

## The Ocean Shipping Act of 1978: New Direction in Maritime Legislation

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**THE OCEAN SHIPPING ACT OF 1978:  
NEW DIRECTION IN  
MARITIME LEGISLATION**

The Ocean Shipping Act of 1978<sup>1</sup> was the Congressional response to the growing usurpation of maritime trade from U.S. shippers by the Soviet Union's merchant fleet.<sup>2</sup> Specifically, Congress desired to give the Federal Maritime Commission (hereinafter referred to as FMC) new power to regulate and check the rate-cutting practices of state-controlled carriers<sup>3</sup> operating as "cross-traders"<sup>4</sup> in U.S. ocean commerce. Although the legislation is not overtly directed at any one nation, the reports accompanying it are singularly concerned with the Soviet merchant fleet and its rapid ascension in world maritime commerce.<sup>5</sup> Since the enactment of the Ocean Shipping Act of 1978 (hereinafter referred to as the Act) almost one year ago, the issue has grown in importance to those concerned with the transportation aspect of import-export trade. New legislation is being devised to augment the existing statutory laws.<sup>6</sup> This topic is certain to be in the forefront of issues in international trade.

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1. The Ocean Shipping Act of 1978, Pub. L. 95-483, 92 Stat. 1607, codified as 46 U.S.C. § 817(c) (1978). As enacted, the Act amends the Shipping Act of 1916 by adding subsection (c) to § 817 and amending the definition of a controlled carrier found in 46 U.S.C. § 801(2) (1970). The legislative history of the bill is set forth in [1978] U.S. CODE CONG. AND ADM. NEWS. 3536.

2. See generally Expansion of the Soviet Merchant Marine Into U.S. Maritime Trades, Study of the Maritime Administration (August, 1977). Soviet penetration of American shipping amounted to .3 percent in 1971. By 1977, the share had increased to 3.4 percent, a tenfold increase. The Maritime Administration (MarAd) of the Department of Commerce estimates that by 1986 Soviet flag ships will account for six percent of U.S. liner cargo trade. See also S. REP. NO. 1260, 95th Cong., 2d Sess. 12 (1978).

3. See H.R. REP. NO. 1381, 95th Cong., 2d Sess. 3 (1978). [hereinafter cited as H.R. REP. NO. 1381]. Earlier attempts at regulating rates were unsuccessful for lack of compliance. For example, an agreement between the Chairman of the FMC and the Soviet Minister of the Merchant Marine, Timofey Guzhenko, known as the Leningrad Agreement (July 16, 1976) failed primarily because of the Soviet refusal to follow the letter and spirit of the agreement. The Soviets had agreed to charge rates not lower than those offered by other independent carriers and to begin negotiations toward joining the shipping conferences of the world maritime community.

4. See S. REP. NO. 1260, 95th Cong., 2d Sess. 1 (1978) [hereinafter cited as S. REP. NO. 1260]. "Cross-traders" are defined as carriers which operate in a specific trade and do not fly the flag of the importing or exporting nations in that trade. Such carriers are also commonly known as Third-Flag carriers.

5. See H.R. REP. NO. 1381 at 3 and S. REP. NO. 1260 at 12.

6. In progress is the Ocean Shipping Act of 1980, a 64 page bill which is a consolidation of three separate Senate bills (S. 1460, S.1462 and S.1463) introduced by Senator Daniel K. Inouye, Chairman of the Commerce Subcommittee on Merchant

The scope of this note will be an examination of the Act, its development and its effectiveness in countering the problem of rate-cutting by the Soviet Union.<sup>7</sup> The effectiveness of the Act is integrally connected to the efforts of the United States to even its balance of trade deficit through a vigorous export program. The irony of that effort lies in the fact that even as export trade grows, the goods are increasingly carried to their destinations by controlled carriers operating as cross-traders, at the forefront of which is the Soviet Union.<sup>8</sup>

#### THE SOVIET MERCHANT FLEET

Essential to an understanding of the Act is a brief examination of the entity it was designed to affect. In an historical context, the Soviet Union has been described as a continental power with only an ancillary link to the high seas and maritime power. Despite this characterization, the Soviets have, in the last twenty-five years, built one of the world's newest, largest and most successful merchant fleets.<sup>9</sup> It has been suggested that the impetus for this

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Marine and Tourism. If passed as is, the legislation will significantly modify the Shipping Act of 1916, a move endorsed in the conclusion of this Note. Specifically, the FMC will be tasked with quicker processing of complaints and a greater degree of independence from the Administration. For the shippers, two-tier rate discounts will be set up ranging from 13–18 percent. Notably, the bill abandons any attempt to obtain a fixed percentage of trade cargo for U.S. flag ships but, instead, relies on a "substantial use" standard.

7. See generally Simon, *More on the Law of Shipping Containers*, 6 J. MAR. L. & COM. 603 (1975). Although rate-cutting is especially pernicious to the highly unionized U.S. Merchant Marine, other problems do present serious challenges to world shipping. The problem of shipping over-capacity has emerged from the development and introduction of containerized cargo vessels with their increased carrying capacity over traditional break-bulk ships. More recently, the use of Roll on/Roll off (Ro-Ro) and Lighter Aboard Ship (LASH) vessels has introduced a new variable in the economic analysis of shipping cost efficiency. The other major concern in the shipping communities is the proposed UNCTAD Code of Conduct for Liner Conferences. U.N. Doc. TD/CODE/11/Rev.1 (1974), reprinted in INT'L LEGAL MATS. 912–51 (1974). The focus of this legislation is the protection and nurturing of Third world shipping interests. See also Capone, *United States Laws and the Convention on a Code of Conduct for Liner Conferences: A Catalogue of Conflicts and Dilemmas*, 15 VA. J. INT'L L. 249 (1975). A liner conference is a group of carriers serving an ocean trade route that have agreed to operate on the basis of a common tariff applicable to cargo rates and general terms and conditions of service.

8. *Id.* See also S. REP. NO. 1260.

9. See H.R. REP. NO. 1381 at 12–13. It has been estimated that 54 percent of the Soviet liner tonnage is engaged in international cross-trading, the majority of which is with the United States. As of 1978, only five percent of the cargo carried by Soviet liner vessels was between the United States and the U.S.S.R.

growth is a strategic triad of political, military and economic factors rather than any commercial ventureousness.<sup>10</sup> While the Soviet fleet has grown, there has been a concomitant decrease in the number, though not necessarily the capacity, of the U.S. merchant fleet.<sup>11</sup> Whatever edge the United States has in capacity must be cushioned by the realization that it is due primarily to the capacity of our large tankers.<sup>12</sup> In fact, a disproportionate amount of U.S. tonnage is found in large volume tankers rather than bulk carriers.<sup>13</sup> Moreover, the modernity of the two fleets is reflected in the average age of the vessels, and area in which the Soviet fleet is roughly half the age of its American counterpart.<sup>14</sup> If there is any area in which the U.S. fleet has an edge on the Soviets, it is in fleet composition. Orly recently has the Soviet Union begun to construct and employ containerships and LASH (Lighter Aboard Ship) carriers in significant numbers.<sup>15</sup> Since the Soviet Union is not

10. See Ackley, *The Soviet Merchant Fleet*, U.S. Naval Inst. Proc. (February 1976). Professor Ackley suggests four roles carried out by the Soviet merchant fleet:

1. reduce Soviet dependence on Western shipping,
2. ensure the capability of transporting arms and supplies to client nations,
3. augment military sealift capability, and
4. provide an image/influence-building instrument of foreign policy.

A fifth role may lie in the potential for the Soviet merchant fleet to undermine the U.S. merchant fleet through competitive elimination. See also *The Attempt to Control Predatory Soviet Shipping Practices*, 13 GONZ. L. REV. 1023 (1978).

11. See U.S. Department of Commerce, Maritime Administration, U.S. Merchant Marine Data sheet (February 5, 1980). The statistical decline of the privately-owned deep-draft fleet is reflected in this data sheet. For instance, on Nov. 1, 1979, the U.S. merchant fleet totaled 736 vessels comprising 22.9 million deadweight tons (dwt.). On January 1, 1980, there were 727 vessels totaling 23.5 million dwt. Thus, a numerical decline of nine ships was accompanied by an aggregate increase of 600,000 dwt. in fleet capacity.

12. As of February 1980, the dry-bulk component of the U.S. merchant fleet totaled 19 ships, all but three of which are thirty or more years old. In other areas, however, the United States has a near monopoly, for example, Liquefied Natural Gas (LNG) carriers. See also Address by Samuel B. Nemirow, Assistant Secretary of Commerce for Maritime Affairs, before the Propeller Club of San Diego (Mar Ad Press Release) (Feb. 26, 1980).

13. *Id.* The most recent available statistics indicate that tankers in the active fleet total 14.8 million dwt. while bulk carriers account for 508,000 dwt. See *supra* note 11.

14. See I. HEINE, *THE UNITED STATES MERCHANT MARINE: A NATIONAL ASSET* (1976). The average age of ships in the U.S. merchant fleet is twenty years old while that of the Soviet ships is ten.

15. See Ackley, *supra* note 10. Contemporary maritime analysts often emphasize quantitative comparisons to the neglect of qualitative considerations. It should be noted, however, that the Soviets are rapidly building containerships and Ro/Ro vessels to augment their fleet capability. For example, in recent years, the "P" Class vessels (small break bulk/containerships) with a capacity of 360 twenty foot equivalent units (TEU) have been replaced by "K" Class containerships such as the Khudozhnik Saryan

a net importer of crude oil at this time, it has not emphasized tanker construction as the United States has. There is evidence, however, that the Soviets are interested in this sector of trade. The construction several years ago of the 150,000-ton supertanker Krym has signaled the seriousness of their interest.

