
REVISITING THE EXEMPTIONS GRANTED TO LINER SHIPPING INDUSTRY

Mr. Rakesh Kumar¹, Mr Sachin Mishra² & Ms. Sakshi Goel³

ABSTRACT

The liner shipping industry plays a significant role in international trade, facilitating the movement of goods across the globe. However, due to the unique characteristics of this industry, such as the need for fixed schedules and the high cost of entry, various exemptions have been granted to liner shipping companies from antitrust laws and regulations. This paper examines the historical and legal background of these exemptions, analyses their impact on the industry and competition, and evaluates the justifications for their continued existence. The paper also considers the potential alternatives to these exemptions and their implications for the liner shipping industry and international trade. Overall, this paper aims to contribute to the ongoing debate on the exemptions granted to liner shipping companies and their effects on competition and consumers.

Keywords: Anti-Trust, Liner Shipping, Exemptions, Competition.

¹ Mr. Rakesh Kumar is Adviser (Economics) in Competition Commission of India.

² Mr. Sachin Mishra is Research Associate (Law) in Competition Commission of India.

³ Ms. Sakshi Goel is Research Associate (Law) in Competition Commission of India.

I. Introduction

Ocean transport, also known as Maritime transport, is defined by the OECD as “Any movement of goods and/or passengers using seagoing vessels on voyages which are undertaken wholly or partly at sea”⁴. Historically, water-borne transportation has been a vibrant mode of transportation for mankind. As at end-2021, Maritime trade is the most vital part of international trade as seaborne trade accounts for 80% of the world trade, out of which 66% of all goods discharged and 41% of all goods loaded are from Asian Seaports⁵.

Transportation through water has always offered unequivocal advantage over land transportation or air transportation. Water transportation is most economical for long distances as it operates on natural tracks and does not require any significant financial investment in either development or maintenance of trade routes and only require investment in canals and ports. Moreover, the operating cost of water transport is very low in comparison to land transportation or air transportation. Water transportation also offers greatest load capacity as compared to other modes of travel such as rail, truck, or aircraft; it is thus best suited to transporting huge quantities of heavy items across long distances⁶.

Water transportation consists of two main categories of transportation i.e. Inland waterways and Ocean Transport. Inland waterways is the transportation through rivers or canals, they are best developed in Europe and North America and there are only six major navigable systems of inland waterways namely the rivers of Western and Central Europe, the Volga-Don system, the North American rivers, the Amazon system, the Parana-Paraguay system, and the Chinese waterways.

Travelling by ocean has introduced many types of maritime transport options; whether the purpose is transporting freight, materials, or passengers, there are different ships used for different reasons. The main types of merchant ships recognised are passenger liners, cargo-liners, bulk-carriers, tramps and coasters, and short-sea traders. However, when Maritime trade

⁴ OECD Glossary, Available at: <<https://stats.oecd.org/glossary/detail.asp?ID=4277>>

⁵ World seaborne trade UNCTAD Handbook of Statistics 2021

⁶ ADVANTAGES AND DISADVANTAGES OF WATER TRANSPORTATION BY NAVATA ROAD TRANSPORT. AVAILABLE AT: <<https://navata.com/cms/advantages-and-disadvantages-of-water-transportation/>>

is considered, it involves two major types of maritime transport sectors namely Bulk shipping and Liner shipping.

Bulk shipping comprises of ships designed to transport uniform, dry cargo or liquid cargo, these goods are placed in the hold of a ship (a space for carrying cargo in the ship's compartment). Bulk shipping is used when there is a need to transport big measures of cargo on bulk carrier ships that can make long trips across the ocean; they are generally servicing an individual shipper on non-scheduled routes.

Liner shipping is the act of providing transport services, via ships designed to carry modular containers, to shippers on a regularised schedule which advertises specific the arrival and departure ports i.e. fixed shipping route with a specific timeline at a known frequency⁷. Development of containers has revolutionized maritime trade by leaps and bounds. Container ships are the cargo ships that carry most seagoing non-bulk cargoes. In today's world, container vessels have around 90% of the world's non-bulk cargo.

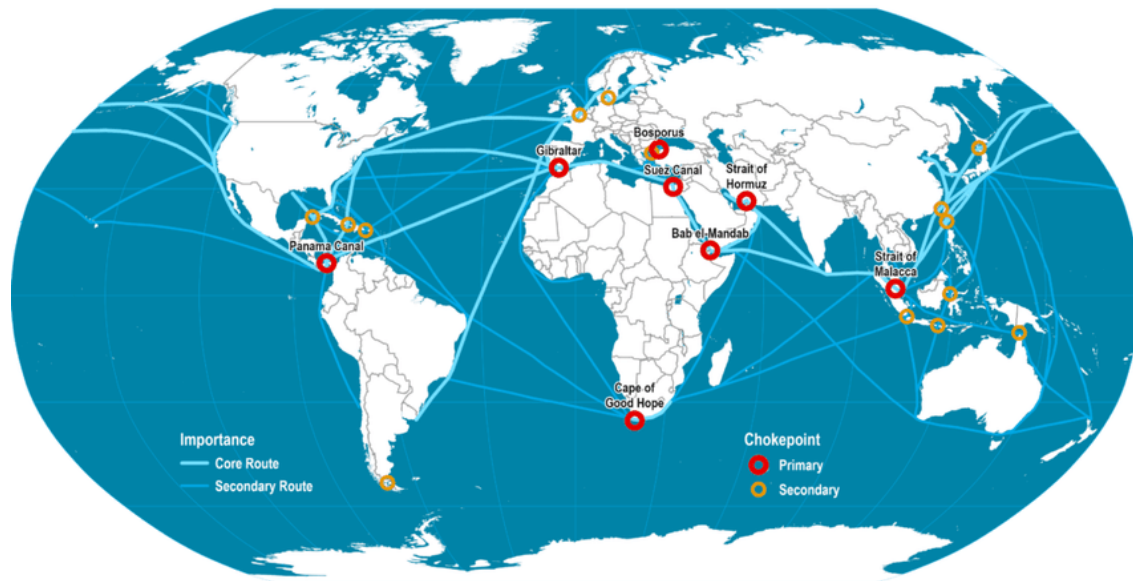
As previously mentioned, in addition to liner shipping, other ship types involved in ocean freight transportation include bulk carriers, tankers, and charter ships. Since they don't employ containers and aren't scheduled on a regular basis, bulk carriers and tankers differ from liner ships. As a result, there is only a limited degree of ship as they do not use containers and charter ships differ as they are not regularly scheduled. Therefore, the substitutability between liner shipping and other modes of freight transportation⁸.

