WATCHDOGS OF THE WORLD: GLOBAL LINER CONFERENCE REGULATORS IN THE MODERN SHIPPING MARKET AND WHY THE P3 AGREEMENT FAILED

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This article analyzes the rise, fall, and ultimate termination of the largest (by volume) proposed vessel-sharing alliance the shipping industry has ever seen, the P3 Network Sharing Agreement. Pertinent to the discussion is detailed evaluation of the world’s fundamental regulators of liner shipping conferences, their relative power and authority, and how they have adapted to the world shipping market. The conclusion is simple: consistent with its status as the world’s largest shipping market and holder of state-owned carriers, China is the last world watchdog with the regulatory clout to prevent the formation of potentially anti-competitive shipping alliances.

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INTRODUCTION

Hello, Engine; I'm Jake Holman.¹

The timeless words of Steve McQueen in *The Sand Pebbles* resonate when considering the changes vessels and China have undergone in the last century. Jake Holman represents the old guard, a gruff engineer aboard a 1926 naval vessel in revolutionary China.² Today, vessels with 18,000 TEU³ capacities roam the oceans, and China represents the world's largest export market by volume.⁴

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¹ THE SAND PEBBLES (20th Century Fox 1966).
² Id.
Liner shipping conferences and vessel-sharing agreements present a bit of a conundrum to most. They permit ocean carriers, shrouded in anti-trust immunity, to legally confer on rates and engage in the sharing of vessels across global shipping markets.5 Three main authorities oversee the approval and monitoring of such agreements including the United States’ Federal Maritime Commission (“FMC” or “Commission”), the European Union’s European Commission (“EC”) and China’s Ministry of Commerce (“MOFCOM”).

Consistent with increases in vessel size and the general flattening of freight rates came one of the largest vessel-sharing agreements the maritime world has seen, representing almost fifty percent of the market share in some routes and referred to as the P3 Network Vessel-Sharing Agreement (“the P3 Agreement” or “the Agreement”).7 The P3 Agreement was filed with MOFCOM in September 2013 and with the FMC in October 2013, embodying a global vessel-sharing alliance between three of the world’s largest ocean carriers, including Denmark’s Maersk Line, France’s CMA CGM, and Switzerland’s Mediterranean Shipping Co. (“MSC”) (“the Parties”).8 The P3 Agreement was approved by the FMC in March 2014, denied by MOFCOM in June 2014, and subsequently terminated by the Parties in September 2014.9

This article will assess the (1) rise, fall, and termination of the P3 Agreement; (2) the current state of liner conference regulation and vessel-sharing agreement regulation; (3) and their future in the world’s most important maritime market, China. Part I will evaluate the regulatory authorities of the U.S., the EU, and China, their relative power, and market application. Part II will consider the P3 Agreement, its treatment by the relevant regulators and why it ultimately failed in

6. See infra Part I regarding discussion on the relevant regulatory authorities of the world’s shipping governments.
7. See infra Part II for further discussion on the P3 Agreement and its unique particularities as a vessel-sharing alliance.
China. The article will then conclude that China represents the remaining international regulator of liner conference agreements with the power and governmental authority to legitimately prevent anti-competitive shipping alliances from dominating the world stage.

I. GLOBAL LINER CONFERENCE REGULATORY AUTHORITIES

Consistent with economic prowess, international shipping and controlled carrier interests, and import and export volume, the three primary regulators of shipping conference and vessel-sharing agreements worldwide include the FMC, the EC, and MOFCOM. The members of the proposed P3 Agreement, therefore, sought the approval of these three regulatory watchdogs, for the inability to operate in any one of these regulated markets would make the utility of a vessel-sharing agreement senseless.

A. The Federal Maritime Commission

The FMC was created on August 12, 1961 during “the early months of the Kennedy Administration.” The FMC that exists today, however, has experienced considerable change over the past century including its name, statutory mandate, status as an independent regulatory agency, and general operation. Generally, the FMC has undergone the following changes since its inception: In 1916, the United States Shipping Board was created by Congress (“USSB”); and from 1936 to 1950, the FMC was known as the United States Maritime Commission (“USMC”). Following the USMC, “the regulatory programs of the [USMC] were transferred to the Federal Maritime Board at the Department of Commerce, where they resided until the [creation of the FMC] in 1961.”

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11. Id.
13. Id.
1. FMC Origin, History, and Predecessor Agencies

The FMC’s origin reaches back to the global issues surrounding World War I (“WWI”). In 1914 WWI had created a vessel shortage for shipping goods, resulting from the considerable amount of vessel-usage for the war effort. As the U.S.’s export needs grew, and space on vessels became sparse, it became clear a “new maritime watchdog agency” was needed to protect American interests at home and abroad. Grounded in war-based concerns and on The Alexander Committee Investigation, 1912-1914, Congress found that shipping conferences that were given anti-trust immunity by the U.S. government would be the best way to serve the needs of U.S. exporters. With anti-trust immunity, however, came great concern that such a privilege would be taken advantage of, and the USSB, created under the Shipping Act of 1916 (“the Act” or “the Shipping Act”) was mandated to “protect American exporters and importers from any potential abuse of the anti-trust immunity Congress would grant conferences under new shipping legislation.” The Merchant Marine Act was created in 1920 and “charged the [USSB] with monitoring and responding to foreign laws, regulations, or practices that create conditions unfavorable to shipping in . . . foreign trade.”

Subsequently, in 1936 Congress shifted the USSB to the Commerce Department, and created the USMC. In 1950 the regulatory duties of the USMC were transferred to the FMB within the Commerce Department, which continued to regulate maritime trade until the FMC was given its congressional mandate in 1961.

15. Id.
16. Id.
17. Id.
22. Id.
23. Id.
2. Creation of the FMC, Statutory Mandates, and Regulatory Power

In the early months of 1961, President Kennedy and Congress “decided that the tasks of regulating the activities of international liner shipping companies and promoting a healthy U.S. merchant marine should be pursued by separate agencies.” Reorganization Plan No. 7, an executive order at the direction of President Kennedy, created two agencies: The FMC and the Maritime Administration (“MARAD”). The FMC was established as an independent regulatory agency, charged with regulating U.S. ocean commerce, where MARAD (part of the Department of Transportation) would promote maritime commerce as well as oversee the merchant marine and an “emergency reserve of cargo ships for use in times of conflict.”