The origins of the Soviet merchant fleet can be arbitrarily dated from 1957, the year in which it began to be developed in earnest. A gradual increase in Soviet foreign trade and aid necessitated the construction of a merchant fleet to transport materials. For example, in 1961, the U.S.S.R. was required to charter foreign ships to carry 19.3 million tons of cargo, roughly thirty-one percent of its foreign trade that year.<sup>16</sup> The reliance on foreign charters generated a negative flow of precious hard currency, a situation that prompted the Soviets to begin work on a fleet capable of reducing and ultimately eliminating this unacceptable reliance.<sup>17</sup> The Soviets have gradually built a merchant fleet that emphasizes large intermodal vessels over tankers and other specialized ships.<sup>18</sup> A net drain of hard currency has been replaced by an influx of hard currency even though the fleet's subsidization by the Soviets often represents a loss in domestic economic terms. In so doing, the Soviets have fulfilled the primary goal of the Seven-Year Plan unveiled in 1957, which was to effect a merger of national security and economic priorities directed at undermining the influence of the Western world on Third World nations.<sup>19</sup> It was this success that brought world attention to the potential threat posed by the new Soviet fleet. The attention of the United States has been directed towards the growth of Soviet international shipping lines.<sup>20</sup> Of particular concern has been the formation of twenty lines operating exclusively as cross-traders.<sup>21</sup>

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(798 TEU) and Ro-Ro ships such as the Magnitogorsk with a 1,368 TEU capacity. Moreover, the Soviet Five Year Plan for 1976-80 calls for a threefold increase in containerships and Ro-Ro vessels. The latter are highly prized by military logistical planners because of their versatility.

16. *Id.*

17. See N. Shadrin, *The Soviet Merchant Marine, A Late Developing Economic Growth Sector*, in *Soviet Economic Prospects for the Seventies*, United States Congress, Joint Economic Committee, 93rd Cong., Washington, D.C. June 27, 1973.

18. See generally Heine, *supra* note 14.

19. See Sulikonyski, *Translator's Introduction to Soviet Ocean Policy*, 3 OCEAN DEV. & INT'L, L. 69 (1976). Despite the emphasis on political/ideological goals, the pragmatic Soviet leadership is acutely aware of economic factors such as balance of trade deficits and extended credit debts.

20. See COMMITTEE ON COMMERCE, REPORT ON SOVIET OCEAN ACTIVITIES: A PRELIMINARY SURVEY, 94th Cong., 1st Sess. (1975).

21. *Id.* See also *supra* note 4.

The threat contained in the Soviet organization of shipping lines is that they operate outside the established shipping conferences. As a result, the Soviet lines can set lower rates to attract customers while at the same time remaining free of noncompetitive agreements.<sup>22</sup> The actions of the Soviet merchant fleet have generated uneasiness among conference carriers that some of their co-members will be tempted to offer illegal rebates and thus, precipitate destructive competition.<sup>23</sup> With this prospect in mind, the U.S. Congress was prompted to begin hearings on the need for and content of regulation of the rate-setting practices of the U.S.S.R.

The United States, as the largest trading nation in the world, has always had an interest in maintaining its trade transportation network. The U.S. Merchant Marine, as one component of that network, has always competed with the shipping lines of other countries for cargo. Through a series of agreements, an equilibrium is maintained that prevents ruinous competition.<sup>24</sup> When state-owned and controlled carriers of countries such as the U.S.S.R. are able to focus the national resources on the penetration of lucrative trade markets, the competitive equilibrium is jeopardized. In the case of the U.S. market, Soviet penetration was deemed to be based on noncommercial motives.<sup>25</sup> Early on, it was recognized that the provisions of the Shipping Act of 1916 were inadequate to resolve the problem of

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22. See generally Bennathan & Walters, *Shipping Conferences: An Economic Analysis*, 4 J. MARITIME L. & COM 93 (1972) and Zamora, *Rate Regulation in Ocean Transport, Developing Countries Confront the Liner Conference System*, 59 CALIF. L. REV. 1299 (1971). The latter article provides some perspective on the impetus for the UNCTAD liner legislation.

23. See *Illegal Rebating in the U.S. Ocean Commerce: Hearings Before the Subcom. on Merchant Marine and Tourism of the Senate Committee on Commerce, Science and Transportation*, 95th Cong., 1st Sess. (1977). In response to the problems posed by these agreements, the Shipping Act Amendments of 1979 (H.R. 3055) were enacted. In effect, the legislation amended the Shipping Act of 1916 to provide the FMC with a framework for enforcement of the law. The legislative history is set forth in [1979] U.S. CODE CONG. & AD. NEWS 1392.

24. See H.R. REP. NO. 1381 at 3. As stated in the report, state controlled carriers "have actively and systematically pursued a practice of rate-cutting to attract more cargo for their ships. This threatens to disrupt our international trade and jeopardize the viability of the United States and other privately owned carriers serving this trade." *Id.*

25. *Id.*

rate-cutting. Thus, a two-fold task evolved: amend the Shipping Act of 1916<sup>26</sup> and put the teeth back in the tiger's mouth, that is, the FMC.<sup>27</sup>

#### THE DEVELOPMENT OF H.R. 9998

As a result of new Congressional concern with Soviet practices, Representative Murphy introduced H.R. 9998 in 1977. A series of hearings began on the bill during which input was received from the relevant federal agencies, domestic shipping groups and international shipping interests.<sup>28</sup> Significantly, from the outset, the bill enjoyed the support of the FMC due to that agency's perception of the Soviet usurpation of U.S. maritime trade.<sup>29</sup> Support from the FMC was critical to the success of the bill since it was the target agency charged with implementing and enforcing the legislation. The endorsement of H.R. 9998 by the FMC was tempered by the submission of two amendments to the bill. First, the FMC wanted the authority to set a minimum shipping rate if, in its determination, a carrier's rate was unreasonable.<sup>30</sup> Secondly, the FMC sought statutory authority to obtain government data from other agencies, provided that the release of such would not endanger national security.<sup>31</sup> The committee rejected both amendments,

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26. *Id.* at 3-4. Originally, legislation to prevent rate-cutting was considered in the 94th Congress. A bill, H.R. 7940, was introduced to prevent Third Flag carriers from charging rates that were not compensatory on a commercial cost basis. Opposition was intense and the bill perished. Recognizing the need to narrow the focus of the legislation, H.R. 14564 was introduced containing the proviso that it would only apply to state-controlled carriers. The bill sought to prohibit carriers from charging rates below those considered "just and reasonable." The bill faltered due to an agreement reached by the FMC and the Soviet Ministry of Merchant Marine to limit rate-cutting. See *supra* note 3. When this accord failed, H.R. 9998, the legislative embryo of the Ocean Shipping Act of 1978, was introduced on Nov. 3, 1977 before the 95th Congress.

27. See H.R. REP. NO. 1381 at 4. Initial testimony was before the House Subcommittee on Merchant Marine. Among those interests present and testifying were the FMC, the Maritime Administration, Sea-Land Services, Inc. and the Transportation Institute, an industry interest group. In addition, a statement for the record was submitted by the Council of European and Japanese National Shipowners Associations.

28. *Id.*

29. *Id.* at 5. For a cogent discussion of some of the problems inherent in analyzing the liner industry and its rate structure, see Ellsworth, *Competition or Rationalization in the Liner Industry*, 10 J. MARITIME L. & COM. 497 (1979).

30. See H.R. REP. NO. 1381 at 5.

31. *Id.* In addition to this policy consideration, the committee was of the opinion that such a provision would be contrary to the Federal Reports Act of 1942, 44 U.S.C. § 3501 *et. seq.* which governs the exchange of information between government agencies. Other policy factors militating against its adoption were that it would discourage people from volunteering confidential information to other agencies and would set a bad precedent by giving the FMC broad access to the files of other agencies.

the former because it was seen as an unwarranted extension of regulatory power over foreign carriers and the latter because there was no evidence submitted to the committee that the FMC had ever been denied a legitimate request for documents.<sup>32</sup> Nevertheless, the amendments provided an indication of the FMC's interest in having new statutory weapons with which to monitor and check the shipping practices of controlled carriers.

Another important participant in the hearings on H.R. 9998 was the Maritime Administration of the Department of Commerce. The importance of support from the Maritime Administration centered on the supposition that its views are closely associated with those of the Executive Office. In fact, the Maritime Administration did support H.R. 9998 based on its concern that the controlled carriers' practice of rate-cutting would eventually damage U.S. liner trade to the point of frustrating the purpose of the Merchant Marine Act of 1936.<sup>33</sup> With the support of the FMC and the Maritime Administration, the prospects of H.R. 9998 becoming law increased considerably. In addition to these two agencies, testimonial support was received from the State and Justice Departments.<sup>34</sup> After a short presentation by the State Department, the Justice Department appeared before the committee to present its views and those of the Carter administration, since the latter had by then formulated its position on H.R. 9998. These views were crucial to the formulation of the Act since accommodation of foreign policy considerations was essential for legislation having the potential to affect foreign commerce on a major scale.

#### CARTER ADMINISTRATION AMENDMENTS

In essence, the Carter administration supported H.R. 9998 but with several specific reservations. These reservations were constructively presented in the form of proposed amendments and transmitted to the committee by the Justice Department. The first proposal defined a zone of reasonable-

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32. The informal influence accorded MarAd views would be reduced by a provision in the proposed Omnibus Maritime Bill, H.R. 4769, that would create the position of Deputy Special Representative for Maritime Affairs in the Office of the Special Representative for Trade Negotiation in the White House. Thus, if passed, the bill would give the White House its own spokesman in this area.

33. See H.R. REP. No. 1381, at 8. With one exception, the amendments offered by the State Department were similar to those offered by the Department of Justice. To avoid redundancy, only those amendments offered by the Justice Department are considered here. The State Department amendment that received separate consideration and was rejected would have allowed the FMC to exercise its own discretion in determining which rates to review rather than upon request.

