Competition Enforcement, Private Actions and the Shipping Act

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I. The Case for Enforcing the Competition Provisions of the Shipping Act

The statutory Sherman Act exemption for oceanic transportation is well known. Less familiar to antitrust practitioners are the competition provisions of the Shipping Act and the private rights of action available to enforce them.[3] This white paper introduces competition enforcers and policymakers to this specialized area of antitrust enforcement and outlines steps that can make this enforcement more common and effective. In the first part, we outline the urgent need for both the Federal Maritime Commission (the FMC or Commission) and private enforcers to vigorously implement the Shipping Act's competition mandate. We then provide a brief overview of the types of actions available. Finally, we offer several proposals for action that Congress and the Commission can take to promote greater competition in oceanic transportation.

A focus on the full range of options for antitrust enforcement is timely because the maritime transportation sector faces an increasingly serious competition problem. As gatekeepers of commerce, ocean carriers and marine terminal operators have particularly potent means of exercising market power. For many reasons, including globalization and the offshoring of American manufacturing, U.S. shippers and consumers are highly dependent on ocean shipping.[4] Nearly everything—from cell phones to ink pens to clothing—arrives in the U.S. on a container ship that

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[3] One normally refers to the "Shipping Act," but there are actually several relevant statutes. For example, the Shipping Act of 1916 was significantly revised and supplemented by the Shipping Act of 1984 ("the '84 Act," "The Shipping Act") which in turn has been amended various times including by the Ocean Shipping Reform Act of 1998 (Public Law 105-258), the Frank LoBiondo Coast Guard Authorization Act (Public Law 115-282), and the Ocean Shipping Reform Act of 2022 (Public Law 117-146).

[4] In 2020, for example, maritime vessels accounted for 40% of U.S. international trade value and nearly 70% of trade weight. U.S. Bureau of Transportation Statistics, "On National Maritime Day and Every Day, U.S. Economy Relies on Waterborne Shipping" (May 12, 2021); https://www.bts.gov/data-spotlight/national-maritime-day-and-every-day-us-economy-relies-waterborne-shipping#:~:text=Maritime%20vessels%20account%20for%2040,any%20other%20mode%20of%20transportation.

has passed through a port. U.S. exporters, from cotton farmers to high-tech manufacturers, also rely on ships and ports to access global markets.

The COVID-19 pandemic showed just how vulnerable global supply chains are to network disruptions. In announcing recently that U.S. Department of Justice (DOJ) Antitrust Division objections had led to abandonment of a proposed combination in shipping containers, Assistant Attorney General Kanter emphasized that the high concentration at different levels of global supply chains reduces resiliency and compounds problems with fragile networks.[5] Similarly, mergers, acquisitions, joint ventures, and bankruptcies have made the ocean carrier industry (a critical part of the maritime transportation sector) far more concentrated today than in the 1960s, when modern intermodal container freight shipping first emerged.[6] The increase in concentration has accelerated in the last few decades.

For example, in 1998, the top 20 ocean carriers controlled approximately 50% of the world's container slot capacity.[7] By 2018, that number had almost doubled, to 90%.[8] As is the case in the international airline alliances, a web of contractual relationships mean effective concentration in the industry is even higher than these statistics suggest. The largest steamship lines—*none* of which are U.S.-based—have organized into three major global alliances: 2M (Maersk, MSC), the Ocean Alliance (CMA CGM, COSCO, Evergreen), and THE Alliance (Hapag Lloyd, HMM, ONE, Yang Ming). In 2021, the three major alliances together accounted for 91% of transpacific trade and 89% of transatlantic trade.[9]

The potential for these highly consolidated actors to injure American shippers and consumers by keeping capacity tight and engaging in supra-competitive pricing has attracted the attention of policymakers. The Biden Administration's landmark Executive Order on Competition calls out maritime transportation as a top priority.[10] The Order makes the FMC a member of the White House Competition Council and calls on the Commission for more vigorous competition enforcement.[11] Congress, too, in the Ocean Shipping Reform Act of 2022 (OSRA), incorporated several competition-focused provisions,[12] including requiring rulemaking related to detention/demurrage charges,[13] unjust discrimination,[14] and unreasonable refusals to deal and negotiate;[15] and expanding the Commission's ability to secure monetary remedies.[16]

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[5] *See* Press Release, U.S. Dep't of Justice, Global Shipping Container Suppliers China International Marine Containers and Maersk Container Industry Abandon Merger after Justice Department Investigation (Aug. 25, 2022**),** https://www.justice.gov/opa/pr/global-shipping-container-suppliers-china-international-marine-containers-and-maersk.

[6] Containerization refers to the shipment of freight using intermodal containers, those big metal boxes one sees at ports, on railroads, and behind trucks. Before containerization, freight was often extracted, sorted, and re-packaged at every inflection point, usually on wooden pallets. This process was expensive, labor-intensive, and prone to error.

[7] This statistic reflects one common measure of global vessel capacity.

[8] J. Hoffman, *Consolidation in liner shipping – time flies*, United Nations Conference on Trade and Development, Transport and Trade Facilitation Newsletter No. 76 (Sept. 2017).

[9] Federal Maritime Commission, *60th Annual Report for Fiscal Year 2021*, at 20-22 (Mar. 31, 2022).

[10] The White House, Executive Order 14036, "Promoting Competition in the American Economy" §1 (July 9, 2021).

[11] *Id.*

[12] Public Law 117-146.

[13] 136 Stat. 1275-76.

[14] 136 Stat. 1276.

[15] 136 Stat. 1276.

[16] 136 Stat. 1276-77.

While these are steps in the right direction, more still needs to be done to increase competition in ocean transportation and to detect, deter, and remedy anticompetitive conduct. This paper proceeds as follows. Section II provides a brief overview of the Shipping Act's competition provision, Section III summarizes the relationship between the Shipping Act and the antitrust laws, and Section IV outlines the private enforcement provisions of the Shipping Act's competition mandate. The paper concludes in Section V with recommendations outlining clear steps that can be taken by Congress, at the FMC and by private enforcers to advance the goal of promoting competition and protecting consumers. These recommendations include:

> **Statutory revisions** to expand private enforcement of the Shipping Act, especially with respect to overlapping agreements among alliances restricting rates and output; and to require treble reparations by default for competition violations.
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> **Changes to Commission adjudicatory procedure**, including permitting the class device and modernizing reparations standards in accordance with current economic research.
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> **Changes to the filed agreement review process**, including providing more transparency as to the standards under which the agreements are reviewed, and updating economic tools in evaluating those agreements.

