, a competitive, market-driven, customer-focused transportation system will ensure that exporter’s needs are addressed fairly and responsibly. (USSA)

- OSRA allows carriers to negotiate inland agreements with railroads and truckers and the benefits have not been realized. (Hapag-Lloyd)

- We believe that in evaluating the effect and impact of OSRA, it is appropriate to evaluate the Commission’s role in implementing OSRA and in regulating the industry in the post OSRA environment. This means that the Commission should be engaged in self evaluation and that it should seek and obtain candid and meaningful reviews of its performance from those whom it regulates. We also believe that the Commission has done an admirable job in its implementation of OSRA and its attempts to examine the impact of OSRA. (P&O Nedlloyd)

- Discussion agreements and conferences have been able to maintain price fixing practices. This is completely against the growth and development of US exports through competitive and efficient ocean transportation by placing greater reliance on the marketplace. (ATOFINA Chemicals)

- OSRA has given our company increased flexibility in moving our ocean cargo. It has also enhanced the environment for shipper-carrier relationships, and in many cases, has strengthened those relationships. (DuPont)

APPENDIX II
SERVICE CONTRACT RANDOM SAMPLE AND SURVEY

With the new statute now in place for two years, the Commission sought to examine pricing and service behavior by conducting an independent survey of service contracts. Previously, the Commission surveyed a selected sample of service contracts on a preliminary basis for its Interim Status Report on OSRA in June 2000. For this study, the Commission conducted a more comprehensive examination from random samples of service contracts taken from its SERVCON electronic Service Contract Filing System.

Selection of Contracts

To conduct its survey, the Commission ran two computer-generated random samples of original service contracts on file in SERVCON from January through November 2000. Each sample was randomly selected and extracted from the overall sampling population. The Commission used only original service contracts for its sampling population in order to obtain complete contracts with all the necessary information. Each random sample contained 500 service contracts, so that 1,000 separate contracts were reviewed. The Commission surveyed unique or separate service contracts within each sample, *i.e.*, there was no duplication of service contracts between the two samples.

The raw survey data from the first sample were entered into a unique database for that sample and then analyzed. Survey data from the second sample were collected in an identical manner and entered into their own database for analysis. This approach allowed the Commission to compare the survey results of the two separate random samples. The comparison of survey results enables some inference as to how well the samples correspond to the overall sampling population of original service contracts.

Contract Information Evaluated

The questions or issues addressed in the survey focused on the topic areas of: general contract information; geographic scope; freight rates and surcharges; and special contract clauses. Under each topic area, contract data and information were collected in response to specific survey questions or issues. The data responses were analyzed for each question or issue to discern and assess any noticeable trends in service contracting since OSRA became effective.

General contract information included such data as the contract number, the identity of the carrier party (or parties), the contract duration, and the status of the shipper(s). The minimum quantity or volume commitment of each contract also was collected. All minimum commitments specified on a container basis were converted to TEUs as a standardized measure for analysis. Further, the survey addressed whether each contract was negotiated on an individual basis, or an agreement basis with multiple-carrier participants. The shipper signatory also was examined to determine whether the contract was entered into by a single-shipper entity, or by multiple non-affiliated shipper parties outside of an association. The survey classified shippers' associations and multiple affiliated shipper parties under one signatory as a single-shipper entity.

The origin and destination port ranges and areas within the geographic scope of each contract also were reviewed. The survey sought to discern each contract's trade direction to and from the US. In this regard, a determination was made whether cargo shipments were exclusively in the inbound (import) direction to the US, exclusively in the outbound (export) direction from the US, or in both the inbound and outbound directions. Based on the trade scope of each contract, the survey also divided the contracts into categories of either: (1) a single US trade or geographic area; (2) multiple US trades or areas; or (3) global. Contracts in the single trade category had scopes limited to one US trade or geographic area, such as between the US and Germany, or the US and Asia. Contracts with multiple scopes spanned two or more US trades or areas, such as between the US and South America, North Europe, and Asia, or US worldwide. Contracts categorized as global contained foreign-to-foreign trades within their scopes in addition to one or more US foreign trades, such as from South America, Mexico, and the US to North Europe. Further, the foreign origins and/or destinations to and from the US were identified for each contract by general geographic region, *e.g.*, Asia, South America, North Europe, the Mediterranean, *etc.*

A number of issues were examined relating to the rate provisions and terms of each contract. The survey addressed whether the contract rates were completely all-inclusive, defined as freight rates that include the base freight rate and all other applicable accessorial charges and surcharges. A related issue focused on whether the contract rate provisions were linked or referenced to a separate carrier or conference tariff. The contracts also were examined for the inclusion of a specific clause incorporating any published GRI, or any other provision for the general increase of freight rates connected to tariff rate increases.