Theoretically, there are an infinite number of maritime shipping routes that can be used for maritime shipping, but in reality, ships stick to predetermined shipping routes due to economic considerations, physical and other conditions. The major trade routes are depicted in the figure below⁹:

⁷ OECD Competition Policy in Liner Shipping, 2002

⁸See e.g. European Commission, *Maersk Line/HSDG* (Case M.8330) [2017] para 11 (Maersk Merger); *COSCO Shipping/OOIL* (Case M.8594) [2017] para 12 (COSCO Merger)

⁹A Comprehensive Analysis of the Port Industry by Port Economics Management and Policy. Available at: <<https://porteconomicsmanagement.org/pemp/contents/part1/interoceanic-passages/main-maritime-shipping-routes/>>



The main axis as depicted in the above figure is a circum-equatorial corridor linking North America, Europe, and Pacific Asia through the Suez Canal, the Strait of Malacca, and the Panama Canal. Due to geography, geopolitics, and trade flows, specific locations play a strategic role in the global maritime network. They are labelled as chokepoints and depicted as such in the above figure. These routes support the bulk of the traffic, but numerous other routes exist depending on the origin and the destination of the maritime shipment.

II. Vessel Sharing Agreements

The present article focuses on the Liner Shipping aspect of the maritime trade. Reliable and regular scheduled ship liner services play an indispensable role in supporting the global economy. In order to achieve maximum efficiency, on time delivery through optimal fleet deployment, routes and schedules of a liner shipping company (LSC) seek efficient freight solutions. It is claimed that due to the underlying characteristics of the liner shipping industry such as high entry cost, huge investment requirement and trade imbalances, the shipping industry requires extensive cooperation amongst competitive carriers in order to attain economy of scale¹⁰.

The size and geographic scope of liner transport firms varies. Operators enter into cooperative arrangements with one another in order to deliver services either independently or in collaboration with other businesses. Such agreements have been in existence for more than a

¹⁰ Policy Brief on “Shipping Block Exemption from Competition Law” by United Nations Economics and Social Commission for Asia and the Pacific; 2015.

century. For instance, the UK-Calcutta Conference, which was founded in 1875 following the construction of the Suez Canal (which shortened the travel time between India and the UK in half), served as a framework for regulating the tea trade.¹¹ A Liner Conference is a cooperation amongst LSCs operational on the same shipping route which aims at the formulation of an agreement between the members with respect to coordination of sailing schedule, fixing of tariff and controlling capacity¹².

These cooperation agreements maybe witnessed in the form of Vessel Sharing Agreements (VSA)/Voluntary Discussion Agreements (VDA)/Consortium/ Conference Agreements/ Alliances etc.

A VSA is an agreement between various container shipping lines who agree to operate a liner service in specified route using a specified number of vessels. It is not necessary for each of the partners to have equal number of vessels. The space that is available for loading and discharging at each of the ports of call is shared between the partners. The quantum of space that each partner gets may vary from port to port and could depend on the number of vessels which are operated or placed by the different partners within the agreement.

Unlike VSAs, VDAs are agreements for routine information exchanges that occasionally may incorporate also involve tariff rules. They are frequently seen in the liner shipping sector. VDAs are primarily agreements on a general rate increase (GRI), also known as a general rate restoration.¹³

Liner shipping businesses collaborate with one another through alliances to offer services on a variety of routes. While an alliance aspires to a consortium and VSA in as much as they strive for operational collaboration among shipping companies, it differs from a consortium and a VSA in that it spans more than one route and offers a more complete method of establishing comprehensive solution to providing a global network. An alliance frequently denotes more

¹¹ Alderton, Patrick M. (2010). *Reeds Sea Transport: Operation and Economics*. London: Adlard Coles Nautical. ISBN 9781408130186.

¹² BENINI & BERMIG, The Commission proposes to repeal the Liber Conference Block Exemption, Competition Policy Newsletter Spring 2006.