II. A Brief Primer on the Shipping Act

To understand how to better address anticompetitive conduct in the maritime transportation sector, it is important to first understand the regulatory framework set out by the Shipping Act. The Shipping Act encompasses a series of legislative efforts to regulate ocean transportation. It is administered and enforced by the FMC, an independent agency of five commissioners.[17] The Shipping Act covers transportation (1) that has some link by water over the high seas or Great Lakes; and (2) occurs between any point in the United States and a foreign country.[18] Among the entities regulated by the Shipping Act are ocean common carriers (sometimes called Vessel Operating Common Carriers (VOCCs or steamship lines), marine terminal operators (MTOs), and other ocean transportation intermediaries (OTIs) such as non-vessel-operating common carriers (NVOCCs). Purely domestic shipping is not within the purview of the Act.

There are four articulated purposes of the Shipping Act:

> "to 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."
> "to ensure an efficient, competitive, and economical transportation system in the ocean commerce of the United States."
> "to encourage the development of an economically sound and efficient liner fleet of vessels of the United States capable of meeting national security needs and supporting commerce"

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[17] *See* About the Federal Maritime Commission, https://www.fmc.gov/about-the-fmc/.

[18] *See* 46 U.S.C. § 40102(6) (defining "common carrier" as any person that, inter alia, "uses, for all or part of that transportation, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country"). For water transportation in the non-contiguous U.S. trade, the Surface Transportation Board ("STB") retains jurisdiction. 49 U.S.C. § 13521.

> "to promote the growth and development of United States exports through a competitive and efficient system for the carriage of goods by water in the foreign commerce of the United States, and by placing a greater reliance on the marketplace."[19]

Originally, the main competition-related concern of the Shipping Act was non-discrimination, or ensuring that small shippers can access markets as easily as larger ones.[20] The Act imposes obligations similar to those placed on critical gatekeepers in other areas under common law and contemporary statutes.[21] For example, the Act recognizes the heightened duties the instrumentalities of ocean shipping, such as "publick wharves" (marine terminals) and "ferries" (ocean carries), have traditionally had to the public.[22] Over time, however, as discussed below, revisions to the Act have attempted to address a broader range of antitrust issues otherwise immunized from Sherman Act enforcement.

III. The Relationship Between Antitrust Enforcement and the Shipping Act: the Shipping Act's "Alternative Competition Regime"

Antitrust enforcement in maritime transportation follows bifurcated pathways. It proceeds either via the general antitrust laws or through the specialized regime set up by the Shipping Act. The path competition enforcement takes depends on the type of agreement or conduct involved. Many types of agreements involving maritime commerce remain subject to general antitrust laws (including private enforcement). These include: mergers and acquisition;[23] agreements relating to inland divisions of through rates in the United States;[24] loyalty contracts;[25] agreements restricting purely foreign transportation, if that agreement has a "direct, substantial, and reasonably foreseeable effect on the commerce of the United States";[26] agreements among common carriers to establish, operate, or maintain a marine terminal in the United States;[27] conduct relating to transportation solely within

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[19] 46 USC § 40101.

[20] *See Waterfront Comm'n of N.Y. Harbor v. Elizabeth–Newark Shipping, Inc.*, 164 F.3d 177, 185 (3d Cir. 1998) ("The primary purpose of the Shipping Act . . . is to eliminate discriminatory treatment of shippers and carriers.").

[21] *See* Rulemaking on Detention and Demurrage Practices, 85 Fed. Reg. 29638, 29648 (May 18, 2020) ("Ocean carriers and marine terminal operators (and ocean transportation intermediaries) do not have an unbounded right to contract for whatever they want. They are limited by the prohibitions of the Shipping Act, one of which is section 41102(c).").

[22] Matthew Hale, "De Portibus Maris," in *A Collection of Tracts Relative to the Law of England*, ed. Francis Hargrave (London: T. Wright, 1787), 77-78; *see also Munn v. Illinois*, 94 U.S. 113, 127 (1876) (citing same).

[23] 46 U.S.C. §40301(c); Submission of the United States, Working Party No. 2 on Competition and Regulation, Competition Issues in Liner Shipping, May 26, 2015.

[24] 46 U.S.C. § 40307(b)(2). Inland division means the amount paid by a common carrier to an inland carrier for the inland portion of through transportation. *Id.* § 40102(12). Essentially, ocean carriers cannot conspire with respect to the amount they pay inland carriers.

[25] *Id.* § 40307(b)(4). A loyalty contract with an ocean carrier allows a "shipper to obtain lower rates by committing all or a fixed portion of its cargo to that carrier or agreement" and "a deferred rebate arrangement." *Id.* § 40102(14).

[26] *Id.* § 40307(a)(4); *see Transpacific Westbound Rate Agreement v. FMC*, 951 F.2d 950 (9th Cir. 1991) (affirming FMC's declining jurisdiction over parts of shipping agreements that regulated wholly foreign transportation; this is important because filing those agreements would have extended antitrust immunity); *cf. also* Foreign Trade Antitrust Improvements Act, 15 U.S.C. § 6a (antitrust laws generally do not apply to foreign conduct unless it has a "direct, substantial, and reasonably foreseeable effect" on import commerce, export commerce, or domestic commerce of the United States).

[27] 46 U.S.C. § 40307(b)(3). Note that ordinary vertical agreements between MTOs and common carriers (and others) are governed by the Shipping Act and thus exempt from the antitrust laws. *E.g.*, *A&E Pacific Constr. Co. v. Saipan Stevedore Co., Inc.*, 888 F.2d 68 (9th Cir. 1989) (action challenging MTO lease was exempted from antitrust laws).

the United States with transportation providers not regulated by the FMC;[28] and any conduct pursuant to an agreement that is either (1) not required to be filed under the Shipping Act or (2) explicitly exempted from filing under the Act.[29]

Agreements required to be filed under the Shipping Act are exempt from the Sherman Act and other state and federal antitrust laws. However, enforcement of the competition provisions of the Shipping Act is based on the "anti-monopoly tradition of the United States."[30] Exemptions under the Shipping Act include protection from liability under certain consumer protection and other unjust enrichment theories. Such conduct is, however, not immune from competition scrutiny. Rather, as the FMC has made clear, the Shipping Act provides an "alternative competition regime" designed to recognize "the multinational nature of international ocean shipping[.]"[31]

All filed agreements are subject to the review and supervision of the FMC.[32] The Commission determines whether a filed agreement meets the Shipping Act's mostly procedural requirements. If not, it rejects the agreement.[33] Much like the process under the Hart-Scott-Rodino Act, the Commission may also ask the parties for more information during the review.[34] If the Commission determines during review that the agreement is likely harm to competition by lowering output or increasing prices, it may move to enjoin the agreement in district court.[35] Unfortunately, there is little transparency about how the FMC evaluates competitive effects during this review process.