In the 1950’s, lured by lower rates and labor costs, freight-forwarders began consolidating shipments and employing the use of U.S. railroads to carry truck trailers over long distances. The age of containerization began in April 1956 when an aging tanker known as the Ideal X, loaded with fifty-eight “aluminum bodies” sailed from Newark, New Jersey to Houston, Texas. In Houston, fifty-eight trucks were ready and waiting for the “aluminum bodies” that would come to be known as containers, and “such was the beginning of a revolution.”

The 1956 onset of containerization was a major factor in compelling the Kennedy Administration to restructure the authorities tasked with regulating international maritime commerce. Containerization created a significantly more dynamic logistics market, changing what had been a

24. Id.
25. Id.
26. Id.
27. A freight forwarder is “[a] person whose business is to act as an agent on behalf of the shipper to arrange transportation services. A freight forwarder frequently makes the booking reservation.” See Glossary, supra note 3.
29. LEVINSON, supra note 28, at 1.
30. Id.
relatively stable industry.\textsuperscript{32} A new kind of maritime commerce meant a new regulatory agency “to take the lead in updating the nation’s transportation regulations to remove obstacles to the intermodal services that [would] bec[ome] so critical to [the] nation’s commerce.”\textsuperscript{33}

3. The Shipping Act (1916 and 1984)

The FMC’s regulatory powers are vested in the primary statute that governs ocean-shipping practices, the Shipping Act.\textsuperscript{34} Congress enacted the Shipping Act of 1916 (“1916 Act”) in response to the events surrounding WWI and, in reaction to changes in maritime commerce, has amended it several times.\textsuperscript{35} Thirty years after containerization revolutionized global trade “shippers and carriers recognized that the pre-container Shipping Act of 1916 needed modernization.”\textsuperscript{36} On March 20, 1984, the Shipping Act of 1984 (“1984 Act”) was passed and with it came “regulatory innovations that have had a major impact on liner shipping and the FMC’s responsibilities.”\textsuperscript{37}

The important amendments of the 1916 Act included the introduction of negotiated service contracts for liner services, expelling the archaic process of exclusively providing public tariffs.\textsuperscript{38} Additionally, the “1984 Act also clarified the authority of conference members to offer intermodal pricing.”\textsuperscript{39} This allowed shippers to now contract with an ocean carrier for an entire “door-to-door” rate including both the ocean and intermodal rates (either truck or rail). Additionally, the 1984 Act expedited the approval process for entities wishing to enter into cooperative agreements, known as conferences.\textsuperscript{40} Under the 1984 Act, such cooperative agreements become active after forty-five days, in the absence of FMC intervention.\textsuperscript{41}

\begin{thebibliography}{9}
\bibitem{32} Id.
\bibitem{33} Id.
\bibitem{34} 46 U.S.C. §§ 40101-41309 (2012).
\bibitem{36} See History, supra note 10.
\bibitem{37} Id.
\bibitem{38} Id.
\bibitem{39} Id.
\bibitem{40} Id.
\bibitem{41} 46 U.S.C. § 40304 (2012).
\end{thebibliography}
Today, the Shipping Act serves four main purposes:

1) establish a nondiscriminatory regulatory process for the common carriage of goods by water in the foreign commerce of the United States with a minimum of government intervention and regulatory costs;

2) provide an efficient and economic transportation system in the ocean commerce of the United States that is, insofar as possible, in harmony with, and responsive to, international shipping practices;

3) encourage the development of an economically sound and efficient liner fleet of vessels of the United States capable of meeting national security needs; and

4) promote the growth and development of United States exports through competitive and efficient ocean transportation and by placing greater reliance on the marketplace.42

In general, “The [FMC] has jurisdiction to regulate ocean shipping lines operating between the United States and foreign countries, monitor agreements between ocean common carriers, and enforce a number of prohibitions against discriminatory and unreasonable rates and practices.”43 The main actors that fall under its regulation are “ocean carriers, ports, and marine terminal operators (‘MTO[s]’).”44


Section 18 of the 1984 Act required that the Commission “conduct a 5-year study on how the Act’s reforms actually worked out in practice.”45 Review of the study took place from 1991 to 1992, the recommendation of which constituted the major deregulation legislation following the 1984 amendments in the form of the Ocean Shipping Reform Act of

43. 80 C.J.S. SHIPPING § 256 n.1 (citing Regal-Beloit Corp. v. Kawasaki Kisen Kaisha Ltd., 557 F.3d 985 (9th Cir. 2009)).
44. Cook, supra note 35, at 1537-38 nn.91-95 (citing §§ 40101-44106).
45. See History, supra note 10.
After Congressional approval, President Clinton signed OSSRA into law on October 14, 1998; it took effect on May 1, 1999. The main purposes of the deregulatory reform were to provide more flexibility to the shipping industry and to allow the liner trade to rely more heavily on the marketplace. The main reforms that OSSRA included were:

1) ending the authority for liner conferences to regulate their members’ service contracts;

2) encouraging confidentiality of rates in contracts;

3) giving the Commission enhanced authority to provide exemptions from existing statutory provisions; and

4) strengthening the FMC’s authority to address restrictive practices by foreign governments and state-controlled carriers.

Today the shippers, carriers, ports, MTO’s, freight-forwarders, and logistics experts that make up the maritime shipping industry operate with more ease and flexibility than ever before, allowing for the highest levels of commercial efficiency the industry has seen since the inception of containerization.