¹³ Japan Fair Trade Commission (JFTC), 'Review of the System for Exemption from the Antimonopoly Act for International Ocean Shipping' (February 2016) 26-27 <<http://www.jftc.go.jp/en/pressreleases/yearly-2016/February/160204.files/160331.pdf>> (JFTC 2016)

often signifies closer cooperation and greater long-term dedication and closer collaboration.¹⁴ There are now three mega alliances: 2M Alliance, Ocean Alliance, and 2MAAlliance¹⁵.

European Union in Article 2(1)¹⁶ of the Consortia Block Exemption Regulation (CBER) defines Consortium as “*consortium means an agreement or a set of interrelated agreements between two or more vessel-operating carriers which provide international liner shipping services exclusively for the carriage of cargo relating to one or more trades, the object of which is to bring about cooperation in the joint operation of a maritime transport service, and which improves the service that would be offered individually by each of its members in the absence of the consortium, in order to rationalise their operations by means of technical, operational and/or commercial arrangements;*”

As more and more countries enacted competition legislation to promote competitive business and restrain anti-competitive behaviour, it was observed that the cooperative agreement by ship liners stand in conflict with the provisions of anti-trust laws. Recognising the characteristics of the shipping industry, some regulators noted that such arrangements generate more positive than negative effects on the economy – this leads many countries to grant exemptions in favour of the shipping industry.

III. History of Exemptions in Various Jurisdictions

Canada and United States were among the first nations to enact specific competition legislation dealing with anti-competitive business practices in the shipping industry (in 1889 and 1890, respectively). Over time, the scope of the competition laws in these two countries has been broadened significantly and special exemptions have been carved out in response to changing economic conditions and/or lobbying by special interest groups. A study of the different competition laws suggests that a wide range of exemptions and exceptions have been granted by various jurisdictions.

¹⁴Asia-Pacific Economic Cooperation Transportation Working Group, ‘Liner Shipping Competition Policy: Non-Ratemaking Agreements Study (Stage 1)’ (May 2008) 22-23; OECD 2015 Pg 9; US FMC 2017 Report

¹⁵Global Shippers Forum, ‘The Implications of Mega-Ships and Alliances for Competition and Total Supply Chain Efficiency: An Economic Perspective’ (November 2016)
<<https://www.globalshippersforum.com/media/1267/gsf-mega-ships.pdf>> (GSF Report)

¹⁶Official Journal of the European Union, Commission Regulation (EC) No 906/2009. Available at: <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02009R0906-20200414&from=EN>>

Historically, VSAs have been exempt from the application of competition laws in several jurisdictions such as the United States, European Union, Canada, Japan, Singapore, New Zealand, etc. However, over the years such exemptions or immunities have been revised on account of the evolving nature of the shipping industry. Accordingly, VSA exemptions have transformed, internationally, from blanket exemptions to being restrictive/ limited in their scope of application¹⁷.

There are three types of exemption regimes: (a) block exemptions; (b) sector specific legislation; and (c) sector specific legislation based on the collective bargaining system. A multi-jurisdiction analysis of the types of exemptions granted is briefly explored below:

European Union (EU)

In the EU, the European Commission Council Regulation 246/2009 provides that, the Commission may exempt consortia from the application of Article 101 (relating to prohibition of anti-competitive agreements) TFEU for a period limited to five years, with the possibility of extension. Accordingly, the Commission adopted in 2009 the CBER (Commission Regulation (EC) No 906/2009)¹⁸, which sets the specific conditions for such an exemption; and it was subsequently extended in 2014 and 2020. In its evaluation, the European Commission discovered that carriers that are allowed to more effectively utilise the capacity of their ships and provide more connections resulting in efficiencies driven from the CBER. Consumers benefit from decreased costs and higher service quality as a result of these efficiencies. The Commission's analysis revealed that while quality of service had been steady, expenses for carriers and customer pricing per twenty-foot equivalent unit (TEU) had both been reduced by about 30%¹⁹. The present CBER is due to expire on 25 April 2024. The European Commission has decided to carry out an evaluation of the CBER on how it has functioned since 2020²⁰.

The CBER allows, under certain conditions, shipping lines with a combined market share of below 30% to enter into cooperation agreements to provide joint cargo transport services, also known as 'consortia'. Consortia are forms of operational cooperation between liner shipping

¹⁷ *ibid*

¹⁸ Official Journal of the European Union, Commission Regulation (EC) No 906/2009 of 28 September 2009. Available at: <<https://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:256:0031:0034:EN:PDF>>

¹⁹ European Commission, Press Release dated 24 March 2020. Available at <https://ec.europa.eu/commission/presscorner/detail/es/ip_20_518>

²⁰ European Commission, Press Release dated 9 August 2022. Available at <https://ec.europa.eu/commission/presscorner/detail/en/ip_22_4864>

companies with a view to provide a joint maritime cargo transport service. The cooperation within a liner shipping consortium must be limited to operational cooperation. The consortium members, therefore, market and price their services individually. It permits actions like sharing management over port infrastructure, determining timetables and calling points, and requiring consortium members to charter space on the consortium held ships only under specific conditions. Though hard-line restrictions like price fixing, market allocation, or capacity limitations that don't correspond to market demand are still unlawful.

Liner shipping consortia have been covered by specific Commission block exemption regulation since 1995 (the repealed block exemption for liner shipping conferences allowed for price and capacity-fixing arrangements).