Review of the last topic area, special service contract clauses, focused on specific provisions of OSRA along with other issues identified as important by shippers and carriers. Of particular significance, the survey addressed the subject of confidentiality between contracting parties, as established by OSRA. Confidentiality allows shippers and carriers to restrict the disclosure of unpublished service contract terms to third parties. The main focus of non-disclosure to third parties usually relates to the freight rates stated in the contract.

In addressing confidentiality, the survey confined its examination to the actual text of the contract and did not endeavor to search cross-references to the governing tariffs of carriers or conferences. While many contracts included generic tariff references, researching the identity and purpose of these general tariff references was not conducted in this particular survey. The textual content of the contract was reviewed for any form of confidentiality between the parties as follows: (1) a specific confidentiality clause; (2) a tariff reference in the service contract specifically denoting confidentiality; or (3) a plainly discernable designation of confidentiality (stamped or marked) within the contract. If none of these were found, the survey concluded that the contract made no mention of, or direct reference to, a confidentiality clause or provision. On a related issue, the survey addressed whether the contract contained a penalty provision for breach of confidentiality between the parties.

Special carrier performance standards or service guarantees also were reviewed. The survey identified special provisions such as those that specifically set delivery or transit times, which also may include quantitative measurements or ratings of the carrier's service along with penalties and/or rewards. Equipment guarantees also were noted in the survey.

Another subject of special interest concerned the carrier's liability for cargo loss or damage. Contracts were examined to see whether the carrier party was assuming a greater degree of liability for cargo loss or damage in addition to the standard bill-of-lading provisions. Other special survey issues focused on whether contracts included such provisions as an official rate rebate or volume incentive discount, and/or pledges by the carrier to match a lower tariff rate.

Results of Evaluations

Analysis of the data revealed a high degree of consistency between the two samples on most of the issues examined in the survey. The similarity between the two samples gives added confidence to the survey results. Both samples included service contracts from over 60 different individual carriers and 4 agreements.

The survey showed that since OSRA was implemented, individual service contracts negotiated on a one-on-one basis between carriers and shippers were clearly preferred over agreement contracts with multiple carrier participants. In both samples, individual service contracts between a single carrier and shipper entity accounted for the vast majority, nearly 100 percent. In addition, neither sample contained contracts signed by multiple, non-affiliated shippers outside of an association. On the issue of shipper status, the division of contracts between the various types of shippers was consistent between the two samples. Shippers identified as proprietary owners of the cargo entered into slightly over 70 percent of the contracts, while those identified as NVOCCs entered into roughly 25 percent. Shippers' associations were the smallest group with 2 percent of the contracts. These results generally are consistent with results previously reported in the Commission's June 2000 Interim Status Report on OSRA.

On other general issues, 90 percent of the contracts in both samples were for a duration of 11 months or less -- the overall range in both was from a few days to upwards of 2 years. In assessing cargo volume commitments, the survey showed that roughly 60 percent of the contracts in both samples had minimum commitments set at 100 TEUs or less. Between the two samples, the minimum commitments of contracts were set as low as 1 TEU, and as high as 68,000 TEUs.

The data collected on geographic scope were first analyzed in total, irrespective of geographic area. The survey revealed that in both samples, over 50 percent of the contracts were exclusively for the shipment of imports to the US, while upwards of 35 percent were exclusively for exports, and less than 10 percent included the shipment of imports and exports. In this regard, it should be noted that the survey only measured the number of contracts in each direction and not the amount of cargo shipped. Therefore, while the *number* of contracts favored a certain trade direction over the other by a certain proportion, no specific conclusions can be drawn regarding the *volume* of cargo moved in either trade direction. On the issue of trade scope, the survey indicated in both samples that the majority of total contracts was confined to a single US trade or geographic area, while roughly 10 percent spanned multiple US trades or areas, and about 8 percent were global.

Further analyses and observations were made with respect to the various geographic areas. Contracts which included Asian countries were the most common in both samples. Among these Asia contracts, the majority were exclusively for the shipment of imports in the US inbound direction. Additionally, the majority were strictly confined to the single geographic area of Asia.

The second most common geographic area in both samples was North Europe. Contracts with North European countries in the scopes were more evenly divided in terms of trade direction, and most were strictly confined to the single geographic area of North Europe.