34. *Id.* at 6-7.



ness within which shipping rates could be evaluated. The amendment attempted to delineate a system whereby rates could be classified as presumptively just and reasonable or not.<sup>35</sup> Specifically, the proposal would allow controlled carriers a fifteen percent differential in its rate structure as compared to that of the conference rates.<sup>36</sup> The committee concluded that adoption of this provision would vitiate the purpose of H.R. 9998 and thus, it was rejected.<sup>37</sup> A second portion of the amendment would have required a full evidentiary hearing by the FMC before it could suspend, reject or disapprove special rates offered by controlled carriers.<sup>38</sup> The primary concern was the Soviets' increased use of FAK (freight-all-kinds) rates<sup>39</sup> and the difficulty inherent in comparing these rates with those of other carriers. The obvious loophole in this amendment would allow a controlled carrier to avoid or delay rate suspensions simply by varying its rates from those of other shippers. For this reason, the amendment was rejected.

A second amendment had as its objective the provision for a presidential override of FMC actions based on foreign policy considerations.<sup>40</sup> Recognizing that actions taken by the FMC based on economic criteria concomitantly produced political effects, the amendment was adopted with minor changes, primarily, safeguards on the exercise of this power.<sup>41</sup> That the FMC did not

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35. See S. REP. NO. 1260 at 14. It has been suggested that the Soviets set their rates anywhere from 10–50 percent below standard conference rates. For example, on the North Atlantic-European Trade Route, Soviet rates were found to be up to 59 percent below that of the major independents.

36. That the Administration proposed this amendment is curious. By allowing a controlled carrier a constant 15 percent rate under that of the conferences, the competitive price margin could conceivably be reduced until all but controlled carriers remained in operation.

37. See H.R. REP. NO. 1381 at 7.

38. See Pansius, *Plotting the Return of Isbrandtsen: The Illegality of Interconference Rate Agreements*, 9– Transp. L. J. 337 (1977). The article contains an overview of the antitrust considerations inherent in rate setting.

39. FAK (Freight-all-kinds) rates are general per container rates encompassing a wide spectrum of commodities. Generally, shippers will set a specific rate for each type of cargo transported. FAK rates are especially tailored to the Soviets' use of intermodal vessels in their merchant fleet.

40. See H.R. REP. NO. 1381 at 8. The proposal is not novel. The president has similar authority over decisions of the Civil Aeronautics Board (CAB). See 49 U.S.C. § 1461(b) (1970); (power over tariff rejections or suspensions of foreign air carriers by the CAB).

41. *Id.* The committee's changes required that a presidential override be exercised within 10 days of FMC action and be accompanied by a detailed explanation of why the FMC's action was overridden. Essentially, the changes formalized a safeguard to prevent abuse of the provision.

vigorously protest the adoption of this amendment indicates its appreciation of the integral nature of commerce and diplomacy.

The third amendment was designed to eliminate the FMC's authority to prescribe minimum rates for a carrier during the period of suspension.<sup>42</sup> Expressing concern over the principle of extending U.S. regulatory authority over foreign commerce, the committee checked the power of the FMC and adopted the amendment. Moreover, the committee was of the opinion that allowing the FMC to exercise such power was unnecessary for implementation of the bill.

The fourth proposed amendment attempted to frame a precise definition of the factors to be considered when evaluating whether a controlled carrier's rates are just and reasonable.<sup>43</sup> The committee, however, was of the opinion that an adequate definition already existed in the statutes, and thus, the amendment was declined. Behind this decision was a feeling that the FMC should have greater discretion in selecting comparable vessels for cost comparison purposes.<sup>44</sup> As will be discussed below, the first litigation to arise from the Act has generated reams of analysis and argument on what is just and reasonable. This is an extremely flexible and broad standard, particularly since the rates in shipping are responsive to minor external effects.

A fifth amendment was aimed at removing the requirement that controlled carriers give thirty days notice before effectuating any rate reductions.<sup>45</sup> This amendment was rejected on two grounds: first, a controlled carrier intent on predatory practices could severely disrupt the shipping market with sudden rate decreases. The thirty day notice requirement cushions the effect of rate decreases and provides notice to the FMC of the carrier's intent. Second, a controlled carrier acting for legitimate reasons could do so upon receiving special permission from the FMC and avoid any harshness inherent in the provision.

The last amendment, which was adopted without much discussion, requires that the FMC rule on suspended rates within 180 days of the suspension. The sole basis for the provision was to eliminate any unjust vulnerability imposed on a controlled carrier by an indefinite suspension period.

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42. *Id.* at 9.

43. *Id.* The key to a new definition was in allowing constructive costs to be substituted for a controlled carrier's actual costs in operation. Constructive cost was defined as the costs of another non-controlled carrier operating similar vessels and equipment and operating in similar conditions. The difficulty in using this provision is that similar conditions rarely exist *vis-a-vis* a controlled carrier and non-controlled carrier. See note 58 *infra*.

44. *Id.*

45. *Id.*

Opposition to H.R. 9998 was primarily from those interests in the United States that would be adversely affected by close regulation of controlled carriers.<sup>46</sup> For instance, the National Industrial Traffic League<sup>47</sup> opposed the bill as being inapposite to its policy of keeping regulation of ocean transportation in foreign commerce to an absolute minimum.<sup>48</sup> Opposition from the Great Lakes Commission and the Illinois Department of Business and Economic Development centered on the fact that Eastern-bloc carriers provided a substantial service to the Great Lakes region. The committee acknowledged the legitimate nature of this complaint and adopted an amendment to H.R. 9998 providing that it would not apply to any trade route served exclusively by controlled carriers. In sum, if U.S. carriers choose not to compete, then the rates charged by a controlled carrier would not be challenged. At this time, the hearings ended and with the designated amendments in place, H.R. 9998 passed to the Senate.<sup>49</sup>

#### SENATE CONSIDERATION

Consideration of S. 2873, a bill almost identical to H.R. 9998, was undertaken by the Senate Committee on Commerce, Science and Transportation. Whereas the House committee focused heavily on the practical and economic aspects of the bill, the Senate committee was attuned to the Soviet political and military objectives in monopolizing ocean shipping routes and projecting influence.<sup>50</sup> This is not to say that the committee did not examine

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46. *Id.* at 11-12. In consonance with the other amendments proposed by the Justice Department and the Administration, the thrust of this amendment was parity.

47. See Heine, *supra* note 14, at 92. It should be noted that although "controlled carrier" is synonymous with the Soviet merchant marine throughout this discussion, there are other Socialist-bloc controlled carriers active in maritime trade. For example, the Polish merchant fleet will have a projected 6.5-7.8 million dwt. of shipping capacity by 1980 with a projected increase to 13.3-21.7 million dwt. by 1990. In addition, the Socialist-bloc countries have formed the Council for Mutual Economic Assistance (CMEA) to strengthen the position of socialist countries in global commerce. CMEA membership consists of Bulgaria, Cuba, Czechoslovakia, East Germany, Hungary, Poland, Romania and the U.S.S.R. See General Council of British Shipping, *Summary of Press Reports from Eastern Europe and Elsewhere* (August 7, 1975).

48. The National Industrial Traffic League (NITL) represents 1,800 shippers, chambers of commerce and others interested in ocean liner services. The NITL argued that interference with commercially negotiated rates, as it considered controlled carrier rates to be, would be detrimental to the international trading capacity of U.S. industry.

49. See H.R. REP. NO. 1381 at p. 11. On July 31, 1978 the House passed H.R. 9998 by a vote of 329-6.

50. See, e.g., Expansion of the Soviet Merchant Marine into the U.S. Maritime Trades, U.S. Department of Commerce, Maritime Administration (1977). See also, Ackley, *supra* note 10.

the traditional rationales for Soviet practice such as the need to generate hard currency<sup>51</sup> through increased exports and shipping business; these factors were recognized. The Senate committee also appreciated the integral function assigned the Soviet merchant fleet in augmenting the wartime capacity of the Soviet blue water naval fleets.<sup>52</sup> In its report, the committee drew a direct correlation between the U.S.S.R.'s rate cutting practices and its plans for the strategic projection of seapower.<sup>53</sup> That is, the Senate recognized that a peacetime merchant fleet is the dormant component of wartime naval power.

With these premises in mind, the committee examined the amendments decided upon by the House committee. Not surprisingly, the Senate committee was in general accord with the actions taken by the House. Noted in its considerations was the fact that the Maritime Administration had indicated to the House committee that it did not condition its support of H.R. 9998 on the Department of Justice amendments. Apparently, the Maritime Administration and the Carter administration did not have harmonious views in this area.<sup>54</sup> Finally, it was noted that the United States was not alone in its concern over the Soviet rate-setting practice. In fact, two other major maritime nations, Japan and Holland, have responded to Soviet competitive pressures by enacting legislation aimed at preventing disruptive intrusions into the liner shipping industry.<sup>55</sup> Without more, S.2873 (H.R.

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51. As of 1978, the U.S.S.R. had a hard currency deficit of approximately \$16 billion. See S. REP. NO. 1260 at 16-17. The significance of the Soviet need for hard currency is that it is necessary to obtain purchasing power for western technological products, equipment and grain. Payment for these goods requires hard currencies such as the dollar, deutsche mark, pound sterling and French franc. The Soviet Union's currency standard, the ruble, is not responsive to an international monetary standard. As of December 1977, the ruble was valued by U.S. banks at .75 to \$1.00. As of March, 1980, the rate of exchange was .64 to \$1.00.