The European Commission acknowledged in Recital 2 of the CBER that such liner shipping consortia may help to improve the productivity and quality of available liner shipping services. Due to the high number of vessels required to operate a regular liner shipping service on a route, consortia allow the rationalisation of their members' activities, economies of scale, and more efficient use of vessel capacity. Consortia thus help to improve the service that would be offered individually by each of the members. Customers receive a benefit from such cooperation, in terms of services provided (higher quality, more regular, frequencies, wider coverage of ports)²¹.

Although there is no ability for a liner shipping consortium to gain prior regulatory clearance in the European Union (unlike United States), the European Commission has not yet objected to the formation of one of the three major alliances that are currently operating even though at least one of the major consortia may be expected to have a market share of more than 30 per cent in any particular deep-sea market²².

The fact that Article 102 of the TFEU applies to both collective and individual abuse of a dominating market position raises significant concerns for the shipping sector. The EU jurisprudence has emphasised that the Article 101 and Article 102 cover separate situations²³.

²¹ Antje Prisker "Commission adopts new block exemption regulation for liner shipping consortia", European Commission Competition Policy Newsletter 2010. Available at: <https://ec.europa.eu/competition/publications/cpn/2010_1_4.pdf>

²² Anthony Woolich and Daniel Martin "Competition and Regulatory Law", *The Shipping Law Review: Edition 8*. Available at <<https://www.lexology.com/library/detail.aspx?g=c40b8b79-8a6b-4ec3-bfd6-35e5cc09faea>>

²³ <https://www.lexology.com/library/detail.aspx?g=c40b8b79-8a6b-4ec3-bfd6-35e5cc09faea#footnote-032>

The EU courts determined in the case of *Atlantic Container Line AB & Ors. Vs. Commission* (TACA), which involved a liner conference that the degree of integration between the enterprises in a conference was such that the conference could function as an autonomous single entity in the market. Large market share liners should be conscious of the possibility of violating both Article 101 and Article 102²⁴.

United States of America (USA)

In USA the first exemption from the antitrust laws for shipping liners was provided under The Shipping Act of 1916, which explicitly conferred an exemption from the antitrust laws for conference agreements on shipping rates, pooling arrangements and shipping route allocations if approved by US Shipping Board. This is known as the sector specific legislation, which substitutes competition law for the liner shipping sector.

Later, this Act was replaced by The Shipping Act of 1984; the said Act under Section 7 provides exemption from antitrust law for carrier agreements along with exemption for activities if they were undertaken with a reasonable basis to deduce that they were pursuant to an effective agreement. The revised antitrust exemption further covered intermodal through rates incorporating rail, truck and ocean journey portions of cargo movements.

The Shipping Act was once again amended in 1998, post which it is referred to as The Ocean Shipping Reform Act (OSRA). The OSRA permits individual members to negotiate independent confidential service contracts with shippers and prohibits the group from taking any retaliatory action against shippers or carriers that have negotiated independent confidential service contracts. However, the exemption still denies the full benefits of competition as OSRA allows agreement members to adopt voluntary guidelines regarding individual service contracts, which can be used by members to an agreement to signal expected behaviour. The OSRA 1998 has been amended by OSRA 2022; however, the new amendment is silent with respect to antitrust exemption. OSRA 2022 has not addressed the competition concerns around antitrust immunity²⁵.

²⁴The TACA judgment: lessons learnt and the way forward, Maria JASPERS, Directorate-General Competition, unit D-2; <https://ec.europa.eu/competition/publications/cpn/2004_1_34.pdf>

²⁵The US Ocean Shipping Reform Act 2022, available at: <https://fiata.org/fileadmin/user_upload/The_US_Ocean_Shipping_Reform_Act_2022_A_guide_for_FFfs.pdf>

It is important to underline that any conduct which does not satisfy the statutory requirements for the antitrust exemptions remains subject to antitrust laws. An example of such a case was established in 2015 wherein three companies (Nippon Yusen Kabushiki Kaisha (NYK Line), Kawasaki Kisen Kaisha Ltd. and Compania Sued Americana de Vapores S. A.) pleaded guilty and had been sentenced to pay a total penalty of over \$136 million, additionally four individuals of the companies had plead guilty and were sentenced to imprisonment²⁶.

A few countries that have followed USA with sector specific legislation exemption are China²⁷, Japan, South Korea²⁸ and Taiwan²⁹.

Canada

In Canada, the shipping conferences are allowed to operate into and out of Canadian ports under The *Shipping Conferences Exemption Act, 1987* which provides exemption from the *Canadian Competition Act*.³⁰ To seek exemption the shipping conferences must file certain documents with the Agency as per the requirements under the *Shipping Conferences Exemption Act*. Section 4 of the Act specifies that the *Competition Act shall not apply to any agreement formulated by liner conference if it fulfils two specified conditions*.