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[28] *Id.* § 40307(b)(1).

[29] 46 U.S.C. § 40307(a)(3)(A)-(B). *See Transpacific Westbound Rate Agreement v. FMC*, 951 F.2d 950, 972 n.6 (9th Cir. 1991) (reasonable belief: "Moreover, all activity permitted or prohibited by the Act enjoys immunity from antitrust coverage if undertaken with a reasonable belief that it was being done under an effective agreement filed with the FMC, at least until such immunity is set aside by an agency or court. The appellants have submitted nothing to show the unreasonableness of the appellees' beliefs on this point." (citations omitted)). Note that in *Gosselin World Wide Moving*, the Fourth Circuit upheld ***criminal*** liability for a bid-rigging conspiracy for which there was no reasonable basis to believe was exempt from the filing requirements. *United States v. Gosselin World Wide Moving*, 411 F.3d 502, 511-13 (4th Cir. 2005). *But see Vehicle Carrier Services*, 846 F.3d at 81 (because Shipping Act bars acting under unfiled agreement, exemption bars private antitrust recovery; court noted that Department of Justice retained jurisdiction to sue for injunctive and criminal enforcement against 'secret' agreements).

[30] *River Parishes v. Ormet Primary Aluminum Co.*, 1999 WL 125991, at *28 n.26 (FMC 1999) (quoting *California Stevedore Ballast Co. v. Stockton Port Dist.*, 7 F.M.C. 75, 82-83 (1962)).

[31] Federal Maritime Commission, *Fact Finding Investigation 29 Final Report, Effects of the COVID-19 Pandemic on the U.S. International Ocean Supply Chain: Stakeholder Engagement and Possible Violations of 46 U.S.C. § 41102(c)* 42-43 (May 31, 2022) (hereinafter "Fact Finding 29 Report").

[32] *See* 46 U.S.C. § 40304; 46 C.F.R § 535.401 *et seq.*; *see also* Fact Finding 29 Report at 43 n.69 (arguing that filing procedural requirements were modelled on the Hart-Scott-Rodino premerger notification requirements). Note that failure to file an agreement is a violation of the Shipping Act, subject to Commission and private enforcement, but that even an unfiled agreement is exempt from the antitrust laws. *E.g.*, *In re Vehicle Carrier Services*, 1 F.M.C. 2d 45, 54-55 (ALJ 2018).

[33] 46 U.S.C. § 40304(b). Similarly, if the Commission finds that the statutory requirements are met, it ***must*** allow the agreement to go into effect. *Id.*

[34] 46 U.S.C. § 40304(d).

[35] 46 U.S.C. § 41307(b)(1) (Commission may file suit if it determines that the agreement "is likely, by a reduction in competition, to produce an unreasonable reduction in transportation service or an unreasonable increase in transportation cost or to substantially lessen competition in the purchasing of certain covered services" (emphasis added)). Covered services means non-transportation tasks, such as *inter alia* berthing/bunkering, unloading cargo, the positioning of buoys, and towing vessel services. *Id.* § 40102(5). Note that this "***is*** likely, by a reduction in competition, to produce an unreasonable" effect language is different from the Clayton Act, which states that transactions are illegal if they "may be substantially to lessen competition," 15 U.S.C. § 18. To issue an injunction under this provision the Shipping Act, courts have applied the traditional four-part test. *See id.* § 41307(b)(2) (court may issue injunction "after a showing that the agreement is likely to have the effect described in paragraph (1)"); *FMC v. City of Los Angeles, California*, 607 F. Supp. 2d 192 (D.D.C. 2009) (Leon, J.) (applying four-part preliminary injunction test).

There is almost no public information about the standards used by the FMC when evaluating the competitive effect of a filed agreement. Some Commission commentary has indirectly referenced the use of common economic tools like the Herfindahl-Hirschman Index (HHI). However, there appear to be no guidelines or other public comment on the subject.[36]

The Commission's lack of transparency in reviewing agreements impedes effective competition enforcement in a number of ways. First, the FMC's failure to explain publicly how it assesses ocean carrier agreements makes it difficult for private parties to understand or challenge it analysis. Second, in the absence of such challenges, it is easy for methods of analysis to become dated and out of step with current economic thinking. There is evidence that this is the case. We noted above that the Commission appears to rely heavily in its review of filed agreements on HHI to measure concentration. Mounting evidence, however, suggests that exclusive reliance on HHI may be inadequate to accurately reflect the competitive effects of filed agreements in industries like ocean shipping. The HHI fails to capture the cumulative effects of the multiple agreements common among ocean carriers, including alliances, consortia, and other joint ventures.[37] Other measures of concentration, such the modified HHI, may be more appropriate to this type of industry and indeed more consistent with the Shipping Act requirements.[38]

Absent greater transparency, it is difficult to know what other tools used by the Commission may need to be updated or replaced. For that reason, changes to make the filed agreement review process more accessible to private parties, whether by legislation or by the Commission itself, are among our key recommendations for improving competition enforcement in the maritime transportation sector.

IV. Private Enforcement Under the Shipping Act: Role and Process

Private enforcement is an important component of competition enforcement under the Shipping Act, just as it is under the general antitrust laws. While private complainants do not have the same ability as the Commission to enjoin the filed agreements directly, the Shipping Act does allow for a private right of action in administrative adjudication for certain types of violations. As discussed in more detail below, these violations include certain types of anticompetitive conduct, such as concerted refusals to deal and other unreasonable uses of market power.[39] Private plaintiffs in these proceedings can seek injunctive relief, as well as reparations (i.e., damages) up to double injury.[40]

When a private right of action is not available, private parties may address competition problems by petitioning the Commission for declaratory relief, investigation, or rulemaking.[41] The process for filing a petition is similar to that for a private action complaint.[42] Private parties have successfully leveraged the petitioning process to address competition concerns. A recent example is Fact Finding

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[36] *See* Fact Finding Report 29, at 44.

[37] *See, e.g.*, O. Merk & A. Teodoro, *Alternative approaches to measuring concentration in liner shipping* § 2 at 4, § 3.4 at 7, Maritime Economics and Logistics (Feb. 12, 2022).

[38] *E.g.*, Daniel P. O'Brien & Steven C. Salop, *Competitive Effects of Partial Ownership: Financial Interest and Corporate Control*, 67 Antitrust L.J. 559 (2000); *see also* 46 U.S.C. § 41307(b)(4) (Commission "may consider . . . the competitive effects of agreements other than the agreement under review.").