5. Conference and Vessel-Sharing Agreements under the Shipping Act

a. Approval Process

The conference agreement process is fairly straightforward, despite the powerful anti-trust immunity vested with the FMC. Under the Shipping Act a conference agreement must be filed with the FMC stating the general purpose of the agreement, “provide reasonable and equal

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47. See History, supra note 10.
48. Id.
49. Id.
50. Id.
terms for admission and readmission to conference membership for any ocean common carrier willing to serve the particular trade or route” and stipulate to other enumerated requirements.\footnote{41}{46 U.S.C. § 40303(b)(1)-(2) (2012).}

After preliminary evaluation, the Commission must reject an agreement if it does not comply with the mandated Shipping Act perquisites.\footnote{52}{Id. § 40304.} If the Commission fails to reject the proffered agreement within forty-five days of filing, the agreement will become effective.\footnote{53}{Id. § 40304(c)(1).} The filing parties may request a shortened period, “but not to a date that is less than [fourteen] days after notice of the filing of the agreement is published in the Federal Register.”\footnote{54}{Id. § 40304(e)(1).} The United States District Court for the District of Columbia possesses sole discretion as to a Commission requested extension of the forty-five day period, through the civil action procedures provided by section 41307 of title 46.\footnote{55}{Id. § 40304(e)(2).} In practice, the five

\begin{enumerate}
\item The agreement must:
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\item permit any member to withdraw from conference membership on reasonable notice without penalty;
\item at the request of any member, require an independent neutral body to police fully the obligations of the conference and its members . . .
\item provide for a consultation process designed to promote—(A) commercial resolution of disputes; and (B) cooperation with shippers in preventing and eliminating malpractices;
\item establish procedures for promptly and fairly considering requests and complaints of shippers;
\item and provide that—(A) any member of the conference may take independent action on a rate or service item on not more than 5 days’ notice to the conference; and (B) except for an exempt commodity not published in the conference tariff, the conference will include the new rate or service item in its tariff for use by that member, effective no later than 5 days after the receipt of the notice, and by any other member that notifies the conference that it elects to adopt the independent rate or service item on or after its effective date, in lieu of the existing conference tariff provision for that rate or service item.
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\item \textit{Id.} § 40303(b)(3)-(4), (6)-(8).
\item \textit{Id.} § 40304.
\item \textit{Id.} § 40304(c)(1).
\item \textit{Id.} § 40304(e)(1).
\item \textit{Id.} § 40304(e)(2). Such an action would be brought by the Commission’s Office of General Counsel. This is in contrast to the majority of federal agencies that statutorily delegate litigation to the Attorney General. \textit{See id.} § 41307(d). The general duty of the Office of General Council (OGC) is to provide legal services to the Commission and Commission staff. \textit{Office of the General Counsel, FED. MAR. COMM’N}, http://www.fmc.gov/bureaus_offices/general_counsel.aspx (last visited Mar. 1, 2015). OGC provides advice to the Commissioners, Chairman, and Commission in general on
senate-confirmed Commissioners that lead the FMC will often vote as to the efficacy of Commission action to block a proposed agreement. The contemporary essence of the Shipping Act, therefore, embodies a statutory framework allowing a relaxed approval process for conference agreements, with the burden on the Commission in denying endorsement.

Many conference agreements will inherently involve a vessel sharing agreement, which are also permitted under the Shipping Act. Under the Act, “[a]n ocean common carrier that is the owner, operator, or bareboat [charterer], time, or slot charterer of a liner vessel . . . may agree with an ocean common carrier . . . to which it charters or subcharters the vessel.” This is provided, however, that the carrier is not a U.S.-flagged vessel involved in the Maritime Security Fleet Program.

b. Legal Regulation

Statutorily, the Commission “may bring a civil action to enjoin conduct [for general violations] . . . [And such] action must be brought in the district court of the United States for any judicial district in which the defendant resides or transacts business.” The primary reason for Commission action, however, is a reduction in competition resulting from an approved agreement. Substantively, the Commission may take action to enjoin members of an agreement from further operation if it “determines that the agreement is likely, by a reduction in competition,

“adjudicatory and investigatory proceedings.” Additionally, OGC drafts all rulemakings involving the FMC, issues formal opinions on behalf of the Commission when reviewing an ALJ’s initial decision, and defends the Commission when its decisions are reviewed by a federal appellate court.

56. This is how the Commission determined whether to take action regarding the P3 agreement. See infra Part II regarding the FMC’s analysis of the legality of the P3 Agreement. The Commission is comprised of five Commissioners, appointed by the President, “with the advice and consent of the Senate.” 46 U.S.C. § 301(b)(1). No more than three Commissioners may be from the same political party, and the President must designate one of them to be Chairman, who will act as the chief executive and administrative officer of the Commission. Id. § 301(c)(1)-(2). The Commission needs only three Commissioners to function, as a quorum is based on a majority vote. Id. § 302.
58. Id. § 40303(d)(2).
59. Id. § 41307(a).
60. See id. § 41307(b)(1).
to produce an unreasonable reduction in transportation service or an unreasonable increase in transportation cost." 61 Unlike an action for a general violation, an action brought for a reduction in competition falls under the exclusive purview of the District Court for the District of Columbia, with the burden on the Commission. 62 This constitutes the FMC’s sole remedy with regard to an action for a reduction in competition. 63

c. Economic Regulation

The Commission’s decision to take legal action for a reduction in competition is usually grounded in the FMC’s economic monitoring programs run by the Bureau of Trade Analysis (“BTA”) and within that Bureau, the Office of Economics and Competition Analysis. The general mandate of BTA is to review agreements and monitor the concerted activities of common carriers. 64 Additionally, BTA “also is responsible for competition oversight and market analysis, focusing on activity that is substantially anti-competitive under the standards of . . . the Shipping Act.” 65 In essence, BTA is an expert organization regarding “the economics of international liner shipping . . . especially with respect to issues of competition and unfair trade practices as they may affect the interests of the shipping public and U.S. international trade.” 66

The Office of Economics and Competition Analysis reports directly to BTA as well as to the Commissioners, and is tasked with keeping the Commission apprised of industry trends based in part on approved agreements. 67 The Office does go through the preparation of “studies and

61. Id.
62. Id. § 41307(b)(3).
63. Id. The court may issue a temporary restraining order, preliminary injunction, or a permanent injunction. Id. § 41307(2). Interestingly, the court may not allow third-party intervention. Id. § 41307(3).
65. Id.
66. Id.
profiles of major trades, using monitoring reports, economic analyses, and agreement/carrier profiles.68 Ongoing surveillance programs to ensure carrier compliance with the statutory mandates for approved conference agreements and the development of “profiles of major trade areas to assess carrier behavior under agreements” make up the balance of the Office’s duties.69