52. See S. REP. NO. 1260 at 15-16. In the report, the following quote from Admiral of the Soviet Fleet Sergi Gorshkov's Mahanesque treatise "Seapower of the State" is set forth:

Shipping is an important component of a nation's seapower. . . . The goal of Soviet seapower is to effectively utilize the world ocean in the interest of building communism. . . . The maritime shipping of the U.S.S.R. has become a dominant, technically well-equipped and highly profitable branch of the national economy, which fully meets the economic needs of the nation. *Id.*

53. *Id.* at 15-18.

54. *Id.* Although the Maritime Administration is said to reflect Administration views, it nevertheless expresses its own views in its testimony before Congress.

55. *Id.* at 24-25. In 1977, Japan enacted a new maritime transportation law, the purpose of which is to provide government control over nonconference shipping operations in Japan's oceanic commerce. Holland's version of this type of legislation, The

9998) was reported out of committee on September 21, 1978 by a unanimous vote.

#### ANALYSIS OF THE LEGISLATION

The United States has long recognized the unique nature of the maritime industry. The industry as a whole has enjoyed special considerations with respect to legislative control. For example, the antitrust laws have been applied in a manner that affords a degree of immunity from them.<sup>56</sup> On the whole, the government's inclination has been to balance the need for a regulated and competitive shipping industry.<sup>57</sup> Ultimately, the test of the Ocean Shipping Act of 1978, and similar legislation to come, will be how well it balances the need for regulation and competition. Should the Soviets be prevented from any competition, the health of the U.S. Merchant Marine might fare as poorly as with the present mode of competition.

The changes effectuated by H.R. 9998 can be found within two statutory provisions: § 801 (2), the definitional section, and § 817 (c), a new addition. Section 801 (2) was amended to define a controlled carrier in terms that would include Third Flag carriers such as the Soviet Union.<sup>58</sup> The purpose of this provision was to provide a workable methodology for classifying

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Maritime Shipping Retortion Act entered into force on June 14, 1977. This bill provides for, among other things, retaliatory action against predatory Soviet shipping practices. In addition, Belgium, West Germany and the United Kingdom have protested the rate-cutting activities of the U.S.S.R.

56. See 46 U.S.C. § 814 (1970). See also *Federal Maritime Board v. Isbrandtsen*, 356 U.S. 481 (1958); *FMC v. Seatrain Lines*, 411 U.S. 726 (1973). See generally Antitrust Subcommittee of the House Committee on the Judiciary, *REPORT ON THE OCEAN FREIGHT INDUSTRY*, H.R. REP. NO. 1414, 87th Cong., 2d Sess. (1962).

57. But see *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213, 217, modified, 383 U.S. 932 (1966) (Court held the Shipping Act of 1916 did not impliedly repeal all antitrust regulation of rate-making activities of the shipping industry). See also *Latin America/Pacific Coast Steamship Conf. v. FMC*, 465 F.2d 542 (D.C. Cir.), cert. denied 409 U.S. 967 (1972), *Pan American World Airways, Inc. v. CAB*, 517 F.2d 734 (2d Cir. 1975). (regulation of competition in the commercial aviation field).

58. 46 U.S.C. § 801 The text of the addition is as follows:

"[C]ontrolled carrier" means a common carrier by water operating, offering or proposing to offer service in the foreign commerce of the United States which carrier is or whose operating assets are directly or indirectly owned or controlled by the government under whose registry the vessels of the controlled carrier operate. Ownership or control by such government shall be deemed to exist if a majority portion of the interest in the carrier is owned or controlled in any manner by such government, by any agency of the government, or by any person, corporation, or entity controlled by such government. Ownership or control shall also be deemed to exist if the government has the right to appoint or disapprove the

controlled carriers. The committee was of the opinion that by modifying the definition, all possible schemes for governmental control over shipping lines, whether direct or indirect, would be covered. 46 U.S.C. § 801 essentially states that a carrier whose assets are either directly or indirectly controlled by the government under which it is registered will be classified as a "controlled carrier." The committee felt a comprehensive and broad definition of what constituted a controlled carrier was necessary. The committee's inclusion of ship registry as a factor in determining which government controls a carrier was based on a belief that to look beyond the vessel's flag to determine nationality or ownership would be inconsistent with general international practice.<sup>59</sup> The use of a ship's registry standard also made practical sense. Multinational corporations often create a web of ownership, charters and sales that would defy attempts to trace nationality.<sup>60</sup> Lastly, it was recognized that state-controlled lines would be unlikely participants in registering under flags of convenience since controlled carrier countries have frequently and publicly voiced opposition to flag of convenience registry.<sup>61</sup>

The heart of H.R. 9998 is manifested in the addition of a new subsection to the Shipping Act of 1916.<sup>62</sup> In essence, the new section prohibits controlled carriers from maintaining rates or tariffs that are below a level determined by the FMC to be just and reasonable.<sup>63</sup> Before stating what the new section

appointment of a majority of the directors or the chief operating or executive officer of the carrier. *Id.*

The following countries have vessels operating as controlled carriers:

Algeria	Hungary	Philippines
Bangladesh	India	Poland
Brazil	Indonesia	Saudi Arabia
Bulgaria	Ivory Coast	Sierra Leone
Burma	Kenya	Singapore
Chile	Kuwait	South Africa
People's Republic of China	Libya	Sri Lanka
Czechoslovakia	Malaysia	Syria
Egypt	Malta	Tanzania
German Democratic Republic (E. Germany)	Mexico	Trinidad
Ghana	Nigeria	Turkey
Guatemala	Oman	U.S.S.R.
	Pakistan	Venezuela
	Peru	Zaire

59. See H.R. REP. NO. 1381 at 22-23.

60. *Id.*

61. *Id.*

62. 46 U.S.C. § 814 *et. seq.* (1972)

63. See 46 U.S.C. § 817 (c). See generally *Com. of Pennsylvania v. FMC*, 392 F. Supp. 795 (D.C.D.C. 1975).

adds to the Shipping Act, it is necessary to briefly examine the deficiencies in the old statutory language.

The Ocean Shipping Act of 1978 was designed to correct the weaknesses of § 18 (b)(5) of the Shipping Act of 1916.<sup>64</sup> That section gave the FMC the authority to disapprove any common carrier's rate or charge found to be unreasonably high or low so as to be harmful to U.S. commerce. The difficulty with the standard was in determining what constituted an unreasonably low rate. The use of high rates posed no problem because there is no possibility of competitive undercutting. With respect to the low rates, there was a total absence of standards by which the FMC could adjudge a rate as unreasonably low. Moreover, the FMC lacked any power to suspend a suspect carrier's rates pending the resolution of the rate investigation. Thus, if economic harm occurred, it would continue throughout the course of an often lengthy investigation.

A subtle, but more important difficulty with the old statute was that the burden of proof in an FMC rate investigation was on the FMC or the complaining party.<sup>65</sup> Thus, as the committee noted in drafting H.R. 9998, to satisfy the burden of proof, the complaining party would have to establish a *prima facie* case of unreasonableness before the carrier would be required to proffer any evidence in support of its rates. In so allocating the burden of proof, Congress effectively discouraged those who might challenge a carrier's rates.

Under prior statutory language, it was generally recognized that two criteria had to be present before a carrier's rates could be suspended. There had to be a finding that existing rates were below the out-of-pocket costs of the carrier and a finding that the rate caused an adverse economic impact. Satisfying these two criteria was difficult because of the complex economic structure of the shipping industry. By manipulating figures, even predatory rate practices could be couched in justifying language. The final major weakness under section 18(b)(5) lay in the fact that a finding of unreasonableness was prospective only in nature. Since a carrier's rates could not be suspended during a rate investigation, an eventual finding of unreasonableness placed the FMC in the embarrassing position of being limited to

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64. See 46 U.S.C. § 817 (b) (5).

The Commission shall disapprove any rate or charge filed by a common carrier by water in the foreign commerce of the United States or conference of carriers which, after hearing, it finds to be so unreasonably high or low as to be detrimental to the commerce of the United States.

This section was enacted in 1961 by the 87th Congress and reflects few of the concerns of its later entity, the 95th Congress.

65. *Id.*

proscribing those rates in the future, with no ability to recoup the damage caused by the low rates prior to a final determination.<sup>66</sup> The onerous burden of conducting litigation under the statute resulted in it falling into relative desuetude by the early 1970s. The Ocean Shipping Act of 1978 attempted to correct many of the weaknesses of the old statute through a new system of regulatory criteria.

The Ocean Shipping Act of 1978 is, in somewhat simplistic terms, a legislative bootstrap for the FMC. The enforcement mechanism for the legislation is contained in the FMC's authority to disapprove, after appropriate notice and explanation, any rates, charges, classifications, rules or regulations which fail to meet a standard of justness and reasonableness. The determination of what is just and reasonable hinges on a variety of empirical and nonempirical variables.<sup>67</sup> There is, however, a common thread in the criteria set forth in the statute. Any rate charged by a controlled carrier that would be below that charged by a commercially motivated carrier for a sustained period of time will be suspect.

In essence, the FMC has been given, within this statutory framework, a great deal of power and an equal amount of flexibility in wielding it. In so doing, the FMC is charged with evaluating each controlled carrier according to the relevant factors in each case.<sup>68</sup>

Section 3 of the 1978 Ocean Shipping Act amended § 18 of the 1916 Shipping Act by adding § c, which contains six subsections, each one reflecting a legislative response to or recognition of a problem in rate regulation. A brief discussion of each section is necessary to fully understand the changes and additions to the FMC's rate regulation powers.

1. The first subsection contains the requirement that rates set by a controlled carrier be just and reasonable.<sup>69</sup> Of paramount importance is that

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66. See H.R. REP. No. 1381 at 20.

67. 46 U.S.C. § 814 (c) (2). Among those listed: evidence that the controlled carrier is operating below a level that is fully compensatory; rate comparisons with carriers operating similar vessels in similar trades; the rates necessary to assure the transport of specific cargoes in trade; or the rates necessary to maintain an acceptable level of service to and from the affected ports.