[39] *Vehicle Carrier Services*, 1 F.M.C. 2d 440 (challenging allegedly anticompetitive agreement as unfiled; and also challenging various effects of the agreement).

[40] *See* 46 U.S.C. § 41301 (private parties may file a Complaint); *id.* §41305 (reparations).

[41] *Id.* § 41302.

[42] *See* 46 C.F.R. § 502.91 *et seq.*

Investigation 28, which spurred the Commission's and Congress's recent focus on detention and demurrage practices.[43] The investigation resulted in new Commission rulemaking[44] and the OSRA legislative reforms discussed above.

Private enforcement of the Shipping Act today plays an important role in addressing competition issues in the sector. Further process reforms to make the process of enforcement more like traditional private antitrust actions promises to make it an even more effective tool. As we discuss below in more detail, key recommendations include increasing available reparations to treble injury, making private action available for a broader range of violations and clarifying the availability of the class device.

A. Bringing a Private Action Under the Shipping Act

The process of bringing a private action under the Shipping Act is similar to bringing a case in federal court. But because the Commission uses an administrative process, it also diverges in important ways. While private enforcement of the Shipping Act is an effective tool today, it could be even more useful for encouraging competition if Congress were to remove limitations that prevent it from addressing all the areas where competition enforcement is needed under the Shipping Act.

Once a private party files a Complaint under the Shipping Act, the case is assigned to administrative adjudication through the Office of Administrative Law Judges (OALJ). An Administrative Law Judge (ALJ) is appointed and manages and decides the case. If an ALJ's decision is appealed, it goes to the FMC,[45] which, unlike a federal appellate court, reviews the rulings *de novo*.[46] For a private suit seeking reparations, the statute of limitations is three years.[47] There is no statutory limitations period for injunctive relief, although the illegal conduct must be ongoing for relief to be granted.[48]

The FMC exists purely by statute and does not act as a court of equity.[49] Nonetheless, its administrative adjudication looks a lot like federal litigation, and the FMC Rules of Practice and Procedure largely mirror the Federal Rules of Civil Procedure.[50] There are, however, some important differences.

> **Evidence:** As in most administrative adjudications, the FMC Rules of Evidence are much more lenient in allowing evidence, such as hearsay, that would otherwise be inadmissible in federal court.[51]

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43 Federal Maritime Commission, Fact Finding 28 Report.

44 85 Fed. Reg. 29638 (May 18, 2020).

45 *See* 46 C.F.R. § 502.221 *et seq.*

46 46 C.F.R. § 502.227(a)(6). Commission orders can in turn be reviewed by federal courts of appeal via a petition for review. *See* 28 U.S.C. § 2342(3)(b).

47 46 U.S.C. § 41301; 46 C.F.R § 502.62(a)(4)(iii).

48 *In re Vehicle Carrier Services*, 1 F.M.C. 2d 440, 456 (FMC 2019).

49 *Dukart v. Ocean Star Int'l Inc. d/b/a Int'l Van Lines*, 2 F.M.C. 2d 118, 126 (ALJ 2020) ("The Commission does not exercise the authority of a court of law or equity. We administer and enforce the requirements of the Shipping Act and related acts." (quoting *European Trade Specialists, Inc. v. Prudential-Grace Lines, Inc.*, 19 F.M.C. 148, 151 (FMC 1976)).

50 *See* 46 C.R.F. § 502.12 ("for situations which are not covered by a specific Commission rule, the Federal Rules of Civil Procedure will be followed to the extent that they are consistent with sound administrative practice.").

51 *See EuroUSA Shipping Inc., Tober Group Inc., and Container Innovations Inc. – Possible Violations of the Shipping Act of 1984 and the Commissioner's Regulations at 46 C.F.R. § 515.27*, 31 S.R.R. 545, slip op. at 19 (FMC 2008) ("Both the Administrative Procedure Act and the Commission's Rules of Practice and Procedure permit the admission of hearsay

Representative Actions: With respect to cases seeking injunctive relief, there is much greater latitude to bring representative actions, including by those not directly injured by the challenged conduct.[52] There is less clarity on reparations representative actions, and it is unresolved whether the Federal Rules of Civil Procedure's class device extends to FMC administrative adjudication.[53]

Jurisdiction: The jurisdiction of the FMC is strictly limited to matters authorized by Congress. This includes jurisdiction over the full intermodal 'through' transportation for international shipments by water, including links to inland points, and jurisdiction to ensure an efficient terminal system.[54] The Commission, however, does not have jurisdiction over mere contract disputes (not concerning a bill of lading),[55] or labor agreements,[56] and the conduct at issue must have a "nexus to the shipping public."[57]

Proof of Reparations: The Commission has previously imposed a higher standard of proof for determining reparations than federal district courts apply for damages and often requires specific details for actual injury.[58] The Commission "follows *strict proof* requirements," and that, for example, "incomplete records . . . are not sufficient."[59] As discussed later, the Commission's higher burden is not necessary or useful and discourages private enforcement, to the detriment of competition enforcement.

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evidence so long as it is relevant, material, reliable and probative and not unduly repetitious or cumulative." (citation omitted)).

[52] *See* Statement of the Commission on Representative Complaints at 1-2, Dkt. No. 21-13 (FMC Dec. 28, 2021) ("any person may file a complaint alleging a violation, including . . . trade associations").

[53] *Vehicle Carrier Services*, 1 F.M.C. 2d at 467.

[54] *Cf. Norfolk Southern Rw. Co. v. James N. Kirby*, 543 U.S. 14 (2004) (federal "maritime contracts" include contracts (bills of lading) for the entire through transportation for international shipments by water, including inland segments, including on railway); *Kawasaki Risen Kaisha, Ltd. v. Regal-Beloit Corp.*, 561 U.S. 89 (2010) (similar); *see also Mitsui O.S.K. Lines Ltd. v. Global Link Logistics et al.*, 2011 WL 7144008, at *6-7 (FMC 2011) ("Given this legislative history, it appears that Congress intended to extend the Commission's jurisdiction to encompass through rates and through transportation."). Regarding terminal jurisdiction, *see Am.Export-Isbrandtsen Lines, Inc. v. FMC*, 389 F.2d 962, 967 (D.C. Cir. 1968) ("*Isbrandtsen I*"); *Am. Export-Isbrandtsen Lines, Inc. v. FMC*, 444 F.2d 824, 829 (D.C. Cir. 1970) ("*Isbrandtsen II*") (Congress enacted a policy choice "facilitating the free flow of commerce by guaranteeing an efficient terminal system."); *Holt Cargo Sys., Inc. v. Delaware River Port Authority*, Dkt. No. 96-13, 2000 WL 246442, at *33 (FMC Feb. 9, 2000) ("FMC should use its statutory authority under the reasonableness standard to further 'an efficient terminal system.'" (citation omitted)).