B. The European Commission

1. The EU Generally

The EU involves unique particularities as a regulator of vessel-sharing and conference agreements because it is not a nation, but a membership of nations; “[i]ts twenty-eight Member States have surrendered elements of their sovereignty to the EU in return for such phenomena as an internal market, a social union, and economic and monetary union, and ‘a new legal order.’”70 This integrated network was spawned from the fragmented economic communities of Europe in the 1950s, including the European Coal and Steel Community (“ECSC”), the European Economic Community (“EEC”), and the European Atomic Energy Community (“EAEC”).71

The European Commission represents the interests of the EU through the drafting of proposals for European laws, implementing EU policies, and spending EU funds.72 It should also be noted that although EU law operates in parallel fashion to Member State law, EU law prevails where the two are in conflict.73 The EU Commission is composed of twenty-eight Commissioners, one from each EU country; the EU Commission

68. Id.
69. Id.
71. Id.
73. Power, supra note 70, at 314 (citing Case 6/64, Flaminio Costa v. ENEL, 1964 E.C.R. 585, 594.).
here may refer to the permanent staff, the Commissioners, or the institution as a whole.  

2. EU Liner Conference and Competition Law

In 1979, Regulation 954/79 was adopted pertaining to the EU Commission’s stance on liner conferences. This regulation essentially adopted the United Nations Convention on a Code of Conduct for Liner Conferences (“UNCTAD”). The EU Commission’s explanation of Regulation 954/79 stated in pertinent part that:

Regulation 954/79 . . . acknowledged the stabilizing role of liner conferences, guaranteeing regular and reliable services to transport users . . . . Th[is] Commission is concerned about the increasing trend to exclude outside competition from trades in which closed conferences operate. These cases are most serious when a State at one end of the trade route precludes non-conference competition. Th[is] Commission’s proposal is designed in particular to deal with this problem.

In an additional proposal, to ensure EU liners’ marketplace competitiveness, it reserved the right to “act against unfair practices where [non-EU shipping companies] cause or threaten material injury to EU liner conferences.”

In 1986, amid a prospering global economy, Regulation 4056/86 established a block exemption for liner conferences. In 2008, however, “by virtue of Regulation 1419/2006, the block exemption for liner conferences in Regulation 4056/86 ended.” EU competition law therefore applies in full to the European shipping sector, meaning “liner conferences, which have as their object or effect the fixing of prices (that is tariffs) or conditions of competition to and from the EU, which are

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76. Power, supra note 70, at 332.
78. Power, supra note 70, at 333.
80. Power, supra note 70, at 352.
now prohibited." The exchanging of information between carriers could therefore constitute a breach of EU competition law.

3. The Lingering Compromise: Consortia

a. Block Exemption Regulations

In 1992, Regulation 479/92 established a block exemption to consortia, which are essentially vessel-sharing agreements, and have unsurprisingly always been favored by the EU Commission because they do not lean on the practice of price-fixing. To that end, “[c]onsortia are clearly more attractive to competition agencies than liner conferences because consortia often provide shipping services in an efficient manner that meets consumer needs.”

But, because consortia are not inherently devoid of anticompetitive concepts, a block exemption was still necessary to ensure legal compliance with EU competition law. This came in the form of a consortia block exemption, chiefly Regulation 823/2000. This regulation was subsequently replaced with Regulation 906/2009 as the block exemption was due to expire in April 2010. This exemption is effective through April 2015, as the block exemptions have perennially been adopted in a series of five-period installments.

81. Id.
82. Id.
84. Power, supra note 70, at 342.
85. Id. at 354.
86. Id.
87. Id.
89. Power, supra note 70, at 354.
b. Definitional Scope, Conditions, and Rationale

Under EU Commission regulations, consortia enable carriers to enter into agreements that enjoy block exemption from Community competition rules so long as such agreements do not eliminate competition.91 By definition, consortia are cooperative agreements between companies to jointly operate a maritime transportation service; “[t]he members of such consortia provide regular international liner shipping services for goods only, generally using containers, in one or more trades.”92 The scope of EU consortia regulations applies to international maritime carrier services from or to one or more EU member ports.93

Eligibility for consortia block exemptions is based on economic anti-monopoly theory, with the main criterion being continued and effective competition in the market.94 Quantitatively, EU regulations state that a “consortium must, in order to benefit from the exemption, possess on each market in which it operates a market share of under 30% calculated by reference to the volume of goods carried when it operates within a conference, or under 35% when it operates outside a conference.”95 Independence is also a main factor in exempted status and has substantive criteria in the regulations, as consortia members must retain the ability to offer autonomous arrangements and services, withdrawal rights without financial consequences, and the ability to engage in independent marketing.96 The responsibilities of consortia members are not onerous, as agreements are automatically exempted without even as

92. Id.
93. Id. (“More specifically, the activities covered are as follows: the joint operation of maritime transport services; temporary capacity adjustments; the joint operation or use of port terminals; participation in one or more of the following pools: cargo, revenue or net revenue; the exercise of voting rights held by the consortium in the conference within which its members operate; a joint marketing structure and/or the issue of a joint bill of lading.”).
94. Id.
95. Id.
96. Id.
much as a written proposal; members are obliged only to “demonstrate to the [EU] Commission that they consult their users on important matters and that the conditions of their maritime transport[ation] services are made available to users at reasonable cost[s].”

The relaxed approval process for vessel sharing agreements could be couched in the EU Commission’s overarching belief that consortia offer benefits to the consumer rather than exclusively promote carrier success. This is reflected in the Regulations, as the EU Commission stated in most recent block exemption, Regulation 906/2009 that consortia:

[I]mprove the productivity and quality of available liner shipping services by reason of the rationalisation they bring to the activities of member companies and through the economies of scale they allow in the operation of vessels and the utilisation of port facilities. They also help to promote technical and economic progress by facilitating and encouraging greater utilisation of containers and more efficient vessel capacity.

In essence, because the regulations mandate that the economic byproducts of increased productivity trickle down to the consumer/shipper, rather than benefit member carriers through uncompetitive rates, consortia as a whole are positively viewed by EU lawmakers.