The first condition to be fulfilled is that a conference agreement shall mandate that each participant shall determine a tariff. The second being that if the conference agreement stipulates any of the following, a conference member must execute a loyalty contract: (a) termination by either party at any time within 90 days of the date on which a notice to conveying intention to terminate is communicated in writing to the other member; and (b) Application of tariffs to goods shipped by the shipper in which no contract rate for any good is less than 85% of the non-contract rate for that good; (c) The existence of any clause requiring any member of a conference to pay a rebate for the transportation of any goods shipped by the shipper; (d)

²⁶Department of Justice, Antitrust Division, Press release number 15-1239. Available at <<https://www.justice.gov/opa/pr/three-ocean-shipping-executives-indicted-fixing-prices-and-rigging-bids>>

²⁷Regulations of the People's Republic of China on International Maritime Transportation, adopted at the 49th Executive Meeting of the State Council on November 5, 2001, promulgated by Decree No.335 of the State Council of the People's Republic of China on December 11, 2001 as amended 31 May 2013

²⁸Maritime Transport Act, as last amended 9 June 2009 (Law Ref 19626, 2009) (R.O. Korea) art 29 and Monopoly Regulation and Fair Trade Act, as last amended 25 March 2009 (Law Ref 17914, 2010) (R.O. Korea) art 58

²⁹Shipping Act promulgated on 3 June 1981, last amended on 22 January 2014, arts 34-35

³⁰ Government of Canada, Shipping Conferences Exemption Act, 1987 (R.S.C., 1985, c. 17 (3rd Supp.)). Available at <https://laws-lois.justice.gc.ca/eng/acts/S-10.01/>

The absence of any terms or conditions in a standard form approved by the conference members that requires a shipper of goods to offer to those members for transportation by them of all goods shipped by that shipper; (e) Regulates the timing of sailing of vessel, members and the kind of service that members of a conference may provide; (f) limits the type of service that conference members may offer; and (g) governs the sharing of goods transportation as well as the profits and losses resulting from each transportation³¹.

Japan

With more than 3,900 oceangoing ships under its control, Japan has the second-largest ship fleet in the world and one of the top three nations for shipbuilding in terms of tonnage. Japan has a distinctive maritime cluster made up of three big shipping firms (NYK, MOL, and Kline)³².

The exemption from the antitrust law of the country, Antimonopoly Act, 1945 to shipping conferences is granted by notification by the Minister of the Ministry of Land, Infrastructure & Tourism (MLIT). These exemptions have been supported by the following three reasons: (a) seasonal variations in the volume of cargo; (b) large-scale process industries; and (c) price fluctuation in the market because of changes in supply and demand. If specific requirements are met, Article 28 of the Antimonopoly Act permits exemptions for agreements pertaining to the following: (a) freight rates; (b) charges; (c) other transport conditions; (d) trade routes; (e) ship deployment; and (f) cargo loading³³.

In order to be eligible for this exemption, shipping services must submit the required documentation to the Japanese Ministry of Transport, who will then review it and determine whether to approve, alter, or reject it. In order to adhere to all competition law requirements, the Japanese Minister of Transport must engage with the Fair Trade Commission before making a decision on the application.

The Japanese government conducted studies on the competition policies of other nations, changes in the maritime transport sector, the stabilising effect of agreements between ship-

³¹ *ibid*

³² The Shipping Law Review: Japan by Jumpei Osada, Masaaki Sasaki and Takuto Kobayashi; 13 June 2022 <<https://thelawreviews.co.uk/title/the-shipping-law-review/japan>>

³³ Act on Prohibition of Private Monopolization and Maintenance of Fair Trade (Act No. 54 of April 14, 1947). Available at: https://www.jftc.go.jp/en/policy_enforcement/21041301.pdf

owners, and the effect that the abolition of immunity would have on the Japanese economy in response to concerns raised by the Japan Fair Trade Commission regarding adjustments to the current regulatory system. This Study led to the extension of antitrust immunity to shipping conferences until 2015³⁴.

In 2016, the Japan Fair Trade Commission conducted a second review of the system for exemption from the Antimonopoly Act for international ocean shipping³⁵. The review concluded that “few shippers consider conferences and discussion agreements to be necessary and shippers place greater emphasis on the level of freight rates than on their stability. Shippers who wish for stable freight rates address this issue by making a fixed-term contract. It is difficult to claim that conferences and discussion agreements work well to stabilize freight rates. Therefore, it is not necessary to make conferences and discussion agreements exempt from the AMA on the grounds of the shippers’ interests”³⁶. The Japan Fair Trade Commission, in its review, stated that as per the Commission no plausible reason was found for maintaining the system of exemptions from the Antimonopoly Act for international ocean shipping.

Singapore

The only block exemption in Singapore is the Competition (Block Exemption for Liner Shipping Agreements) Order (the “BEO”), which conditionally exempts certain types of liner shipping agreements i.e. agreements between two or more vessel-operating carriers which gives liner shipping services, i.e. the transport of goods on a regular basis amongst ports in accordance with timetables and sailing dates determined in advance. Under the BEO, liners are permitted to engage in vessel sharing agreements or price discussion agreements provided that the agreements allow each party to the LSA to have individual confidential service arrangements with their own customers; allow each party to the LSA to withdraw from the agreement upon giving an agreed period of notice without financial or other penalty; do not require mandatory adherence to a “tariff” and do not require the disclosure of confidential information concerning service arrangements. Singapore grants exemption to both VDAs and VSAs.

³⁴ WTO, 2010: 24

³⁵Review of the System for Exemption from the Antimonopoly Act for International Ocean Shipping, available at https://www.jftc.go.jp/en/pressreleases/yearly-2016/February/160204_files/160331.pdf

³⁶ Ibid, Page No. 50

The exemption requires that when the aggregate market share of the parties to a liner shipping agreement exceeds 50 percent, the parties are required to file their agreement and any variation or amendment of it with the Competition and Consumer Commission Singapore. This is done to ensure healthy competition and to restrict the probability of anti-competitive behaviour.