[55] *E.g.*, *Pro-Transport, Inc. v. Seaboard Marine of Florida, Inc. & Seaboard Marine Ltd., Inc.*, FMC Dkt. No. 16-12 (ALJ Apr. 26, 2017), *notice not to review issued* (FMC May 31, 2017) (no jurisdiction over contract dispute for domestic trucking). *McKenna Trucking Company v. A.P. Moller-Maersk Line and Maersk Incorporated*, 27 S.R.R. 1045 (ALJ 1997), administratively final, September 16, 1997 (allowing limited discovery from to determine for jurisdictional purposes whether shipping customers were harmed by alleged discriminatory scheme to drive trucking company out of business).

[56] 46 U.S.C. § 40102(1)(B) (agreements subject to the Shipping Act "does not include a maritime labor agreement").

[57] *Sea-Land Dominicana, S.A. v. Sea-Land Service, Inc.*, 26 S.R.R. 578, 584, 1992 FMC LEXIS 118, at *18-22 (FMC 1992).

[58] *See* 46 CFR § 502.252 ("When the Commission finds that reparation is due, but that the amount cannot be ascertained upon the record before it, the complainant shall immediately prepare a statement in accordance with the approved reparation statement in Exhibit No. 1 to this subpart, showing details of the shipments on which reparation is claimed. This statement shall not include any shipments not covered by the findings of the Commission").

[59] *Vehicle Carrier Services*, 1 F.M.C. 2d at 446 (emphasis added) (citing *Gov't of Guam v. Sea-Land Serv., Inc.*, 29 S.R.R. 894, 908-09 (ALJ 2002), admin. final 2002 FMC LEXIS 25 (FMC 2002)); *see also Ceres Marine Terminal, Inc. v. Maryland Port Admin.*, 27 S.R.R. 1251, 1274-75 (FMC 1997) (rejecting argument that Complainant had been insufficiently precise in arguing for damages and so claims should be dismissed; but remanding for further proceedings to quantify damages).

B. Competition-Related Violations of Shipping Act Subject to Private Action

This section outlines the most common violations of the Shipping Act relating to competition concerns and gives examples of private actions where applicable. However, in addition to the rights of action described below, there are a number of other Shipping Act violations which may give rise to a cause of action, including: retaliation; a failure to file an agreement as required by the Shipping Act; disclosing competitively sensitive information to the detriment of a shipper; consignee or other common carrier; and agreements to restrict intermodal services or technological innovation.[60]

We note that there is currently no private right of action under §41104(a)(13), the provision prohibiting ocean carriers from entering into simultaneous agreements to share vessels and to agree on rates if the effect is anticompetitive.[61] In other words, a cartel of common carriers may agree to restrict capacity, or they may agree on pricing, but not both at the same time when they are anticompetitive.[62] In essence, the only remedy for a violation under this provision is for the Commission to order common carriers to pick one cartel as "their" cartel. As noted in the recommendations, this is an area that is underenforced and in which private action is useful and justified.

1. Unjust and Unreasonable Practices related to Delivery of Property, §41102(c)

Section 41102(c) states that "a common carrier, marine terminal operator, or ocean transportation intermediary may not fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property."[63] Under Commission regulation, a complaint seeking reparations for a violation of this provision must meet five elements: (1) respondent is an ocean common carrier, MTO, or ocean transportation intermediary; (2) claimed acts or omissions of the regulated entity are occurring on a "normal, customary, and continuous basis;" (3) the practice or regulation relates to or is connected with receiving, handling, storing, or delivering property; (4) the practice or regulation is unjust or unreasonable; and (5) the practice or regulation is the proximate cause of the claimed loss.[64]

Under Commission precedent, "just and reasonable" means that the challenged conduct is "fit and appropriate to the end in view,"[65] or "tailored to meet its intended purpose[.]"[66] The process to determine if conduct is 'reasonable' looks a lot like the burden-shifting framework under the rule of

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60 *See* 46 U.S.C. §§ 41102-41106.

61 *See* 46 U.S.C. § 41104(b).

62 This 'double exemption that allows ocean common carriers to conspire and also the freedom to pick their cartel (*and then* be immune from private enforcement for violations) is particularly concerning from a competition standpoint.

63 46 U.S.C. § 41102(c).

64 46 C.F.R. § 545.4.

65 *Distribution Services Ltd. v. Transpacific Freight Conference of Japan*, 24 S.R.R. 714, 722, 1988 WL 340659, at *7 (FMC 1988) (quoting *Investigation of Free Time Practices – Port of San Diego*, 9 F.M.C. 525, 547 (1966)). The Commission sometimes calls this reasonability analysis the "*WGMA* Test," i.e. "the test of reasonableness as applied to terminal practices is that the practice must be otherwise lawful, not excessive, and reasonably related, fit and appropriate to the ends in view." *West Gulf Maritime Ass'n v. Port of Houston Auth.*, 21 F.M.C. 244, 18 S.R.R. 783 (FMC 1978), *aff'd without opinion sub nom. West Gulf Maritime Ass'n v. FMC*, 610 F.2d 100 (D.C. Cir. 1980).

66 85 Fed. Reg. 29,638, 29,651 (May 18, 2022) (rulemaking pursuant to ocean common carrier obligations).

reason in antitrust cases.[67] The Complainant must first show substantial harm (either actual or likely), through direct evidence or through showing harmful effects in a defined market.[68] The burden then shifts to the Respondent to proffer a "worthy objective," something more than a firm's profit-maximization, and not created post hoc in response to litigation.[69] The Respondent must show, by a preponderance of the evidence, that the conduct is reasonably necessary to achieve that worthy objective, and that the beneficial effects are market-wide.[70] If the Respondent is able to making this showing, the burden shifts back to Complainant to identify whether the objective can be satisfied through "less intrusive" alternatives.[71] If so, then the conduct is "excessive" and "unreasonable," and thus violates the Shipping Act.[72]

Examples of practices the Commission or an ALJ has found state a claim under this rule are: an ocean carrier conference rule that put excessive requirements on "transshipment" services;[73] excessive conditions and costs placed by terminal owner on a marine terminal operator's lease;[74] and a price-fixing conspiracy concerning roll on/roll off vehicle shipping.[75]

2. Unfair and Unreasonable Prejudice, Preference, or Discrimination

Because of the Shipping Act's concern with leveling the playing field among shippers, many different provisions prohibit regulated entities from discriminating, or providing unreasonable preference, especially for one shipper versus another.[76] In practice, cases addressing these prohibitions also generally apply a reasonableness test, similar to §41102(c). Some cases also suggest a requirement of a "triangular relationship," i.e., that the entity advantaged and entity disadvantaged have the same