C. China

As the world-leader in export volume, China’s approval or barring of a liner conference or vessel-sharing agreement makes a proposal worthwhile, or completely fruitless. Chinese anti-trust law as it relates to liner agreements in the maritime context parallels Chinese norms regarding rigid state control, absence of positive free-market economic theory, and nebulous legal transparency. The law that is accessible is accommodatingly broad, so that Chinese regulators may conveniently employ the same statutory provision oppositely, in justifying a pre-

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97. Id.
100. See discussion infra Parts I.C.1-2.
determined conclusion based on extraneous factors.\textsuperscript{101} This section will evaluate the Chinese approval process taking into account the unique considerations that accompany any legal or business endeavor in China.

\textit{1. Regulations of China on International Maritime Transportation}

The applicable law concerning liner conference and vessel sharing agreements is embodied not in the Chinese Maritime Code, but in the Regulations of the People’s Republic of China on International Maritime Transportation (“Transportation Regulations”).\textsuperscript{102} The Transportation Regulations were “[a]dopted at the [forty-ninth] Executive Meeting of the State Council on December 5, 2001, promulgated by Decree No. 335 of the State Council of the People’s Republic of China on December 11, 2001, and [became] effective as of January 1, 2002.”\textsuperscript{103}

\textbf{a. Scope and General Applicability}

Where the Chinese Maritime Code provides substantive maritime law within Chinese admiralty jurisdiction, the Transportation Regulations include the protocols for operating within the maritime transportation system in a commercial sense.\textsuperscript{104} The stated purposes of the Transportation Regulations, therefore includes “regulating international maritime transportation operations, protecting fair competition, maintaining the order of [the] international maritime transportation market and safeguarding the lawful rights of the interests of the relevant parties involved in international maritime transportation.”\textsuperscript{105} Consistent with the U.S. and the EU, Chinese law regulating liner agreements applies to and from Chinese ports.\textsuperscript{106} The Transportation Regulations apply with equal force to auxiliary business operations that \textit{relate} to

\begin{itemize}
\item \textsuperscript{101} See \textit{id}.
\item \textsuperscript{102} Regulations of the People’s Republic of China on International Maritime Transportation (promulgated by St. Council, Dec. 5, 2001, effective Jan. 1, 2002) available at www.sse.net.cn/doc/e01.doc (China) [hereinafter Transportation Regulations].
\item \textsuperscript{103} \textit{id} at pmbl.
\item \textsuperscript{104} \textit{id}.
\item \textsuperscript{105} \textit{id} art. 1.
\item \textsuperscript{106} \textit{id} art. 2.
\end{itemize}
international maritime transportation. These “auxiliary business[es]” include “the businesses relating to international shipping agency services, international ship management, loading and unloading, storage and warehousing of international shipments and international maritime container freight station and container yard services, etc.”

b. The Chinese Liner Agreement Approval Process: 
Criteria, Requirements, and Interpretative Guidelines

The general requirements for submitting a liner agreement proposal are fairly straightforward and are outlined in Article 22 of the Transportation Regulations. To initiate the approval process, photocopies of the agreement must “be filed with the competent communications department of the State Council within [fifteen] days from the date of conclusion of [the] agreement[].” Like other international regulators, Chinese law emphasizes that agreements built on an anti-competitive framework will not be tolerated. Article 27 of the Transportation Regulations articulates these criteria as prohibited acts, including providing anti-competitively low freight-rates, offering shippers secret rebates, taking advantage of a dominant market position to impose discriminatory freight rates or other detrimental terms, and “committing any other acts detrimental to the other party of the transaction or the order of [the] international shipping market.”

107. Id.
108. Id.
109. Id. art. 22.
110. See infra Part I.A-B (regarding U.S. and EU regulators’ clearly articulated statutory provisions barring agreements that lean solely on anti-competitive constructs).
111. Transportation Regulations, supra note 102, art. 27.
112. Id. ¶ 1.
113. Id. ¶ 2.
114. Id. ¶ 3.
115. Id. ¶ 4. In theory, investigations would be carried out by the competent Chinese authorities based in part on investigatory powers vested in the Government in the Transportation Regulations. See id. art. 35 (“The competent communications department of the State Council may, upon the request of the interested parties or at its own discretion, conduct investigations into the following cases: liner conference agreements, operational . . . or freight rate agreements concluded among international shipping operators engaged in international liner services in which Chinese ports are involved and which can be detrimental to fair competition; service activities of the consortium set up
Despite the seemingly clear approval process, the primary mechanism employed by Chinese regulators in evaluating and ultimately barring a proposed liner agreement is not embodied in Article 22, but rather Article 24, the approval process for a merger of international shipping operators.\textsuperscript{116} As alluded to earlier, these interpretive guidelines are just that; Article 24 provides enough ambiguity to be applied in the liner agreement context and in any way the regulators see fit.\textsuperscript{117} In evaluating the efficacy of a merger, and whether to approve it, Chinese authorities must “

\textit{take} into consideration policies of the State for the development of \cite{text}

of \cite{text} international shipping industry and the situation of competition prevailing in the international shipping market, and make a decision either approving or disapproving such an agreement, and shall notify the international shipping operators of the result in writing.”\textsuperscript{118} The breadth with which Article 24 was written offers the obvious advantage of liberal interpretation and ultimately, creative application.

2. **Anti-Monopoly Law of the People’s Republic of China**

In addition to the Transportation Regulations, China also refers to its generally applicable anti-monopoly law in reviewing conference agreements. The Anti-monopoly law of the People’s Republic of China was adopted at the 29th meeting of the Standing Committee of the 10th National People’s Congress on August 30, 2007, and came into force on August 1, 2008.\textsuperscript{119} Specifically, the Ministry of Commerce, MOFCOM, by international shipping operators engaged in international liner services through agreements that involve a shipping volume exceeding 30 \cite{text} of the aggregate shipping volume for one consecutive year on one particular shipping line to and from Chinese ports which can be detrimental to fair competition.”; \textit{id.} art. 40 (“

\textit{In case of} detrimental to fair competition, the investigatory authority may take certain prohibitive or restrictive measures such as ordering to amend relevant agreements, limiting the frequency of liner services, suspending the application of freight rates, or stopping for the time being the filing of freight rates, or ordering to submit relevant materials on a regular basis.”).