Other geographic areas showed different results. Areas where the trade direction favored exclusive export contracts outbound from the US included Central America/Caribbean, Australia/New Zealand, South America, the Mediterranean, and the Middle East. Areas with a high proportion of global and multi-trade contracts included the Indian Subcontinent, the Middle East, and Australia/New Zealand.

With respect to freight rates and surcharges, both samples showed that less than 10 percent of the contract rates were completely all-inclusive, while over 90 percent of the contract rate provisions were linked to or referenced a separate carrier or conference tariff. In addition, upwards of 35 percent of contracts in both samples contained a GRI clause or other provisions for the general increase of freight rates connected to tariff rate increases.

On confidentiality, an examination of the text of each contract in both samples revealed that about 35 percent contained either a confidentiality clause, a tariff reference in the contract denoting confidentiality, or a designation of confidentiality (stamped or marked). This percentage may be understated in terms of the actual use of confidentiality between contracting parties, because the review did not expand into a check of cross-references to a specific carrier's or agreement's governing tariff rules that might contain such confidentiality provisions. Additionally, any informal agreements between the parties, or confidentiality agreed to outside the terms of the actual contract, were not counted. On a related issue, both samples showed that only an extremely small number of contracts, around 2 percent, included penalty provisions for breach of confidentiality. Further, the survey results indicated that, in all cases, less than 10 percent of the contracts contained any of the other special clauses examined (*e.g.,* special carrier performance standards, equipment guarantees, volume incentive discounts, *etc.*).

APPENDIX III
OCEAN TRANSPORTATION INTERMEDIARY STATISTICS

This Appendix presents more detailed information on the number of NVOCCs and ocean freight forwarders, their financial responsibility amounts, and the nature of bonding coverage.

Number of OTIs

Prior to the passage of OSRA there were 2,200 NVOCCs, both in and outside the US, 1,700 licensed ocean freight forwarders, and 400 firms that were both NVOCCs and ocean freight forwarders. Altogether, there were approximately 4,300 OTIs. A year after the effective date of OSRA, there were 4,175 OTIs: 1,900 NVOCCs (1,300 in the US and 600 outside the US); 1,750 licensed ocean freight forwarders; and 525 firms that were both NVOCCs and ocean freight forwarders. As of June 30, 2001, there were 4,043 OTIs: 1,878 NVOCCs (1,250 in the US and 628 outside the US); 1,347 ocean freight forwarders; and 818 firms that were both NVOCCs and ocean freight forwarders (see table below).

Ocean Transportation Intermediaries

	Pre-OSRA	One Year After OSRA	Two Years After OSRA
NVOCCs	2,200	1,900	1,878
Ocean Freight Forwarders	1,700	1,750	1,347
NVOCC/Ocean Freight Forwarder	400	525	818
Total	4,300	4,175	4,043

Source: Internal FMC data as of June 30, 2001.

Amounts of Financial Responsibility on File with the Commission

Financial protection for the public for damages arising from the transportation-related activities of NVOCCs has increased since OSRA became effective. Before OSRA, each NVOCC was required to provide proof of financial responsibility in the amount of $50,000, plus $10,000 for each unincorporated branch office in the US. The total amount of financial responsibility in place was approximately $130 million collectively for the 2,600 NVOCCs. Because of the increased amount of financial responsibility now required of NVOCCs (*i.e.*, $75,000 for US-based NVOCCs and $150,000 for non-licensed foreign NVOCCs), along with the requirement that $10,000 be posted for each unincorporated NVOCC branch office in the US, proof of financial responsibility for NVOCCs now collectively totals approximately $264 million.

Before OSRA went into effect, each ocean freight forwarder was required to provide proof of financial responsibility in the amount of $30,000, plus $10,000 for each unincorporated branch office. The total amount of surety bond financial responsibility for ocean freight forwarders at that time was approximately $85 million. After OSRA became effective, freight forwarders were required to provide $50,000, plus $10,000 for each unincorporated branch office. The ocean freight forwarder proof of financial responsibility now collectively totals approximately $129 million. In summary, total consumer protection against losses caused by NVOCCs and ocean freight forwarders is currently at $393 million.

Surety Companies

Although Commission regulations permit OTIs to use guaranties and insurance policies as proof of financial responsibility, all coverage currently is provided by surety bonds. At this time, approximately 67 surety companies underwrite OTI surety bonds. The top two companies underwrite approximately 49 percent of the total number of bonds; the top five approximately 72 percent; and the top 10 approximately 87 percent.

Currently, only one group surety bond is on file with the Commission. The Federation Internationale des Associations de Transitaires et Assimiles NVOCC bond covers approximately 160 members.