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[67] *See Ohio v. Am. Express Co.*, 138 S.Ct. 2274, 2284 (2018) (First, the plaintiff "has the initial burden to prove that the challenged restraint has a substantial anticompetitive effect that harms consumers in the relevant market." Then, if the plaintiff makes that prima facie case, "the burden shifts to the defendant to show a procompetitive rationale for the restraint." If the defendant makes this showing, then the burden shifts back to the plaintiff to demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means."). Note that other harms to competition, in contrast, may be directly cognizable and do not have a reasonableness test, such as retaliation or disclosing competitively sensitive information. *Infra.*

[68] *See River Parishes*, 1999 WL 125991, at *24 ("before requiring [a Respondent] to justify its business decision, there must be a showing of something more than an effect on a 'relatively tiny portion of the relevant market . . . and the minimal impact on the complaining [person] resulting from its exclusion,'" (citation omitted)."

[69] *Id.*; *see also* 46 CFR § 545.5(c)(1) ("In assessing the reasonableness of demurrage and detention practices and regulations, the Commission will consider the extent to which demurrage and detention are serving their intended primary purposes as financial incentives to promote freight fluidity."). *Cf. also United States v. Microsoft*, 253 F.3d 34, 58-59 (D.C. Cir. 2001) (per curiam) (procompetitive justification must be "nonpretextual").

[70] *Cf.* 7 Areeda & Hovenkamp, *Antitrust Law* ¶ 1505 (5th Edition, 2022 Cum. Supp 2015-21).

[71] *Distribution Services*, 1988 WL 340659, at *7.

[72] *Id.*

[73] *Distribution Services Ltd. v. Transpacific Freight Conference of Japan*, 24 S.R.R. 714, 722, 1988 WL 340659 (FMC 1988).

[74] *Maher Terminals v. The Port Authority of New York and New Jersey*, 34 S.R.R. 35 (FMC 2015).

[75] *In re Vehicle Carrier Services*, 1 F.M.C. 2d 45, 94 (ALJ 2018), *aff'd in part* 1 F.M.C. 2d 175 (FMC 2019).

[76] The Constitution further prevents the federal government from giving any "Preference . . . by any Regulation of Commerce or Revenue to the Ports of one State over those of another," U.S. Const. art I § 9.

relationship with respect to the Respondent.[77] More recent cases, though, suggest a loosening of this requirement.[78]

These nondiscrimination obligations include certain 'unilateral'[79] bans on common carriers (either alone or in conjunction with any other person) discriminating among shippers (or others). These 'unilateral' prohibitions bar common carriers from allowing lower rates than established in a tariff or service contract;[80] unreasonably refusing cargo space when available;[81] engaging in unfairly discriminatory practices;[82] or giving unjust advantage or disadvantage, such as to different ports or to types of shipment or commodity.[83] The Shipping Act also prohibits common carriers from acting *together* to discriminate against ports or types of customer or commodity.[84]

The nondiscrimination provisions also extend to marine terminal operators, who may not agree with any other marine terminal operator or with another common carrier to unreasonably discriminate in the provision of terminal services;[85] or give any undue or unreasonable preference or advantage or impose any undue or unreasonable prejudice or disadvantage with respect to any person.[86] Last, in addition to outright discrimination, the Shipping Act also prohibits common carriers from allowing shippers to pay below-tariff or below-contract rates, or deferred rebates, or limiting compensation to less than a reasonable amount.[87]

Examples of practices that the Commission or an ALJ has found sufficient to state a claim under this rule include: discriminatory marine terminal operator charges that were contrary to announced incentive policy,[88] and discriminatory change of control policies applied by port authority to marine terminal operator.[89]

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77 *River Parishes*, 1996 WL 264720, at *14. *Distribution Services* describes this triangular relationship as follows: "it must be shown that: (1) two shippers are given unequal treatment; (2) the shippers are competitors; (3) the prejudice or disadvantage is the proximate cause of injury; and (4) the unequal treatment is not justified by differences in transportation circumstances." 1988 WL 340659, at *4-5.

78 *Ceres Marine Terminal v. Maryland Port Admin.*, 27 S.R.R. 1251, 1997 WL 35281266, at *31 n.46 (FMC 1997) ("In essence, if the cargo moves in substantially similar transportation circumstances, it is not necessary for the purpose of meeting this criterion that the parties be in direct competition with one another.").

79 Unilateral is a bit of a misnomer because these prohibit common carriers from acting either alone, or in conjunction with any other person. In contrast, the Shipping Act refers to prohibitions on common carriers acting together with other common carriers as 'coordinated' conduct.

80 46 U.S.C. § 41104(a)(1).

81 *Id.* § 41104(a)(3).

82 *Id.* § 41104(a)(4).

83 *Id.* §§ 41104(a)(5). 41104(a)(8), 41104(a)(9), 41104(a)(16).

84 *Id.* §§ 41105(9)-(10).

85 *Id.* § 41106(1).

86 *Id.* § 41106(2).

87 *Id.* § 41104(a)(2) (unilateral: below-tariff or below-contract rates); *Id.* § 41104(a)(7) (unilateral: deferred rebates); *Id.* § 41105(7) (concerted: group of common carriers may not deny in export commerce the compensation to an ocean freight forwarder or limit that compensation to less than a reasonable amount).

88 *Ceres Marine Terminal, Inc. v. Maryland Port Admin.*, 27 S.R.R. 1251 (FMC 1997).

89 *Maher Terminals v. The Port Authority of New York and New Jersey*, 34 S.R.R. 35 (FMC 2015).

