

Washington International Law Journal

Volume 8 | Number 1

1-1-1999

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Recommended Citation

Randy L. Baldemor, Comment, *Federal Maritime Commission Sanctions on Japanese Carriers: A Call for Fairer Methods of Resolving Disputes*, 8 Pac. Rim L & Pol'y J. 109 (1999).

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FEDERAL MARITIME COMMISSION SANCTIONS ON JAPANESE CARRIERS: A CALL FOR FAIRER METHODS OF RESOLVING DISPUTES

Randy L. Baldemor

Abstract: On February 26, 1997, the U.S. Federal Maritime Commission imposed sanctions upon Japanese shipping carriers for allegedly restrictive port practices that existed in Japan. The Federal Maritime Commission imposed the sanctions under Section 19 of the Merchant Marine Act of 1920. Section 19 gives the Federal Maritime Commission authority to make rules and regulations where conditions unfavorable to shipping in the foreign trade exist. However, the Japanese Government does not control the port practices in Japan. The Japan Harbor Transportation Authority, a private conglomeration of labor unions, shippers, and other shipping entities in Japan, regulates port practices through collective-bargaining negotiations. By using Section 19 authority to force a change in Japanese port practices, the U.S. Government unilaterally interfered in internal labor-management relations within a foreign country. Such action is unfair, in light of the fact that such collective-bargaining agreements would be considered valid labor agreements in the United States. In the future, the United States should pursue other alternatives, such as the World Trade Organization's multilateral dispute resolution mechanism, to provide a fairer method of resolving such disputes.

I. INTRODUCTION

Under Section 19 of the Merchant Marine Act of 1920, the U.S. Federal Maritime Commission ("FMC") has the authority to regulate conditions that are unfavorable to shipping in the foreign trade of the United States.¹ Recently, the FMC imposed sanctions against Japanese carriers in an attempt to force the Japanese government to correct allegedly restrictive port practices in Japan.² By taking such action, the FMC tested the bounds of its authority to interfere in the collective bargaining arrangements of a foreign country. Because such arrangements would be considered valid labor agreements in the U.S., a double standard has been created when such arrangements are considered invalid in Japan by the FMC. When faced with such a predicament in the future, a better solution would be for the United States government to pursue other alternatives, such as action through a multilateral dispute resolution body like the World Trade Organization.

¹ 46 U.S.C. app. § 876 (1)(b) (1994).

² Port Restrictions and Requirements in the United States/Japan Trade Final Rule, Docket No. 96-20 (FMC, 1997) (46 C. F. R. pt. 586) [hereinafter Port Restrictions, Final Rule], *amended by* Amendment to Final Rule, Docket No. 96-20 (FMC, 1997) [hereinafter Final Rule Amendment], *suspended by* Final Rule: Suspension of Effectiveness, Docket No. 96-20 (FMC, 1997) [hereinafter Final Rule Suspension] (visited May 12, 1998) <<http://www.fmc.gov/96-20f.htm>>.

On September 12, 1995, the FMC began investigating Japanese shipping laws to determine whether they created conditions unfavorable to shipping in the United States and Japan trade.³ Based on the investigation, the Federal Maritime Commission concluded that unfavorable conditions existed in the form of restrictive port practices that were imposed by the Japan Harbor Transportation Authority ("JHTA"), a private-sector Japanese stevedore⁴ association which governs Japanese port conditions.⁵ On February 26, 1997, the Federal Maritime Commission issued a "Final Rule" in response to these unfavorable conditions.⁶ Operating under Section 19 of the Merchant Marine Act of 1920,⁷ the FMC imposed a \$100,000 sanction each time a Japanese-flag container-carrying liner vessel entered a U.S. port from abroad.⁸ However, the "Final Rule" was suspended until September 4, 1997 to allow the Japanese government to begin to reform the unfavorable conditions.⁹ No agreements were reached in Japan to reform port practices in the period between the FMC's suspension of the sanctions to the deadline of September 4, 1997.¹⁰