The BEO was first introduced in 2006 and has subsequently been extended in 2010, 2015, 2020 and 2022. The current BEO has been extended for three years from 1 January 2022 to 31 December 2024³⁷.

South Africa

The Competition Commission of South Africa was approached by the Association of Shipping Lines (ASL) in March 2014 for exemption from certain provisions of the Competition Act; the exemptions were sought for a period of five year. The argument presented in support of seeking exemption provided by the ASL was that the exemption sought for the agreements (Slot Charter Agreement, Slot Exchange Agreement, Vessel Sharing Agreement and Multi-Carrier Contracts) are unlikely to contravene the provisions of the South Africa Competition Act, 1998³⁸ and are mainly pro-competitive. However, the Competition Commission of South Africa decided not to grant any exemption³⁹.

The Competition Commission of South Africa fined two shipping companies in August 2015 for engaging in restrictive horizontal business practises, such as fixing the price at which a good or service must be bought or sold, segmenting markets, and engaging in collusive tendering for the transportation of machinery, equipment, and/or vehicles by sea on the route between Japan and South Africa⁴⁰. Nippon Yusen Kabushiki Kaisha (NYK) paid an administrative penalty of over R104 million after admitting to 14 instances of the restrictive acts outlined in section 4(b) of the Competition Act. Wallenius Wilhelmsen Logistics (WWL) consented to a R96 million settlement as payment for its involvement in the cartel and its 11

³⁷“CCCS Recommends Three-Year Extension of the Block Exemption Order for Certain Liner Shipping Agreements” Press Release, dated 15 November 2021. Available at: <<https://www.cccs.gov.sg/media-and-consultation/newsroom/media-releases/2021-cccs-recommends-three-year-beo-extension>>

³⁸South African Government, Competition Act 89 of 1998, Available at <<https://www.gov.za/documents/competition-act>>

³⁹Government Gazette, 15 June 2016, Case Number: 2014MAR0082. Available at <https://www.gov.za/sites/default/files/gcis_document/201606/40071gon720.pdf>

⁴⁰See, Competition Commission v NYK Logistics and BLL(NLB) of South Africa (Pty) Ltd, Case No. CO055Jun15.

instances⁴¹. This settlement was achieved following an examination into several shipping companies' collusive behaviour, including Mitsui O.S.K Lines, Kawasaki Kisen Kaisha Ltd, Compania Sud Americana de Vapores, Hoegh Autoliners Holdings AS, Wallenius Wilhelmsen Logistics, Eu-kor Car Carriers, and NYK between 1999 and 2012.

Australia

In Australia, there is a sector-specific regulatory framework based on collective bargaining. Shippers in Australia form organisations known as peak shippers bodies, which are acknowledged by the Australian government as representing the interests of their members. Liner shipping companies are required to transmit a copy of the draft agreement to the peak shippers' organisation and notify the registrar if when they are considering signing an agreement. The liner shipping companies must take part in any negotiations that the peak shippers' group wants. The liners' agreement is registered by the registrar of liner shipping once both parties have reached an agreement, and it is then immune from Australian competition law laws dealing to cartels and other agreements that have the effect of restricting competition. The parties to the registered agreement are required to engage in ongoing negotiations speak with the shippers about the terms and conditions and as well as other matters⁴².

The block exemption system should be implemented and pro-competitive agreements between liner shipping companies should be addressed under it, according to a thorough competition law review report from 2016⁴³ and several reports before it. The argument put forth by those who favour its repeal is that the collective bargaining system is failing to protect shippers' interests, and that shippers can instead advance pursue their interests by hiring forwarders or starting their own freight transportation business. Additionally, they claim there are no longer any justifiable reasons to regard liner shipping services differently⁴⁴. However, the Australian government has left the matter open for discussion and has not embraced this recommendation.⁴⁵

⁴¹See, *Competition Commission v Wallenius Wilhelmsen Logistics AS*, Case No. CO084Jul15.

⁴² *Competition and Consumer Act 2010 (Cth) part X (CC Act) Act No. 51 of 1974 as amended (CC Act) part X*

⁴³An Harper and others, 'Competition Policy Review: The Final Report' (March 2015) 285
<<http://competitionpolicyreview.gov.au/final-report/>>

⁴⁴ *Ibid*, pg 380-85

⁴⁵ Australian Government, 'Government Response to the Competition Policy Review' <<https://treasury.gov.au/publication/government-response-to-the-competition-policy-review>>

India

While India does not feature in the major sea trade routes, India does have a healthy maritime trade. According to the Ministry of Shipping, 70% of India's value and 95% of its volume of trade is carried out by sea transport. India has 205 notified minor and intermediate ports, along with 12 major ports. India's ports and shipping sector are essential to maintaining the expansion of trade and commerce in the nation. With a coastline that measures roughly 7,517 km, India is the sixteenth-largest marine nation in the world. Most cargo ships travelling between East Asia and America, Europe, and Africa transit via Indian territorial waters; in FY22, 650.52 million tonnes (MT) of cargo were transported through all of India's major ports.⁴⁶

The Ministry of Corporate Affairs (“MCA”), for the first time, issued a notification dated September 19, 2012 to exempt Vessel Sharing Agreements (“VSA”) and Voluntary Discussions Agreement (“VDA”) from being anti-competitive, for the duration of one year⁴⁷. In 2013 the MCA issued a notification to renew the exemption granted to VSA but not to VDAs; in 2018⁴⁸ the MCA once again granted a 3 year extension to the pre-existing exemption of Vessel Sharing Agreements. However, the 2018 notification for the extension of the exemption from Section 3 also for the first time stated that “...*provided that the Central Government may withdraw the said exemption, if any complaint for fixing of prices, limitation of capacity or sales and allocation of markets or customers comes to its notice.*” The said exemption provided by 2018 notification expired in July, 2021 and no new notification has been released by the MCA, extending the antitrust exemptions provided to the shipping industry.