\textsuperscript{116} \textit{id.} arts. 22, 24.

\textsuperscript{117} \textit{id.} art. 24.

\textsuperscript{118} \textit{id.}

looks to Article 27 for factors regarding business concentration within a given market. In evaluating the market concentration, a Chinese regulator must consider the following factors:

1. [The market share of the business operators involved in the relevant market and the controlling power thereof] over that market;

2. [The degree of market concentration in the relevant market],

3. [The influence of the concentration of business operators on the market access and technological progress];

4. [The influence of the concentration of business operators on the consumers and other business operators];

5. [The influence of the concentration of business operators on the national economic development]; and

6. [Other elements] that may [have an effect on the market competition and shall be [taken into account as regarded] by the Anti-monopoly Authority under the State Council.121

Consistent with the Transportation Regulations, the Anti-monopoly code includes broad and malleable language, affording Chinese regulators the ability to apply the law flexibly.

MOFCOM must also abide by Article 30, which obliges it to publish decisions regarding the prohibition of a market concentration for monopolistic reasons.122 MOFCOM’s eventual statement of rejection regarding the P3 Agreement, Announcement No. 46 of 2014, was issued in part to comply with Article 30 of the Anti-monopoly code.123

120. *Id.* art. 27.
121. *Id.*
122. *Id.* art. 30.
3. **MOFCOM**

MOFCOM serves at the pleasure of the State Council, and operates on a multi-faceted basis “formulating the strategies, guidelines and policies of developing domestic and foreign trade and international economic cooperation, drafting the laws and regulations governing domestic and foreign trade, foreign investment in China, foreign assistance, overseas investment and foreign economic cooperation, [and] devising relevant departmental regulations.” Additionally, MOFCOM also launches all anti-monopoly investigations, both preemptively and regarding organizations with operational approval. MOFCOM therefore functions with incredible autonomy and authority as it possesses the power to create, interpret, and apply law with virtually no oversight. This is to say, that unlike the FMC and European Commission, for which appellate processes are available, MOFCOM is both the initial and final decision-maker for a proposed liner agreement.

The Anti-Monopoly Bureau (“Bureau”) functions within the overarching construct of MOFCOM and is tasked with a myriad of functions relating to anti-monopoly regulation. Pertinent to the relevant discussion, the Bureau is obligated to undergo anti-monopoly review of “applications of concentrations of undertakings, and take

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125. *Id.*
126. *Id.*
127. *See infra* Part I.A-B. (regarding FMC and EU procedures for vessel-sharing agreement approval).
128. It should be noted that while the Bureau oversees the approval of liner agreements, the Shanghai Shipping Exchange (“SSE”), part of the Ministry of Commerce, plays a vital the international shipping industry where Chinese ports are involved as “SSE is gifted with the basic functions . . . ‘to standardize the transaction, to adjust the freight rates, and to communicate information on the shipping market. ’” *Brief Introduction*, *SHANGHAI SHIPPING EXCHANGE*, http://en.sse.net.cn/brief/introen.jsp (last visited Mar. 2, 2015). To that end, “SSE has produced widespread social and economic benefits and played an important role in regulating China’s shipping market, maintain[] the shipping transaction order and propelling healthy development of the shipping market.” *Id.*
related hearings, investigation and review” and “[t]o take charge of investigation into monopoly in foreign trade and take measures in a bid to eliminate damage.” Additionally, the Bureau also holds general competition oversight, “organiz[ing] consultations and negotiations on competition clauses of multilateral and bilateral agreements.” Similar to the Transportation Regulations that it interprets and enforces, the functional competency of the Bureau is comprehensively vague, so that its oversight presumably reaches any monopolistic threat. It is also equally ironic that the Bureau is the ultimate decision-maker on liner agreement applications, as this insinuates that liner agreements are, by their very nature, inherently monopolistic.

II. THE P3 NETWORK VESSEL SHARING AGREEMENT: RISE, FALL, AND TERMINATION

The P3 Network Vessel Sharing Agreement was filed with MOFCOM on September 18, 2013, and subsequently with the FMC on October 24, 2013. The Agreement cleared FMC regulatory review on March 20, 2014. Conversely, MOFCOM denied regulatory approval on June 17, 2014, essentially destroying any potential commercial viability the Agreement was aimed to achieve. Consistent with the consortia block exemption requirements, the Parties to the P3 Agreement were not required to file for approval with the EU Commission because the carriers would not collectively operate in any one market above thirty percent of the total container volume, and the structure of the agreement reflected a pure vessel-sharing agreement.

The stated purpose of the Agreement was “to authorize the parties to share vessels with one another in the Trade . . . and to authorize the

130.  Id.
131.  Id.
132.  Notice No. 46 of 2014, supra note 123.
133.  P3 Sharing Agreement, supra note 9.
135.  Notice No. 46 of 2014, supra note 123.
136.  Exemption for Certain Agreements, supra note 91.
parties to enter into cooperative working arrangements in connection therewith.”\textsuperscript{137} Importantly, therefore, the parties were proposing a vessel-sharing agreement, and not a conference agreement including the collective setting of freight rates. Maersk, CMA CGM, and MSC constituted the three parties to the Agreement; essentially, “the [proposed A]greement . . . would authorize the [P]arties to share vessels and engage in related cooperative [arrangements] in the trades between the U.S. and Asia, North Europe, and the Mediterranean.”\textsuperscript{138} Substantively, the Parties would be “authorized to discuss and agree on the size, number and . . . characteristics of vessels to be operated . . . and the number of vessels contributed by each [p]arty.”\textsuperscript{139} At a quantitative level, this would result in the Parties collectively “operate[ing] approximately one hundred and thirty (130) vessels in the Trade, with nominal capacities ranging from approximately 4,000 TEUs to approximately 12,250] TEUs.”\textsuperscript{140} The Agreement would also authorize the parties to futuristically “operate up to one hundred and eighty (180) vessels in the Trade, each with a capacity of up 19,200 TEUs.”\textsuperscript{141} Temporally, the Agreement was to continue for not less than ten years; resignation of rights for any Party would accrue after two years.\textsuperscript{142}