68. See S. REP. No. 1260, 95th Cong., 2d Sess. (1978).

69. See 46 U.S.C. § 817 (c) (1):

No controlled carrier subject to this chapter shall maintain rates or charges in its tariffs filed with the Commission that are below a level which is just and reasonable, nor shall any such carrier establish or maintain unjust or unreasonable classifications, rules, or regulations in such tariffs. An unjust or unreasonable classification, rule, or regulation means one which results or is likely to result in the carriage or handling of cargo at rates or charges which are below a level which is just and reasonable. The Commission may at any time after notice and hearing, disapprove any rates, charges, classifications, rules, or regulations which the con-



Congress specifically shifted the burden of proving that rates are just and reasonable from the complaining party to the controlled carrier.<sup>70</sup> This procedural shift favors an activist role for the FMC rather than the passive one assigned to it under the earlier statute. It is interesting to note that the language of the statute distinguishes between rates and charges in a tariff and classifications, and rules and regulations contained within a tariff.<sup>71</sup> With respect to the former, there is a prohibition on setting rates or tariffs below a level that is just or reasonable. With regard to the latter, however, the wording is in the negative, namely that the classifications, rules and regulations not be unjust or unreasonable.<sup>72</sup> The amendment provides a precise definition of what is to be considered unjust or unreasonable but does not define what is to be considered just and reasonable.<sup>73</sup> This is in consonance with the statutory scheme of keeping the determination of justness and reasonableness flexible and open to FMC interpretation. The division in the language is intentional and reflects a Congressional desire to avoid ambiguity arising from associating classifications, rules and regulations with a presumptively just and reasonable level.<sup>74</sup> The committee reports on this section contain a specific caveat that in all cases arising under the section, the burden of proof on these standards will be on the controlled carrier.<sup>75</sup>

2. The second subsection provides the mechanics for working with the just and reasonable standard.<sup>76</sup> The subsection lists appropriate factors to be

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trolled carrier has failed to demonstrate to be just and reasonable. In any proceeding under this subsection, the burden of proof shall be on the controlled carrier to demonstrate that its rates, charges, classifications, rules, or regulations are just and reasonable. Rates, charges, classifications, rules, or regulations filed by a controlled carrier which have been rejected, suspended, or disapproved by the Commission are void, and their use is unlawful.

70. *Id.* Note that the language of the statute states in pertinent part that: "In any proceeding under this subsection, the burden of proof shall be on the controlled carrier to demonstrate that its rates, charges, classifications, rules, or regulations are just and reasonable."

71. *Id.*

72. See S. REP. NO. 1260 at 31.

73. 46 U.S.C. § 817 (c) (1): "[a]n unjust or unreasonable classification, rule or regulation means one which results or is likely to result in the carriage or handling of cargo at rates or charges which are below a level which is just and reasonable."

74. See S. REP. NO. 1260 at 31.

75. *Id.*

76. 46 U.S.C. § 817 (c) (2):

(2) For the purposes of this subsection, in determining whether rates, charges, classifications, rules or regulations by a controlled carrier are just and reasonable, the Commission may take into account appropriate factors, including,

considered in determining which rates are just and reasonable. Since it is not necessary for the FMC to consider each factor listed every time it reviews a rate, the FMC may be somewhat selective in using this list. Furthermore, the FMC has the power to add new criteria since the list is not exhaustive. Congress intended that the FMC flesh out that statutory framework for dealing with the just and reasonable standard. Among the factors set forth in the statute are: carrier costs; the relationship of the challenged rates to other rates; the necessity of the rates for the cargo to move; and the level and quality of service provided.<sup>77</sup> Of particular importance to the litigator is the cost factor. The amendment allows rates to be justified if fully compensatory to the controlled carrier based on its actual costs or constructive costs. Constructive costs are defined as the costs of a non-controlled carrier operating similar vessels and equipment in the same or similar trade.<sup>78</sup> It is this factor that presents problems.

The use of constructive cost comparisons in rate investigations was sanctioned by Congress because of the anticipated problems inherent in working with the actual costs of state-controlled carriers.<sup>79</sup> One of the problems encountered in using constructive cost comparisons is the conflict between the realities of a market versus a command economy. State-controlled carriers need not use profit concepts in their accounting procedures. They can set rates which ignore costs necessary to carriers from market economies. The FMC has been reluctant to use constructive costs in rate comparisons due to the above problem. Yet, due to the statutory language, the FMC must accommodate the constructive cost analysis to a practicable standard of rate evaluation. The ultimate resolution of this issue will be essential to effective implementation of the Shipping Act.<sup>80</sup>

The FMC will also have to refine the just and reasonable standard. Since the FMC is allowed to choose from a number of factors relating to operation

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but not limited to, whether: (i) the rates or charges which have been filed 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 its constructive costs, which are hereby defined as the costs of another carrier, other than a controlled carrier, operating similar vessels and equipment in the same or a similar trade; (ii) the rates, charges, classifications, rules, or regulations are the same as or similar to those filed or assessed by other carriers in the same trade; (iii) the rates, charges, classifications, rules, or regulations are required to assure movement of particular cargo in the trade; or (iv) the rates, charges, classifications, rules, or regulations are required to maintain acceptable continuity, level, or quality of common carrier service to or from affected ports.

77. *Id.*

78. *Id.*

79. See H.R. REP. NO. 1381 at 24.

80. 46 U.S.C. § 817 (c) (2).

and the factual variables in each case are to be given substantial consideration, no conclusive explanation of the just and reasonable standard can be arrived at from an analysis of the statute or its legislative history.

3. The third subsection of the amendment states the requirement that a controlled carrier file all rates, charges, classifications rules or regulations, including those effecting rate decreases, at least thirty days prior to their effective date.<sup>81</sup> In addition, upon request by the FMC, the carrier has twenty days to file a justification of its existing or proposed rates, rules and classifications.<sup>82</sup> The filing is conducted in accordance with the rules of procedure for the FMC.<sup>83</sup> The justification required of a controlled carrier is to show that its rates are necessary, just and reasonable. It is established that a point by point comparison of one commodity rate to another is inappropriate and insufficient to satisfy the burden of proof placed on the controlled carrier to show that its rates are just and reasonable.<sup>84</sup> What is required is a detailed statement of the carrier's need for and purpose of the proposed rates, charges, classifications and rules.

4. The fourth subsection of the amendment provides that upon a finding that a carrier's rates are unjust and unreasonable, the FMC may issue an order to the carrier requiring it to show cause why its rates, charges, classifications, rules or regulations should not be disapproved.<sup>85</sup> Pending

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81. See 46 U.S.C. § 817 (c) (3):

(3) Notwithstanding the provisions of subsection (b) (2) of this section, rates, charges, classifications, rules, or regulations of controlled carriers shall not, without special permission of the Commission, become effective within less than thirty days following the date of filing with the Commission. Following the effective date of this subsection, each controlled carrier shall, upon the request of the Commission, file within twenty days of request, with respect to its existing or proposed rates, charges, classifications, rules, or regulations a statement of justification which sufficiently details the controlled carrier's need and purpose for such rates, charges, classifications, rules, or regulations, upon which the Commission may reasonably base its determination of the lawfulness thereof.

It should be noted that this requirement can be avoided by petitioning the FMC and receiving special permission to act otherwise. *Id.*

82. *Id.*

83. See 46 C.F.R. § 502 *et. seq.* (1979).

84. See S. REP. NO. 1260 at 32.

85. 46 U.S.C. § 817 (c) (4):

(4) Whenever the Commission is of the opinion that the rates, charges, classifications, rules, or regulations filed by a controlled carrier may be unjust and unreasonable, the Commission may issue an order to the controlled carrier to show cause why such rates, charges, classifications, rules, or regulations should not be disapproved. Pending a determination as to their lawfulness in such a proceeding, the Commission may suspend such rates, charges, classifications, rules, or regulations at any time prior to their effective date. In the case of any rates, charges, classifications, rules, or regulations which have already become effective, the

ultimate resolution of the investigation, the FMC is authorized to suspend the rates or regulations prior to their effective date.<sup>86</sup> If, on the other hand, the rates have already become effective, the FMC is required to give sixty days notice before suspension and the suspension period may not exceed 180 days. To prevent unjust hardship, the controlled carrier may file new rates at any time after the FMC has acted. It should be noted, however, that these rates are also subject to suspension if deemed by the FMC to be unjust and unreasonable.<sup>87</sup> The show cause order acts as a signal to the controlled carrier that documentary data must be forthcoming to substantiate all claims of reasonableness.

From a review of litigation conducted under this Act to date, it appears that the data necessary to respond to a show cause order is voluminous, detailed and often supplemented by affidavits of economists and transportation analysts in support of the proposed rates.<sup>88</sup> A failure to cooperate with the FMC — *i.e.*, by refusing to produce sufficient evidence required by the show cause order — can lead to litigation in the federal courts. In addition, the FMC can petition the courts for an order revoking the putative wrongdoers' access to U.S. ports pending satisfactory compliance with the provisions of the statute.

5. The fifth subsection of the amendment is a provision for presidential override of the FMC's actions with respect to a controlled carrier.<sup>89</sup> The section requires the FMC, upon publication of an order of suspension or a final order of disapproval of rates or regulations, to concurrently transmit a

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Commission may, upon the issuance of an order to show cause, suspend such rates, charges, classifications, rules, or regulations on not less than sixty days notice to the controlled carrier. No period of suspension hereunder may be greater than one hundred and eighty days. Whenever the Commission has suspended any rates, charges, classifications, rules, or regulations under this provision, the affected carrier may file new rates, charges, classifications, rules, or regulations to take effect immediately during the suspension period in lieu of the suspended rates, charges, classifications, rules, or regulations: *Provided, however,* That the Commission may reject such new rates, charges, classifications, rules, or regulations if it is of the opinion that they are unjust and unreasonable.