Competition Commission of India imposed penalties on three maritime transport companies, Nippon Yusen Kabushiki Kaisha (NYK Line), Kawasaki Kisen Kaisha Ltd. (K-Line), Mitsui O.S.K. Lines Ltd. (MOL) and Nissan Motor Car Carrier Company (NMCC); for alleged cartelisation. The case provided that there was an agreement between NYK Line, K-Line, MOL and NMCC with the idea of enforcing “respect rule”, which implied evasion of competition with each other and protecting the business of incumbent carrier with the respective automobile original equipment manufacturer. To achieve this goal, the maritime transport companies

⁴⁶<https://www.ibef.org/industry/ports-india-shipping>

⁴⁷Government of India, Ministry of Corporate Affairs, Notification September 2012. Available at <http://www.mca.gov.in/Ministry/pdf/draft_notification_19_sept_2012.pdf>

⁴⁸Government of India, Ministry of Corporate Affairs, Notification the 4th July, 2018. Available at <https://mca.gov.in/bin/ebook/dms/getdocument?doc=NjgyOQ==&docCategory=Notifications&type=open>

resorted to multilateral as well as bilateral contacts with each other to share commercially sensitive information which included freight rates. As the three companies filed lesser penalty applications, the Commission gave benefit of reduction in penalty by 100% to NYK Line and its individuals, 50% to MOL and its individuals and 30% to NMCC and its individuals. Accordingly, the Commission directed K-Line, MOL and NMCC to pay penalties to the tune of approximately ₹24.23 crores, ₹10.12 crores and ₹28.69 crores respectively⁴⁹.

IV. The Debate on Utility of Exemptions

There has been an ongoing debate with respect to the above-mentioned exemptions and whether these exemption work in the favour of the global maritime trade. The importance of maritime trade has also been brought to the forefront of public discussion in part due to the Covid-19 pandemic which has disrupted maritime transport and resulted in supply chain disruptions that the entire world struggled to recuperate from. Post Pandemic there has been a growing public concern about dramatic price increases in liner shipping, the need to protect the supply chain as a whole, and ensure a balanced and level-playing field for all specific actors.

The argument that is provided by Liner Shipping Companies which are in favour for granting exemption to vessel sharing agreements and consortium shipping businesses under the various jurisdictions is that doing so will enhance the effectiveness and standard of the liner shipping services, that are currently provided. Additionally, by facilitating and promoting increased container utilisation and more effective vessel capacity usage, they aid in the advancement of economic development. Liner shipping firms that operate in several countries throughout the world contend that Vessel Sharing Agreements are beneficial to the economy as a whole and contribute to the goal of public welfare. Therefore, the Liner Shipping Companies which are in favour of exemptions argue that these agreements should be excluded from the scope of the various competition laws in effect across the world.

Conferences have been advocated for on the grounds of "excessive competition," "destructive competition," and "empty core" theories, which convey that price fixing is necessary because the liner-shipping service is characterised by large sum investments where the marginal cost to load an additional container on a fleet is negligible; if liner shipping companies were left to compete against one another, no investment would be profitable and the service would suffer.

⁴⁹Case Number 10 of 2014, Competition Commission of India, Available at: <<https://www.cci.gov.in/antitrust/orders/details/636/0>>

In Japan, Malaysia, and Singapore, antitrust exemptions for conferences and VDAs were justified using a similar justification⁵⁰.

As opposed to the arguments presented by the Liner Shipping Companies, user associations who are not in favour of granting these exemptions have raised very serious concerns for the further extension of the exemptions. For instance, concerns with quality of the service, possibility of price hiking and possible cartelisation between big shipping corporations have been raised by Shippers of different jurisdictions of the world. In the US and the EU there is continuing review of the need for carrier antitrust immunity by the US Congress and the European Commission⁵¹.

The mega alliance Ocean, 2M, and THE Alliance own more than 90% of the worldwide shipping industry, which may suggest an oligopolistic market structure and possibly collective dominance, according to UNCTAD's analysis of the maritime transport sector⁵². Even though an alliance does not expressly forbid price competition among its members, the U.S. Department of Justice noted that members will nevertheless share competitively sensitive information⁵³. Alliances also control important factors including routes, frequency, dependability, and the amount of boats they use, which puts them in a position to control output and service quality⁵⁴. This dominant position might be abused against both shippers and the providers of bunkering and other services that are procured by the liner shipping companies.