Each party to the Agreement would have an individual slot capacity allocation with respect to each service and in each trade lane.\textsuperscript{143} The Agreement also allowed the Parties to discuss and agree upon terminals for vessel calling.\textsuperscript{144} In an attempt to presumably distinguish the Agreement as a vessel-sharing agreement, rather than a conference agreement, each Party was obligated to “retain its separate identity and . . . have fully separate and independent sales, pricing, and marketing functions.”\textsuperscript{145} In reiterating this distinction, and to quell the inevitable Chinese scrutiny of a perceived merger, the Agreement goes on to state

\begin{thebibliography}{145}
\bibitem{138} \textit{P3 Agreement Clears FMC Regulatory Review}, supra note 134.
\bibitem{139} P3 Sharing Agreement, No. 012230, \textit{supra} note 137, art 5(5.1)(a).
\bibitem{140} \textit{Id.}
\bibitem{141} \textit{Id.}
\bibitem{142} \textit{Id.} art. 8(8.1).
\bibitem{143} \textit{Id.} art. 5(5.2).
\bibitem{144} \textit{Id.} art. 5(5.4).
\bibitem{145} \textit{Id.} art. 5(5.6)(a).
\end{thebibliography}
that “[t]his Agreement does not create and shall not be construed as creating any legal entity . . . or joint liability under the law of any jurisdiction.”

What proved to be a contentious, and somewhat contrary, stipulation of the Agreement was the authorization to “form, own, utilize, and dissolve a legal entity to act as a network cent[er] . . . for the purposes of the joint coordination and management of the P3 network.” The Network Center was therefore tasked with implementing the conditions stated in the corporate documents and to oversee the maintenance of the vessel schedules. In addition to the network center, two standing committees were also to be formed as a condition of the Agreement. These would include a management committee and an audit and compliance committee. To an unbiased observer, these committees could be perceived as managerial boards, much like a corporation’s board of directors.

A. Analysis of Regulatory Review

1. FMC Review

The FMC undertook extensive review in approving the Agreement, which per FMC mandate, became effective on March 24, 2014. The Commission’s decision, from which Commissioner Lidinsky dissented, was “based on a determination that the agreement is not likely at this time, by a reduction in competition, to produce an unreasonable increase in transportation cost or an unreasonable reduction in transportation service under 6(g)” of the Shipping Act.” Essentially, the Commission noted that the Agreement had the potential to

146. Id.
147. Id. art. 6(6.1)(a).
148. Id. art. 6(6.1).
149. Id. art. 6(6.2).
150. Id.
151. P3 Agreement Clears FMC Regulatory Review, supra note 134.
circumstantially reduce services or unreasonably increase rates in violation of the Shipping Act, and in addressing these concerns would “direct[] staff to issue alternative reporting requirements . . . . specifically tailored to this agreement’s unique authority.”154 In implementing additional reporting requirements, the Commission felt it would “have timely and relevant information to act quickly should it be necessary.”155

Commissioner Lidinsky’s reservations and basis for dissenting, however, should not be overlooked, as they are foundationally similar to the Chinese regulator’s rationale in barring approval of the Agreement. At a very basic level, the dissent highlights the perceived lack of value the P3 Agreement adds to the market, and to the shipper/consumer. Commissioner Lidinsky noted that the Agreement “[o]ffers nothing to the shipper, and only helps to minimize carriers’ losses[,] [o]ffers no significant improvement in service[,] [d]oes nothing to stabilize rates[,] [a]nd [c]ongests terminals and landside infrastructure.”156 Paralleling the lack of positive service the Agreement would offer to the consumer, the Commissioner made clear, that in his view, alliances such as the P3 actually reduce competition because they concentrate rate setting power, and bar entry into the market “by new carriers who cannot compete on economy of scale.”157

The Commissioner’s dissent emphasized the relevant truth regarding vessel sharing agreements and the carriers’ recent need for collectivism: the onset of 18,000 TEU vessels and a general flattening in freight rates demand alliances to make carriers financially competitive.158 In the Commissioner’s view, therefore, the P3 Agreement is a retroactive and corrective action by the carriers who mistakenly judged the market in building the largest container vessels the world has ever seen.159 To this end, the Commissioner felt an injunction should have been sought under the Shipping Act procedures, and rhetorically challenged the FMC:

154. Id.
155. Id.
157. Id.
158. Id.
159. Id.
“where is its obligation to allow foreign cross traders to rectify their mistakes and insure profits, which could possibly harm waterborne commerce to and from the United States?”

Despite the Commissioner’s well-founded concerns and holistic approach to market analysis, the Commission’s ultimate approval was grounded in the procedural structure of the Shipping Act. The 1984 Act and OSRA are illustrative of the deregulatory movement of the late 1980s and 1990s, such that the burden of garnering approval of an Agreement lies not on the alliance-seeking carriers but on the Commission itself. The FMC has yet to take injunctive action under the Shipping Act regarding a proposed agreement. Conceptually, it would be very difficult for the Commission to show that an agreement such as the P3 Agreement would absolutely have a detrimental effect on market competition, to the extent that injunctive relief, preliminary or permanent, could be awarded. This is to say that the FMC’s only real course of action in regulating a conference or vessel-sharing agreement is to allow the agreement to go into effect and then closely monitor it. The Commission may then take action under the Act, armed with economic data and monitoring analysis in disarming an anti-competitive agreement; this is information it could not possibly have access to at the inception of a proposed agreement, and before it has gone into effect.