3. Unreasonable Refusal to Deal

The Shipping Act also contains prohibitions on common carriers (and others) refusing to deal with others. As with other provisions, generally the refusal must be unreasonable.[90] For example, the Shipping Act states that no common carrier may (alone or with any other person) unreasonably refuse to deal or negotiate, including with respect to vessel space accommodations provided by an ocean common carrier.[91] It also prevents common carriers from acting in concert to "boycott" or "resulting in an unreasonable refusal to deal."[92] And the Shipping Act also prevents marine terminal operators, either alone or with others, from unreasonably refusing to deal or negotiate.[93]

OSRA mandates that the Commission issue rules to clarify certain refusal-to-deal standards. More specifically, OSRA requires the Commission to define an unreasonable refusal to deal or negotiate with respect to vessel space accommodation provided by an ocean common carrier,[94] perhaps due to alleged refusals to negotiate during the COVID-19 pandemic supply chain crisis resulting in dramatically higher shipping rates.[95] As of this writing, the Commission has issued a notice of proposed rulemaking, but final rules have not been issued.[96]

Examples of practices that the Commission or an ALJ has found sufficient to state a claim under this rule include: an ocean carrier's refusal to release shipped containers to operator in Yemen[97] and an agreement to allocate customers in the roll-on, roll-off vehicle carrier conspiracy case.[98]

4. Predatory Practices to Drive Another Ocean Carrier out of Market

The Shipping Act prohibits ocean carriers from engaging in practices aimed at driving competing ocean carriers out of business. For example, the 'unilateral' prohibition prevents an ocean carrier (either alone or with any other person) from using "a vessel in a particular trade for the purpose of excluding, preventing, or reducing competition by driving another ocean common carrier out of that trade[.]"[99] Similarly, a group of two or more ocean carriers may not use "any predatory practice designed to eliminate the participation, or deny the entry, in a particular trade of a common carrier not a member of the conference, a group of common carriers, an ocean tramp, or a bulk carrier."[100]

C. Remedies for Private Complaints

As in federal court litigation, private complainants may seek reparations (i.e., damages) and injunctive relief, as well as attorneys' fees. The Shipping Act authorizes injured parties to recover

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90 Of course, *River Parishes* suggests that certain conduct may be *per se* illegal, and under the antitrust laws certain group boycotts are *per se* illegal. *Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co.*, 472 U.S. 284, 294 (1985).

91 46 U.S.C. § 41104(a)(10).

92 *Id.* § 41105(1).

93 *Id.* § 41106(1), (3).

94 Public Law 117-146 § 7(d).

95 *See, e.g.*, *MSRF Inc. v. HMM Co. Ltd. & Yang Ming Marine Transp. Corp.*, FMC Dkt. No. 22-14 (filed June 8, 2022; voluntarily dismissed Aug. 3, 2022); *Achim Importing Co. v. Yang Ming Transp. Corp.*, FMC Dkt. No. 22-08 (filed Mar. 31, 2022; settlement approved Aug. 22, 2022).

96 87 Fed. Reg. 57674 (Sept. 21, 2022).

97 *Marine Logistics, Inc. v. CMA-CGM (America) LLC*, Dkt. No. 18-07, 2019 WL 5206007 (ALJ Oct. 8, 2019).

98 *In re Vehicle Carrier Services*, 1 F.M.C. 2d 45 (ALJ 2018), *aff'd in part* 1 F.M.C. 2d 175 (FMC 2019).

99 46 U.S.C. § 41104(a)(6).

100 *Id.* § 41105(3).

reparations within a three-year statute of limitations.[101] The Commission applies a direct purchaser rule similar to the Clayton Act rule, preventing certain indirect purchasers from recovering reparations.[102] Accordingly, the Commission also bars defendants from raising any 'pass-on' defense claiming reduced liability to direct purchasers because they shifted overcharges to indirect purchasers.[103]

Key components of the remedies available to private complainants under the Shipping Act include:

First, the Shipping Act establishes a baseline of single reparations for actual injury, which *shall* be awarded to Complainant for violations.[104] But for certain violations, the Commission *may* award additional amounts up to "twice the amount of actual injury."[105] Double reparations are available for various competition-related prohibitions, including most of those described above. "Unilateral" discrimination injuries are calculated as the difference between the rate paid by the Complainant, and the most favorable (i.e., lowest) rate paid by another shipper.[106] As noted above, the standard for proving the amount of reparations due has traditionally been higher at the Commission than the parallel standard for showing damages in antitrust litigation.

Second, private Complainants may also seek an order from the Commission for parties to cease and desist illegal conduct. We use the short term 'injunctive' relief for these orders, although the Commission is not a court of equity and so district court principles of equitable relief do not map perfectly onto Commission practice.[107] For example, the Commission may only issue injunctive relief if the illegal conduct is ongoing.[108] The Shipping Act also allows parties (after filing a private complaint with the Commission) to obtain an injunction, including a preliminary injunction during the pendency of an action before the Commission, from a district court.[109]

Finally, the Shipping Act allows, but does not require, the Commission to award attorneys' fees for prevailing parties in both reparations and injunctive actions.[110] In considering whether to award attorneys' fees, the Commission considers factors including objective unreasonableness, improper motivation for the litigation, litigation misconduct, and the need for compensation.[111] The Commission has made clear, however, that it will not award attorneys' fees to a respondent if a reasonable basis exists for the allegations of a complaint.[112]

As noted above, there are limitations on remedies private parties may seek in Shipping Act proceedings relative to those available in general antitrust litigation. We are aware of no compelling

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101 46 U.S.C. 41301; 46 C.R.R. 502.62(a)(4)(iii).

102 *In re Vehicle Carrier Services*, 1 F.M.C. 2d 440, 455 (FMC 2019).

103 Order Affirming Initial Decision, slip op. at 12-13, *TCW, Inc. v. Evergreen Shipping Agency (Am.) Corp. & Evergreen Line Joint Service Agreement*, Dkt. No. 1966(I) (FMC Dec.29, 2022).

104 46 U.S.C. § 41305(b).

105 46 U.S.C. § 41305(c).

106 46 U.S.C. § 41305(d).

107 As a result, the Commission frequently refers to this power as "cease-and-desist" relief.

108 *Vehicle Carrier Services*, 1 F.M.C. 2d at 456.

109 46 U.S.C. § 41306. *Cf. AMG Capital Management v. FTC*, 141 S. Ct. 1341 (2021) (no disgorgement remedies under FTC Act's section 13(b) authorizing Commission to obtain injunctive relief). *See also* 46 U.S.C. § 41306(d) (authorizing attorneys' fees for prevailing defendants under this provision).

110 46 U.S.C. § 41305(e).

111 *See* Statement of the Federal Maritime Commission on Attorneys Fees at 4-5, Dkt. No. 21-14 (Dec. 28, 2021).

112 *Id.* at 5.

reason for not making available the full range of private antitrust remedies, including mandatory treble damages, to private enforcers of the Shipping Act. Treble damages have been a mainstay of private antitrust litigation and reflect a tested model for addressing the underdeterrence that results when antitrust violations go undetected. Accordingly, we recommend that legislation adopt treble injury, rather than the discretionary double injury that is currently available to private parties under the Shipping Act.