86. *Id.*

87. *Id.* See also H.R. REP. No. 1381 at 25.

88. *Re Far Eastern Shipping Co. Rate Cases* FMC Docket No. 79-10, March 2, 1979. All documents, an original and 15 copies, submitted by parties to a FMC proceeding are kept in the Docket Room of the Secretary, Federal Maritime Commission, 1100 L Street, N.W., Washington, D.C. 20573.

89. 46 U.S.C. § 817 (c)(5).

Concurrently with the publication thereof, the Commission shall transmit to the President any order of suspension or final order of disapproval of rates, charges, classifications, rules, or regulations of a controlled carrier subject to the provisions of this subsection. Within ten days after the receipt or the effective date

copy of the order to the President.<sup>90</sup> From the time of receipt, the President has ten days or until the effective date of the final order, whichever is later, to request, in writing, that the FMC stay the order for reasons of national defense or foreign policy. The FMC is required to immediately grant the request through the issuance of an order.<sup>91</sup> Several safeguards are inherent in this provision to prevent abuse. First, the President must specifically state the national defense or foreign policy rationale underlying his request. Second, whenever practicable, the President must attempt to resolve the inhibiting issue with the applicable foreign government.<sup>92</sup> It should also be noted that this section does not give the President *carte blanche* veto power over all FMC orders. Rather, the Congress intended that this section should be construed narrowly and only for valid national defense or foreign policy reasons.<sup>93</sup> Moreover, there exists no authority for presidential interference with an FMC order once the statutory time limit has expired.

Although this provision is relatively simple in application, it represents two fundamental precepts: the constitutional division of powers reserving the right to conduct foreign policy to the Executive branch of government; and the symbiotic association of commercial actions to diplomatic reactions. This is especially true when the legislation is designed solely to affect vessels in the service of foreign governments.<sup>94</sup> In effect, this section embodies the rationale behind the whole of the Ocean Shipping Act of 1978, which is an integration of economically-oriented commercial regulation with foreign policy and national defense considerations.

6. The sixth and final subsection of the amendment may be the most appropriate starting place for one confronted with representing a controlled carrier whose rates have come to the attention of the FMC. This provision

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of such Commission order, whichever is later, the President may request the Commission in writing to stay the effect of the Commission's order if he finds that such stay is required for reasons of national defense or foreign policy which reasons shall be specified in the report. Notwithstanding any other provision of law, the Commission shall immediately grant such request by the issuance of an order in which the President's request shall be described. During any such stay, the President shall, whenever practicable, attempt to resolve the matter in controversy by negotiation with representatives of the applicable foreign governments.

90. *Id.*

91. *Id.*

92. *Id.*

93. See S. REP. NO. 1260 at 33.

94. *Id.* This provision is not unique. A close corollary can be found in 49 U.S.C. § 1461 (b) which gives the president similar powers with respect to foreign air carriers regulated by the Civil Aeronautics Board. The legislative history of the amendment indicates that in the years from 1973-78, the president invoked his privilege 18 times to affect CAB actions.

provides all of the exemption criteria that will insulate a controlled carrier from the provisions of the Act.<sup>95</sup> There are five basic exceptions for controlled carriers. First, all controlled carriers entitled by a treaty of the United States to receive national or most-favored-nation treatment are excepted from the Act.<sup>96</sup> The second exemption applies to controlled carriers whose state of

95. 6 U.S.C. § 817 (c)(6):

The provisions of this subsection shall not apply to: (i) any controlled carrier of a state whose vessels are entitled by a treaty of the United States to receive national or most-favored-nation treatment; (ii) any controlled carrier of a state which, on the effective date of this subsection, has subscribed to the statement of shipping policy contained in note 1 to annex A of the Code of Liberalization of Current Invisible Operations, adopted by the Council of the Organization for Economic Cooperation and Development; (iii) rates, charges, classifications, rules, or regulations of any controlled carrier in any particular trade which are covered by an agreement approved under section 814 of this title, other than an agreement in which all of the members are controlled carriers not otherwise excluded from the provisions of this subsection; (iv) rates, charges, classifications, rules, or regulations governing the transportation of cargo by a controlled carrier between the country by whose government it is owned or controlled, as defined herein, and the United States, or any of its districts, territories, or possessions; or (v) a trade served exclusively by controlled carriers.

96. *Id.* The following is a list of countries not affected by the provisions of the Act due to one of the exemptions contained in 46 U.S.C. § 817 (c)(6)(i) or (ii).

Argentina-FCN	Korea-FCN
Australia-OECD	Liberia-FCN
Austria-FCN	Luxembourg-FCN/OECD
Belgium-FCN/OECD	Muscat-FCN
Bolivia-FCN	Nepal-FCN
Canada-OECD	Netherlands-FCN/OECD
Republic of China-FCN	New Zealand-OECD
Colombia-FCN	Nicaragua-FCN
Costa Rica-FCN	Norway-FCN/OECD
Denmark-FCN/OECD	Paraguay-FCN
Ethiopia-FCN	Portugal-OECD
Finland-FCN/OECD	Romania-Trade Agreement
France-OECD	1975; Maritime Agreement
FRG-FCN/OECD	1976
Greece-FCN	Spain-FCN
Honduras-FCN	Sweden-OECD
Iceland-OECD	Switzerland-OECD
Iran-FCN	Thailand-FCN
Iraq-FCN	Turkey-FCN
Ireland-FCN/OECD	United Kingdom-OECD
Israel-FCN	Yemen-FCN
Italy-FCN/OECD	Yugoslavia-FCN
Japan-FCN/OECD	

It should be noted that this list is not inclusive since carriers from other countries may qualify for exemption based on their trade rates or membership in a liner conference.

registry has subscribed to the statement of shipping policy contained in note 1 to annex A of the Code of Liberalization of Current Invisible Operations as adopted by the Council of the Organization for Economic Cooperation and Development.<sup>97</sup> Third, rates, charges, rules, regulations and classifications of a controlled carrier covered by the liner conference provisions of the Shipping Act of 1916, other than a controlled carriers conference, will be exempt from the Act.<sup>98</sup> Fourth, an exemption is made for a controlled carrier operating in bilateral trade between the carrier's host state and the United States. In essence, this provision exempts non-Third Flag controlled carriers.<sup>99</sup> Finally, a controlled carrier operating in a trade route served exclusively by controlled carriers is exempt from the Act.<sup>100</sup>

All but the last provision are structured so as to insure that controlled carriers operating outside of the Act will be covered by other codes or controls having similar objectives to those of the Act. The last exception, however, is merely a legislative recognition that where a controlled carrier operates on a route not serviced by noncontrolled carriers, it cannot be said that it is engaging in anti-competitive practices.<sup>101</sup> If an initial review of these provisions implies a broad range of loopholes, that is partially correct. A careful application of the exceptions, however, reveals that the Act remains applicable to those controlled carriers it was designed to affect — the socialist bloc controlled carriers. In that sense, these exceptions are not nearly as important as might be initially perceived.<sup>102</sup>

#### FMC LITIGATION: THE FESCO LITIGATION

In order to provide a glimpse of how the Act is working, the following discussion briefly analyzes the only set of cases to be litigated before the FMC

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97. See *supra* note 93. Although the United States is a signatory to the Code of Liberalization, the United States, in order to avoid a conflict with domestic laws, refrained from subscribing to Note 1 to Annex A. In all, 20 countries have subscribed to the note, thus pledging to conduct their shipping policy on the premise of "free and fair" competition. The Code seeks to eliminate restrictions on invisible transactions and transfers, such as occurs in insurance, transportation and banking.

98. 46 U.S.C. § 814 provides for the organization of liner conferences under the Shipping Act of 1916.

99. 46 U.S.C. § 817 (c) (6) (iv).

100. 46 U.S.C. § 817 (c) (6) (v). As noted earlier, this provision reflects the concern of those in the Great Lakes region, which is heavily serviced by Socialist-bloc controlled carriers, that the service provided by controlled carriers is essential to the vitality of the regional economy.

101. See H.R. REP. NO. 1381 at 11-12.

102. The exceptions are drafted so that compliance with one or more of them would mitigate or eliminate the competitive advantages controlled carriers have over non-controlled carriers, that is, state supported monopoly and subsidy.

under the Act. Although they constitute three different actions by docket number, all of the actions arise out of the FMC's investigation of the shipping rates of the Far Eastern Shipping Company, a state-controlled carrier of the U.S.S.R.<sup>103</sup> The litigation, *Re Rates of Far Eastern Shipping Company*,<sup>104</sup> is actually a series of actions, involving the same parties, before the FMC. The substantive focus of the litigation is the rate-setting activities of the Far Eastern Shipping Company (hereinafter referred to as FESCO), a state-controlled carrier of the U.S.S.R. The procedural thrust of the litigation, however, centers on the conduct of litigation within the parameters of the Ocean Shipping Act of 1978. In particular, problems are already developing with the "just and reasonable" standard and the constructive costs criteria set forth in the Act.<sup>105</sup> Although the litigation is still in progress, an examination of some of the issues raised up to this point provides useful insight into the Act's potential and problems.