2. Chinese Review

a. MOFCOM Rationale

MOFCOM’s rejection of the P3 Agreement, posted on its website in substantial compliance with Article 30 of the Anti-monopoly code, was concise and unsurprisingly vague in rationale. The statement cited no legal authority other than Articles 27 and 30 of the Anti-monopoly Code and seemed to refer tangentially to some of the overarching concepts defined in the Transportation Regulations. While MOFCOM’s ultimate

160. Id.; see supra Part I.A.5.a (regarding the Shipping Act Procedures for moving for a preliminary injunction in the District Court for District of Columbia).
161. See supra Part I.A.5.a (regarding the Shipping Act Procedures for moving for a preliminary injunction in the District Court for District of Columbia).
162. Foundation for Commissioner Lidinsky’s Dissent, supra note 156.
163. Notice No. 46 of 2014, supra note 123.
decision to deny approval of the Agreement rested on competition-related factors, the more relevant, and absurdly evident criterion on which the decision likely turned was much simpler; the P3 Agreement did not include any Chinese controlled carriers, such as COSCO or China Shipping.164

In reviewing the Agreement, MOFCOM mainly underwent a competition evaluation regarding the routes that would affect Chinese ports.165 Substantively, these routes included the Asia-Europe route and the trans-Pacific route.166 However, because the trans-Pacific route has a relatively high market share with a diverse control of the volume, the Chinese regulators looked primarily at the Europe-Asia route.167 This is also an assertion that should be viewed with relative skepticism, as all three of the P3 carriers are European-based.168

The criteria MOFCOM purported to employ in coming to its conclusion, in conjunction with Article 27, included “the elements of relevant market shares, market power, market concentration, market entry, [and] the impact on consumers and other business operators.”169 In evaluating these principles as they related to the Agreement, MOFCOM ultimately “found that after the completion of the concentrated operations, the [P]arties will form a close association.”170 To this end, it appears that from a macro evaluative level, MOFCOM viewed the P3 Agreement as a merger, possibly taking into account the merger criteria of China’s Transportation Regulations.171 MOFCOM felt that the general collective structure of the Agreement differed markedly from other approved agreements in the areas of “cooperation, operational procedure and cost sharing . . . which is obviously a close association.”172 MOFCOM found the communal operation of the P3 to be in contrast

165.  *Id.*
166.  *Id.*
167.  *Id.*
168.  *See supra “Introduction”* (regarding the nationality of the carriers involved in the P3).
169.  *Notice No. 46 of 2014, supra* note 123.
170.  *Id.*
171.  *See supra Part I.C.1* (regarding the merger procedures and criteria under Article 24 of the Transportation Regulations).
172.  *Notice No. 46 of 2014, supra* note 123.
with other approved alliances, including the Network Center that the Agreement would create to mutually run the operation.\footnote{Id.}

MOFCOM also evaluated the relative market share and concentration that the P3 carriers would possess in the Asia-Europe route, which despite any cynicism regarding Chinese regulators’ evaluation, does present a notable concern. MOFCOM correctly noted that together the three carriers would control as much as 46.7 percent of the market share, and that consolidation of such capacity would inevitably lead to enhanced market control power.\footnote{Id.} This control power, MOFCOM stated, would dilute competition in the market and make the entry barrier economically infeasible for other carriers wishing to enter the market, a fact that it felt made the Agreement fundamentally anti-competitive.\footnote{Id.} Additionally, MOFCOM also noted the glaring disparity of power between shippers, consignees, and carriers, a gap that would be further exposed by the consolidation of market power.\footnote{Id.} Therefore, MOFCOM denied approval of the P3 Agreement with great finality stating that “[t]he parties concerned cannot prove this concentrated operation’s positive effects outweigh the negative impact on competition, neither can they prove this transaction is in accordance with the social public interests.”\footnote{Id.}

b. The Absence of Chinese Controlled Carriers from the P3 Agreement

With vessel capacity outpacing uncertain cargo demand, Chinese carriers, like the rest of the market are having difficulty filling vessels and competing on a world scale.\footnote{Id.} What makes the P3 Agreement distinct from other liner conferences and vessel-sharing agreements that do have authority to operate in the Chinese market can be synthesized to

\footnotetext{173}{Id.}
\footnotetext{174}{Id. Maersk controls 20.6 percent of the container volume, MSC possesses 15.2 percent, and CMA CGM represents 10.9 percent of the market. Id.}
\footnotetext{175}{Id.}
\footnotetext{176}{Id.}
\footnotetext{177}{Id.}
a single fact—other liner agreements have involved state-owned Chinese carriers.179

In the first quarter of 2014 COSCO reported losses of $300 million as a result of low freight rates, with China Shipping reporting moderate growth.180 These losses and perceived gains are even worse when considering the subsidized state of these carriers, and the common practice of Chinese Government asset disposal to lift profitability.181 Given the economic climate, and the performance of its controlled carriers, it would not make logical sense for Chinese regulators to approve the P3 Agreement, concurrently awarding three foreign carriers almost fifty percent of the market share.182

In rationalizing this conclusion it is necessary to make a negative inference, looking to conference agreements that have garnered Chinese approval and how they differ from the P3 Agreement. One of the largest and most important agreements that does operate in Chinese ports is the Transpacific Stabilization Agreement (“TSA”). The TSA was established in 1989, operates in almost every major shipping market and allows for meeting and sharing of market information, voluntary and non-binding rate guidelines, and collective representation before regulatory bodies.183 Additionally, TSA contains fifteen members; this includes COSCO and China Shipping, both Chinese state-owned carriers, which may in part explain the continued approval of the TSA, and present denial of the P3 Agreement.184 While intellectually simple, this distinction should not be overlooked when combined with extenuating factors such as Chinese carriers’ losses, low freight rates, and a stagnant global economy.

179. See id.
180. Id.
182. Id.; see supra text accompanying note 174 (regarding what P3 market share would have amounted to in the Asia-Europe Trade).
184. See id.
CONCLUSION

The P3 Agreement’s path to termination represents a useful lens through which to view the modern state of international liner conference regulators. The EU and U.S. are illustrative of global deregulation, with Europe allowing vessel-sharing agreements to move forward virtually unregulated, granted they control less than thirty percent of the market share. While the U.S. does have a concerted interest in freight rates based on American import volume, the gradual erosion of the U.S.-flag fleet makes the FMC’s liner agreement concerns one of continued monitoring rather than initial prevention.

The P3 Agreement was conceptually aimed at striking at the heart of the world export market, China. China’s regulation system, though hardly transparent, seems to reflect a malleable framework capable of deflecting foreign influence, defending the world’s largest export market, and protecting its state-owned carriers. While the future of the freight rate market is nothing but uncertain, China appears to be the last remaining regulatory watchdog with the power and authority to act—an inevitable truth carriers will continue to confront in seeking conference agreement approval in the world’s most important shipping arena.