V. Analysis and Recommendations for Effective Competition Enforcement Under the Shipping Act

The foregoing discussion previews several recommendations directed at Congress and the Commission to improve private competition enforcement under the Shipping Act. For ease of reference, we gather them here. As a preliminary matter, while the question of whether the antitrust exemption should be eliminated partially or entirely remains open, it is unclear whether the original justifications for the antitrust exemption continue to be salient today. Further, AAI has long "advocate[d] against expansive interpretations of existing [antitrust] exemptions and immunities," and notes that they often "shelter inappropriate, anticompetitive behavior[.]"[113] However, the following recommendations, which include both legislative and Commission-level changes, will strengthen competition enforcement under the Shipping Act and enable it to respond more effectively to the anticompetitive conditions in ocean shipping today.

Eliminate the statutory bar on private enforcement of agreements that concern both rates and output if their effect is to reduce competition.[114] As explained above, it is unlikely that agreements to restrict output and raise price can ever be justified, much less by common carriers who nearly always retain the ability to exercise unchecked market power. Even if policymakers determine that some coordination among regulated entities is necessary, allowing private enforcers to challenge these arrangements would allow the Commission to sift out beneficial agreements from harmful ones, without burdening the already overtaxed enforcement division.

Order treble reparations for violations by default instead of the current double reparations at the Commission's discretion.[115] We further urge Congress to apply treble reparations to *all* competition-related violations of the Shipping Act. The analogous provision of the antitrust laws, which allow treble damages by default, have been central to identifying, remedying and deterring anticompetitive behavior, and we urge Congress to apply this experience to maritime transportation.

Permit the class device. The Commission has not resolved the question of whether its administrative adjudication process permits class actions. Yet the class device has been central to the success of antitrust enforcement and could easily be applied to the Shipping Act. The frequent use of the class device in antitrust litigation reflects that antitrust injuries are often relatively high-volume, low-dollar injuries. Because this does not incentivize individuals to take on the expense of solo actions, deterrence cannot be achieved without a procedural device to

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113 Am. Antitrust Inst., Exemptions and Immunities (last accessed Mar. 18, 2023).

114 46 U.S.C. § 41104(b).

115 *See* Fact Finding Investigation 28 Final Report at 48-49 (calling for same).

aggregate claims. [116] This rationale applies to Shipping Act claims as shippers generally have markedly fewer resources than regulated entities. Moreover, litigation puts shippers in the awkward position of suing the very entities they need in order to survive. AAI has long noted that the fear of retaliation is a serious impediment to competition enforcement.[117] The Commission has already recognized these hurdles to private enforcement, which is why it takes a more permissive position with respect to representative actions.[118] In light of these considerations, the class device is consistent with sound administrative practice and we urge the Commission to align its Rules of Practice and Procedure with the Federal Rules of Civil Procedure, including Rule 23.

Adopt a 'reasonable estimation' standard for reparations and allow economic modeling. Antitrust tribunals have long recognized that overly strict damages standards simply allow a violator to benefit from covering up its own violations. As a result, courts frequently emphasize that it "does not come with very good grace for the wrongdoer to insist on specific proof of the injury which it has itself inflicted."[119] We urge the Commission to not require too-strict proof of competitive injury, such as with specific shipping invoices, but to allow reasonable estimates of reparations, including with the assistance of appropriate economic modeling.

More transparency in filed agreement review process. U.S. shippers and consumers are currently in the dark as to the economic standards the Commission uses to evaluate the likely competitive effects of filed ocean carrier agreements. We believe that the Commission could look to the antitrust enforcement agencies, who have published merger guidelines over the years that incorporate emerging economic and legal research.[120] The guidelines provide businesses and the public with the current agencies' thinking, including which transactions are most likely to raise competition scrutiny. We believe the public would similarly benefit from the Commission publishing its guiding principles and economic tools it uses to evaluate filed agreements.

Update substantive economic tools. A statement by the Fact Finding 29 Investigation Team suggests that the Commission uses HHI to evaluate filed ocean carrier agreements.[121] HHI is a well-respected and established tool in evaluating proposed transactions in the antitrust context.[122] However, HHI presumes that firms are separate, with limited ability to influence one's horizontal rivals. However, ocean carriers, unlike ordinary firms, have a limited antitrust exemption, which allow them to conspire with one another. As a result, emerging economic research questions the extent to which HHI fully captures how conducive markets are to anticompetitive outcomes in situations, like joint ventures and common ownership, in which horizontal rivals can influence one another's competitive decisions.[123] We urge the Commission

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116 *See En Banc* Brief for Am. Antitrust Inst. as Amicus Curiae, p. 10-11, *Olean Wholesale Grocery v. BumbleBee Foods*, 31 F.4th 651 (9th Cir. 2022)

117 Am. Antitrust Inst., Roundtable: The Darkest Side of Rising Concentration: Fear and Retaliation in Antitrust (Oct. 20, 2021).

118 *See* Statement of the Commission on Representative Complaints at 1-2, Dkt. No. 21-13 (FMC Dec. 28, 2021) ("any person may file a complaint alleging a violation, including . . . trade associations").

119 *J. Truette Payne Co. Inc. v. Chrysler Motors Corp.*, 451 U.S. 557, 566-67 (1981) (citations omitted).

120 *E.g.*, U.S. Dep't of Justice & Fed. Trade Commission, Horizontal Merger Guidelines (2010).

121 Fact Finding 29 Report at 44-45.

122 *See* Horizontal Merger Guidelines § 5.3.

123 *E.g.*, O. Merk & A. Teodoro, *Alternative approaches to measuring concentration in liner shipping*, Maritime Economics and Logistics (Feb. 12, 2022); *see also, e.g.*, Daniel P. O'Brien & Steven C. Salop, *Competitive Effects of Partial Ownership: Financial Interest and Corporate Control*, 67 Antitrust L.J. 559 (2000). *See also* Timothy Bresnahan & Steven C. Salop, *Quantifying the*

to consider additional tools, such as a Modified HHI, which more fully capture the likely competitive effects of filed agreements, including the *cumulative* effects of overlapping agreements among competitors.

Competitive Effects of Production Joint Ventures, 4 Int'l J. Indus. Org. 155, 156 (1986); M. Backus, C. Conlon & M. Sinkinson, *Common Ownership in America: 1980-2017*, Am. Econ. Journal: Microeconomics, Vol. 13, No. 3 (Aug. 2021); J. Gramlich & S. Grundl, *Estimating the Competitive Effects of Common Ownership* 4 (FEDS Working Paper No. 2017-029); J. Azar, M Schmalz & I Tecu, *Anticompetitive Effects of Common Ownership*, Journal of Finance, Vol. 73, No. 4 (2018); J. Azar, S. Raina & M Schmalz, *Ultimate Ownership and Bank Competition*, 51 Fin. Mgmt. 227 (2022). There are additional economic studies collected at E. Elhauge, *The Causal Mechanisms of Horizontal Shareholding*, 82 Ohio St. Law J. 1, 3 n.1 (2021).