FESCO, a common carrier of the Soviet Union, provides liner service between U.S. ports and ports located in the Far East, Australia, New Zealand and the Philippines. All of the vessels employed by FESCO operate under the registry of the U.S.S.R. As such, FESCO is a controlled carrier within the meaning of the Act.<sup>106</sup> The FMC initiated this litigation with a request that FESCO file a statement of justification with respect to certain of its rates and tariffs for liner service. The actual dispute over the rates charged by FESCO involves complex economic analysis, contained in voluminous exhibits. In essence, the FMC felt that FESCO's rates were significantly lower than those of its non-controlled carrier competitors. Thus, the FMC issued a bifurcated procedural notice that suspended FESCO's rates and ordered it to show cause why its rates should not be disapproved.<sup>107</sup> In conjunction with the latter requirement, FESCO was ordered to demonstrate that its commodity rates were just and reasonable.<sup>108</sup> The FMC dismissed FESCO's first attempt at rate justification as incongruent with congressional intent, due to FESCO's attempt to make a point to point comparison of its rates to those of similar

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103. The Far Eastern Shipping Co. is known colloquially at the FMC as "FESCO."

104. *Rates of Far Eastern Shipping Co.*, FMC Docket No.'s 79-10 (1979), 79-104 (1974) and 80-6 (1980). The docket books containing the briefs, orders, exhibits and ancillary materials are on file at FMC headquarters at 1100 L Street N.W., Washington, D.C. The docket room is open to the public on a limited basis.

105. *Id.* See *supra*, text accompanying notes 69-79.

106. See 46 U.S.C. § 801.

107. See 46 U.S.C. § 817(c)(3). The FMC's order was issued in accordance with this section.

108. *Id.*



non-controlled carriers.<sup>109</sup> In the same case, the FMC went on to state that 46 U.S.C. § 817 (c)(4) does not require the issuance of a show cause order separate from the initial order of suspension.<sup>110</sup> In addition, the FMC held that due process considerations do not require that a controlled carrier be granted a hearing prior to the suspension of rates.<sup>111</sup> From these initial encounters, it appears the FMC is fulfilling its congressionally sanctioned role of filling in the framework of the Act.

The burden of initiating action in cases brought under the Act lies with the FMC. Once an order is filed however, the burden of proving the reasonableness of its rates lies with the carrier. Given the uncertainty over which tests will be used by the FMC to measure the justness or reasonableness of a carrier's rates, the burden of proof can be seen as more than a procedural impediment; it is a substantive obstacle that can be very difficult to surmount. That difficulty is compounded by conflicts over what criteria will be sufficient to demonstrate the justness and reasonableness of a carrier's rates.

In the continuing FESCO litigation, the controversy over what is just and reasonable is at the forefront. The act sets forth criteria for measuring which rates are just and reasonable;<sup>112</sup> these criteria are not, however, conclusive or limiting. In the instant cases, the FMC and FESCO have their own differing concepts of the methodology necessary to discharge the burden of proof needed to respond to the FMC's show cause order.<sup>113</sup> In particular, the FMC feels that FESCO's attempt to justify its rates by means of comparison to selective rates of non-controlled carriers is not in consonance with the type of justification envisioned by Congress.<sup>114</sup> FESCO wanted to compare individual commodity rates to those of selected non-controlled carriers.<sup>115</sup> The FMC has rejected this approach in favor of a comparison of entire rate structures.<sup>116</sup>

The flexibility of the Act may actually tie down the FMC and strain its resources as it struggles to define the parameters of the Act in a practical

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109. *See Re Rates of Far Eastern Shipping Co.*, FMC Docket No. 79-10. (March 2, 1979).

110. *See Re Rates of Far Eastern Shipping Co.*, FMC Docket No. 79-10. (May 23, 1979).

111. *Id.*

112. 46 U.S.C. § 817(c)(2). *See supra* text at notes 69-79.

113. *See Re Rates of Far Eastern Shipping Co.*, FMC Docket No. 79-10, 2-4 (March 2, 1979).

114. *Id.*

115. *Id.* at 3-4.

116. *See* H.R. REP. NO. 1381 at 7-8.

context. The FMC may not be up to this task without more funding and manpower.<sup>117</sup>

In its reply memorandum to the FMC, FESCO attempted to rely on a constructive costs analysis to justify its rates.<sup>118</sup> Basically, FESCO contended that its rates were compensatory under the constructive costs standard and, moreover, appropriate under the alternative review provisions of the Act. The FMC, however, indicated that the constructive cost standard is applicable only to across the board rate comparisons and not to individual commodity rates.<sup>119</sup> Instead, the FMC has favored the formulation provided by its transportation economics analysts. For example, the testimony of Dr. Robert Ellsworth<sup>120</sup> before the FMC suggested an analogy between the provisions in the Act to the means used to determine the fair value of commodities from state-controlled economies under the Antidumping Act.<sup>121</sup> Dr. Ellsworth stated that under the Antidumping Act, actual comparison of prices and costs in state-controlled economies are useless since they fail to reflect market supply and demand.<sup>122</sup> Thus, the FMC has contended that constructive cost comparisons of individual rates, rather than an entire rate structure, are highly suspect.

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117. See Report of the Comptroller General of the United States, *Essential Management Functions at the Federal Maritime Commission Are Not Being Performed* 34. (January 18, 1980). In this General Accounting Office report, it was noted that implementation of the Ocean Shipping Act of 1978 has caused much of the routine work of the Office of Audits and Programs and the Bureau of Ocean Commerce Regulation to be deferred. The report states that in November of 1978, the FMC requested sixteen positions from the Office of Management and Budget (OMB) for fiscal year 1979 along with \$150,000 funding. The request was denied. The impact of funding problems on implementing legislation such as the Act is reflected in the report's summary of the FMC's capabilities. As stated in the report, "minimal review of tariffs may or may not be sufficient for (the) FMC to fulfill its regulatory duties, but apparently under normal workloads, (the) FMC will be able to perform only a minimum review with its existing staff." *Id.* Unfortunately, the Act places a great deal of emphasis on reviewing each case on its merits and the documentary evidence, not a perfunctory task for the FMC staff.

118. See *Re Rates of Far Eastern Shipping Co.*, FMC Docket No. 79-10, 1-4 (March 2, 1979).

119. *Id.*

120. Chief of the Office of Economic Analysis, Bureau of Industry Economics, Federal Maritime Commission.

121. See 19 U.S.C. § 160 *et. seq.* (1978). In 1979, the administration of the provisions of the Antidumping Act was transferred to the Department of Commerce from the Department of Treasury following the passage of the Trade Agreements Act of 1979, 19 U.S.C. § 2501.

122. See, *e.g.*, 19 C.F.R. § 153 *et. seq.* (regulations for implementing the Anti-Dumping Act).

Dr. Ellsworth suggested a two-pronged test for implementation of the Act. Once it has been determined that a controlled carrier is charging lower rates and that they are unreasonable, a further requirement should be to demonstrate some actual harm or injury to the affected carriers. Obviously, this would represent a step backward to the old two-tiered rate analysis under section 18(b)(5) of the Shipping Act of 1916.<sup>123</sup> In fact, the Act assumes that where a controlled carrier operates with rates lower than reasonable, a *prima facie* case of harm is made. This area is bound to produce additional problems as the cases brought before the FMC raise new problems with the use of the Act. The FESCO litigation is providing the first glimpses of the practical difficulties inherent in the Act. Indeed, the cases are by no means complete since resort to the courts can be had after the FMC has acted on the cases. Although this brief discussion is by no means indicative of the complexity or content of the FESCO cases, it does point out the major problems that are arising under the attempt of the FMC to use its new regulatory weapon to curb the predatory practices of the Soviet shipping community.

#### PROSPECTS FOR THE ACT

The Ocean Shipping Act of 1978 is in a settling process buffeted by litigation's demands for clarity. As noted earlier, the various exceptions to the Act appear to leave few controlled carriers subject to the Act's regulatory scheme.<sup>124</sup> It is also clear that Congress was aware that the impact of the Act would be contingent upon the FMC's ability to enforce it.<sup>125</sup> Inherent in this awareness is the fact that Congress anticipated that fiscal or political exigencies might dictate a degree of benign neglect in the enforcement of the provisions of the Act.<sup>126</sup> Finally, the committee reports contain the interesting note that the impact of the Act on the U.S. economy would be minimal since controlled carriers only account for five percent or less of the total U.S. foreign liner commerce.<sup>127</sup> This conclusion is at odds with much of the legislative concern expressed throughout the drafting of H.R. 9998. Indeed, if

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123. 46 U.S.C. § 817(b)(5).

124. See 46 U.S.C. § 817(c)(6) and *supra* notes 95-100. The controlled carriers subject to the Act and able to avail themselves of the least number of exemptions are the Socialist-bloc carriers.

125. See S. REP. NO. 1260 at 29. In its Regulatory Impact Statement, the committee noted that "the burden upon those carriers which remains subject to the terms of the legislation depends upon the frequency with which the Commission may decide to investigate rates or other tariff items of a controlled carrier." *Id.* See also *supra* note 111.

126. *Id.*

127. See S. REP. NO. 1260 at 29.

the committees considered a five percent share of U.S. foreign liner commerce held by a controlled carrier to be *de minimus*, it stands in contradiction to much of the rationale given for enacting the Act.

#### STRATEGIC IMPLICATIONS

Even if Congress acted hastily and the United States has indeed overreacted to the Soviet merchant fleet's expansion, the legislation, according to some, is nevertheless essential. As one commentator has suggested, despite any "Red-Menace" reasoning, there is no question that Soviet rate-cutting practices undermine the vitality of the American merchant marine and, if unchecked, could lead the whole industry into a depression that would be devastating.<sup>128</sup> It might be further suggested that the passage of the Act, with the political and military considerations inherent therein, must be given additional weight if the economic imperatives are less important than once thought. With the growing concern over national defense matters, and in particular, with that of the Navy's need for adequate logistical support, the security policies underlying the Act achieve almost equal weight with the economic ones. In fact, similar considerations have played an important role in regulating foreign investments in both the U.S. Merchant Marine<sup>129</sup> and the defense industry.<sup>130</sup> The importance of assessing the impact of national defense planning in legislation affecting the U.S. Merchant Marine cannot be underestimated.<sup>131</sup> The Assistant Secretary of Commerce for Maritime Affairs recently referred to the U.S. Merchant Marine as the fourth arm of defense, an indispensable logistical tool for projecting and sustaining U.S. military capability.<sup>132</sup> With this in mind, the

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128. See Note, *supra* note 10. The author notes that the rate-cutting problem has arisen at a time when U.S. flag liners are recovering from the flag-of-convenience troubles. To respond to that problem, Congress enacted the Merchant Marine Act of 1970, 46 U.S.C. § 1101 (1970) to provide the framework for federal subsidies to American shipbuilders.