It is also crucial to remember that the maritime sector has experienced significant consolidation, to the point that it might be said that consolidation is an industry feature. In 2016, CMA-CGM acquired American President Lines, China Shipping Container Liners and COSCO combined, Maersk purchased Hamburg Sud, and Hanjin Shipping left the market. The

⁵⁰Singapore Competition Commission, 'Consultation on CCC's Proposed Recommendation to the Minister with Respect to Liner Shipping Agreements' (May 2015) 5-7<<https://www.cccs.gov.sg/public-register-and-consultation/public-consultation-items/2015-public-consultation-on-proposed-recommendation-to-extend-beo-for-liner-shipping-agreements>>; Malaysia Competition Commission, 'Overview on The Proposed Block Exemption for Liner Shipping Agreements by the My CC' <http://mycc.gov.my/sites/default/files/Overview-on-The-Proposed-Block-Exemption-for-Liner-Shipping-Agreements-by-the-MyCC_pptx.pdf>

⁵¹Organisation for Economic Co-operation and Development (OECD) (Directorate for Financial and Enterprise Affairs), 'Competition Issues in Liner Shipping: Note by the Secretariat' (2015) DAF/COMP/WP2/WD(2015)3unclassified<[http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP2\(2015\)3&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP2(2015)3&docLanguage=En)> (OECD 2015)

⁵² UNCTAD 'Review of Maritime Transport 2017' (2017) UNCTAD/RMT/2017; Pg 49

⁵³ See e.g. U.S. Department of Justice, Comments of the U.S. Department of Justice on the THE Alliance Agreement, FMC Agreement No. 012439 (22 November 2016); Comments on the OCEAN Alliance Agreement, FMC Agreement No. 012426 (19 September 2016). Both documents are available at<<https://www.justice.gov/atr/comments-federal-agencies#fmc>>.

⁵⁴ Supra Note 41; Pgs14, 49-50

following year, 14 Korean liner shipping companies, including Hyundai Merchant Marine, formed a partnership⁵⁵. Furthermore, Hapag Lloyd and United Arab Shipping Company merged. Nippon Yusen KK, Mitsui Osaka Shosen Lines (MOL), and Kawasaki Kisen (K Line) consolidated to form a joint venture called Ocean Network Express⁵⁶. The market for shipping liner services may become even less competitive as a result of these consolidations. Through their roles as port operators or any other economic position in the adjunct markets, vertically integrated liner shipping corporations may also use exclusionary practises⁵⁷.

The consistency of the terms and conditions of the contract is another argument offered in favour of price fixing. This claim like that is very contentious as this argument merely serves to highlight the anticompetitive nature of such agreements, given that stability implies a stabilised price. Customers are unlikely to favour a constant higher price over a variable cheaper price⁵⁸. If the stability is interpreted to mean that the service are continuously available with the absence of major disruptions like bankruptcy, it would provide an inclination towards destructive competition theory⁵⁹ and the criticism of it can be considered valid here.

V. Conclusion

India will need a thriving and powerful maritime sector for both economic and strategic reasons. The marine industry in India needs to be always on the lookout for innovations and technology that might reduce costs and provide more for less money. One important option might be through forming alliances and working together with prosperous marine clusters, particularly in the fields of ship design, automation, and technology. Such partnerships can increase productivity and competitiveness; nevertheless, a sector may only be exempted if net consumer advantages outweigh potential drawbacks. Legal oversight can be established to ensure legal compliance, prevent abusive market dominations among major players and to promote constructive competitive business environment to ensure better market efficiency

⁵⁵ World Maritime News, 'South Korean Container Carriers Unite' (4 August 2017) <<https://worldmaritimeneeds.com/archives/226620/south-korean-container-carriers-unite/>>

⁵⁶ OECD Mega Ships, Pg68

⁵⁷ OECD 'Competition in Ports and Port Services' DAF/COMP(2011)14 (2014) 11-12 <<http://www.oecd.org/regreform/sectors/48837794.pdf>>;

⁵⁸ According to the JFTC, while 97% of shippers indicated the level of freight rates was one of their criteria for choosing shipping companies, only 53% of them chose the stability of freight rates. US FMC, Federal Maritime Commission Agreement Library, THE Alliance / OOCL Vessel Sharing Agreement (originally filed on 27 July 2017)

⁵⁹ Destructive competition is the circumstance in which an industry is not a natural monopoly, nonetheless lacks a stable competitive equilibrium. See Destructive Competition And Market Unsustainability In The Liner Shipping Industry by J.E. Davies, *International Journal of Transport Economics*, Vol. 17, No. 3; pp. 227-245

within the shipping sector. It needs to be reiterated that there are three kinds of exemption regimes: block exemptions, sector specific legislation and sector specific legislation based on the collective bargaining system; as mentioned above each of these exemptions offers their own advantages and disadvantages. At the international level, there is an absence of globally endorsed, legally binding multilateral instrument on competition in liner shipping.

Significantly there is a need to recognise that continuous increases in vessel size and consolidation in the liner shipping industry have led to an oligopolistic market structure on various trade routes. Concentration is higher in developing countries; these countries have therefore faced decreased liner shipping service frequencies and higher freight rates. Developing nations are currently grappling with relatively higher transport costs, in granting exemption from antitrust law their trade levels may be affected more than those of developed countries.

It has been over a year since the exemptions granted by the MCA to shipping liners operating in India has expired, the shipping industry has not as of yet raised any major operating concerns. This maybe in part due to the fact that India not holding a key drop position in the core route or secondary route of maritime trade; it may also implicate that the current market of ship liner services is effectively able to operate without a need for antitrust exemption. However, India may need to consider reassessing the requirement for such exemptions from time to time, as is the case with mature jurisdictions.