129. See generally Phillips, *Restraints on Foreign Investment in the Merchant Marine—An Asset or Liability to United States Interests?* 1 CORNELL INT'L L. J. 1 (1978).

130. See generally Phillips, *Foreign Investment in the United States: The Defense Industry*, 56B. U. L. REV. 843 (1976).

131. See, e.g., O'Rourke, *A Good New Idea*, U.S. NAVAL INST. PROC. 47 (March 1980). In his article, Capt. O'Rourke reasserts the propriety of Project Arapaho, a plan to use commercial containerhips as platforms to carry anti-submarine warfare (AWS) helicopters and modular control containers in time of a national emergency.

132. See Address by Samuel B. Nemirow, Assistant Secretary of Commerce for Maritime Affairs, *Partnership at Sea Symposium*, U.S. Merchant Marine Academy (December 4, 1979). In his speech, Mr. Nemirow gave the following statistical references to the U.S. merchant fleet: 99 percent of the tonnage carried in the import-export trade of the United States is shipborne; over 90 percent of the military logistical support to a

Act can be read as more than a reflexive legislative response to an economic threat. It is that, but it is also an implicit recognition that the U.S. Merchant Marine is an essential component of the overall political-economic-military strength of the United States and that the most serious challenge to its capability to fulfill its strategic role has come from the Soviet Merchant fleet with its rate-cutting practices.

The efficacy of the Act, and its progeny that are about to follow,<sup>133</sup> can be assessed in one of two ways. It could be that the Act is a legislative overreaction propelled by some powerful lobbying from U.S. interests,<sup>134</sup> to the highly visible growth of the Soviet merchant fleet. Or, as some groups have suggested, too little is being done too late and the Act still falls short of the checks necessary to stop the decline of the U.S. merchant fleet.<sup>135</sup> There is support for each contention. For example, even though the Soviet flag fleet outnumbers that of the United States, a significant percentage of U.S. privately-owned vessels sail under foreign flags of convenience, primarily those of Panama and Liberia. On the other hand, if the U.S. merchant fleet is as valued for its latent military potential in times of national emergency as for its commercial role, U.S.-owned vessels operating under foreign flags may be of little use, even assuming that the owners would be willing to turn them over.<sup>136</sup> There is, however, statutory authority for seizing these ships in time

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foreign theatre of operations would have to be supplied by ship; and lastly, it was noted that in 1979, U.S. flag tankers carried less than three percent of the nation's oil imports and less than two percent of its dry-bulk trade (a trade which represents 40 percent of the U.S. foreign trade tonnage). In fairness, the latter statistics ought to be read in light of the U.S. tax laws rather than attributed solely to our maritime shipping rates. See also Kilmarx, *America's Maritime Legacy: A History of the U.S. Merchant Marine and Shipbuilding Industry Since Colonial Times*, Center for Strategic and International Studies, Georgetown University, (1979).

133. See *supra* note 6.

134. See generally Ackley, *supra* note 10, at 27. Although Professor Ackley does not appear to subscribe to this theory, he does attempt to present a balanced view of Soviet maritime growth.

135. See I. HEIN, *supra* note 14. Among these groups are the National Maritime Council, the International Longshoremen's Association and the Industrial Union of Marine and Shipbuilding Workers of America (AFL-CIO) representing respectively the trade, seafaring and longshore interests.

136. See generally McCleave, *The National Defense Requirement for a U.S. Flag Merchant Marine*, NAVAL WAR C. REV. (June, 1969). Although dated in some respects, this article presents issues that remain germane today. The availability of foreign flag U.S. owned merchant ships has been questioned due to factors such as the location of the ship at the time of the need, its condition, the crew's disposition and the owners' willingness to sanction its use.

of national emergency under § 902 of the Merchant Marine Act of 1936.<sup>137</sup> Statutory authority also exists for requisitioning foreign flag/foreign-owned vessels in the event of a national emergency under the Emergency Foreign Vessels Acquisition Act of 1954.<sup>138</sup> It should be clear from this short exercise in unlayering facts that the issues cannot be easily categorized as right or wrong. A more logical approach to the Act is to view it as a significant step in maritime legislation that will doubtlessly be modified by more Congressional action.

#### CONCLUSION

The impact of the Ocean Shipping Act of 1978, a piece of legislation aimed primarily at the Soviet Union, can be measured in the strained relations between the maritime interests in both countries. In the general cooling of relations that has accompanied recent global events,<sup>139</sup> friction generated by the Act's passage goes unnoticed in the general media. It does, however, exist. Recently, the Soviet Ministry of Merchant Marine attacked leading American maritime officials and Congressional leaders for supporting steps that could, in its words, destroy U.S.-U.S.S.R. relations.<sup>140</sup> Thus, whatever the economic impact of the Act on maritime commerce, its enactment has generated controversy over issues beyond the initial scope of the legislation. The United States has committed itself to revamping the Shipping Act of 1916, a primarily shipper-oriented law, to reflect the needs of the maritime carriers. Being committed to a general goal, however, is not the same as actually doing something about it. Congress is at a point where it must either enact further, more potent legislation to support the merchant

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137. 46 U.S.C. § 1242(a) (1970). The discretion of the President weighs heavily in deciding whether to requisition foreign flag ships owned by U.S. citizens. The language of the statute authorizes the requisition or purchase of "any vessel or other watercraft owned by citizens of the United States." *Id.*

138. 50 U.S.C. § 196 (1970). See generally Phillips, *supra* note 129, at 8-14.

139. The most obvious example is the December 1979 invasion of Afghanistan by the Soviet armed forces. The deterioration of U.S. interests in the Persian Gulf coupled with a growing concern that the United States has become a second-rate military power *vis-a-vis* the Soviet Union have also contributed to the present decline of détente.

140. See Axelbank, *U.S. Blasted by Soviets*, *The J. of Com.*, March 5, 1980, at 1. The Soviet Ministry noted that any new "protectionist" measures would generate consequences "even outside the framework of Soviet-American relations." *Id.* It was also noted that if the United States intends to limit the Soviet Union to bilateral trade, Soviet charterers may retaliate by cutting business with American shipowners operating vessels under foreign flags. If anything, this threat serves to underscore the weakness of the U.S. merchant fleet due to the large number of ships operating under foreign registry.

marine in the competitive world of shipping or retreat through inaction.<sup>141</sup> As it stands, the Ocean Shipping Act of 1978 can best be viewed as a stopgap measure in remodeling U.S. Maritime legislation to meet new challenges in the world shipping market.<sup>142</sup> These challenges did not even exist when the original Shipping Act was enacted. Because of the antiquity of much of our maritime legislation, as well as its lack of cohesion, new legislation is necessary. The tortuous path of the Omnibus Maritime Bill indicates that the concomitant effect of industry, special interest and Congressional pressures may make a unified maritime policy a long time in coming. Whether the threat to U.S. Shipping interests lies in the enactment of the UNCTAD Code of Liner Conduct<sup>143</sup> or from the Soviet merchant fleet and its Gulliver-like expansion, the legislative response from the United States must be coordinated with and based on the political, economic and strategic imperatives of the present. The Ocean Shipping Act of 1978 represents one step in this direction.

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141. See *The J. of Com.*, March 6, 1980, at 1, 33. The long awaited Omnibus Maritime Bill (H.R. 4769) is approaching the end of its course in the House Merchant Marine Committee chaired by Rep. John M. Murphy. The overall goal of the legislation is to have U.S. flag ships carry 40 percent of U.S. ocean foreign commerce. Among the controversial provisions contained within the bill are a plan to allow U.S. operators to build abroad and place the vessels under a U.S. subsidy program and a proposal to centralize maritime policy decisions in a new position, a Deputy Special Representative for Maritime Affairs to be established in the Office of the Special Representative for Trade Negotiations in the White House. The person filling the position would have general authority to conduct international relations pertaining to maritime affairs. If the position is established, the effect would be to remove a number of important powers from the FMC and the Maritime Administration.

142. See Whitehurst, *Do American Shipping and Shipbuilding Have a Future?*, U.S. NAVAL INST. PROC. 66 (April 1980). Professor Whitehurst presents a concise and cogent review of current problems in American shipping and shipbuilding. Particular attention is given the Omnibus Maritime Bill (H.R. 4769) with its inherent problems. Of relevance to the instant discussion is Professor Whitehurst's perception of the State Department as lacking enthusiasm for a U.S. flag merchant marine. An indifferent or hostile State Department would be inimical to the Omnibus Bill's treatment of controlled carriers. That is, under the bill, the State Department would have the responsibility for gathering data and documents from foreign governments when needed by the FMC for a rate justification hearing. As Professor Whitehurst sees the situation, the State Department might be a reluctant participant in this role.

143. See *supra* note 5. The 40-40-20 formulation of the UNCTAD document would ensure that on a bilateral trade route each of the trading partners would be allowed to carry forty percent of the trade on ships flying their flag, while twenty percent would be reserved or available to Third Flag carriers. It is in this area that the United States and the Soviet Union compete as Third Flag carriers, with the United States usually faring poorly. A merchant marine revitalized by product legislation would be a valuable check on growing Soviet domination of these trade routes.