As a result of the Japanese government's failure to reform the port practices, from September 5, 1997 to late October 1997, sanctions accrued against Japanese carrier lines: Mitsui O.S.K. Lines, Kawasaki Kisen Kaisha,

³ Under the Merchant Marine Act of 1920, 46 U.S.C. app. § 876(1)(b) (1994), the Federal Maritime Commission's (FMC) authority extends to the following:

[t]o make rules and regulations affecting shipping in the foreign trade not in conflict with law in order to adjust or meet general or special conditions unfavorable to shipping in the foreign trade, whether in any particular trade or upon any particular route or in commerce generally, including intermodal movements, terminal operations, cargo solicitation, forwarding and agency services, non-vessel-operating common carrier operations, and other activities and services integral to transportation systems, and which arise out of or result from foreign laws, rules, or regulations or from competitive methods or practices employed by owners, operators, agents, or masters of vessels of a foreign country.

See Port Restrictions and Requirements in the United States/Japan Trade—Information Demand Order, 27 SRR 324 (FMC, 1995).

⁴ A "stevedore" is another name for a longshore worker.

⁵ See Port Restrictions, Final Rule.

⁶ *Id.* at 1.

⁷ 46 U.S.C. app. § 876(1)(b) (1994).

⁸ See Port Restrictions, Final Rule. This "Final Rule" was amended on April 14, 1997. The amendment imposed a fee of \$100,000, assessed each time a designated vessel entered any port of the United States from any foreign port or place; provided, however, that no fee would be assessed against a designated vessel if (1) within the past seven days, or (2) for a vessel calling in the state of Hawaii, that vessel had previously been assessed a fee under the rule within the past forty days. See Final Rule Amendment.

⁹ See Final Rule Suspension. The "Final Rule" was suspended based on the premise that the Japanese Government would provide a framework for reforming the prior consultation system by July 31, 1997. July 31, 1997 was the deadline by which these reforms were to be reported to the Federal Maritime Commission.

¹⁰ See Response of Federal Maritime Commission and the United States of America to Application For Stay, No. 97-1194 at 4 (FMC, 1997) (available from the Federal Maritime Commission).

and Nippon Yusen Kaisha ("Japanese carriers"). On October 14, 1997, the deadline for payment of accumulated sanctions passed. Because Japanese carriers had defaulted on payment of \$4 million in fines, the FMC ordered the Coast Guard to detain Japanese containerships in U.S. harbors on October 17, 1997.¹¹ However, an agreement was eventually reached between U.S. Departments of State and Transportation and Japanese government officials regarding the reformation of the Japanese port practices.¹² In light of this agreement, on October 27, 1997, the FMC compromised with the Japanese carriers by agreeing that sanctions would be paid only for the month of September, amounting to a total amount of \$1.5 million in fees for the three carrier lines.¹³

Part II of this Comment will address important background information, lending insight into the evolution of shipping into the "containerization age,"¹⁴ U.S. shipping laws, and past exercises of Section 19 of the Merchant Marine Act of 1920. Part III will address the FMC's authority to interfere in collective-bargaining agreements extraterritorially and the reasonableness of such action. Finally, Part IV will argue that this problem would have been more fairly and wisely resolved through WTO dispute resolution procedures.

II. THE EVOLUTION OF FOREIGN SHIPPING, AND THE FEDERAL MARITIME COMMISSION'S ROLE POLICING THIS ENVIRONMENT

A. *The U.S. Government's Involvement in Foreign Shipping*

The United States first became involved in policing foreign shipping because of shipping conferences.¹⁵ Shipping conferences are "association[s] of ocean common carriers operating on the same route."¹⁶ Conferences were created during the late 1800s in response to intense competition between shipowners that was detrimental to their economic survival.¹⁷ Shipowners agreed to surrender certain rights to independent action in exchange for protection from predatory competition from other shipowners in the

¹¹ David E. Sanger, *Agency Orders U.S. Ports to Bar Japanese Ships*, N.Y. TIMES, Oct. 17, 1997, at A1.

¹² *FMC Responds to Progress in Resolving Japanese Port Dispute*, FMC NEWS, Oct. 17, 1997, at 1.

¹³ *FMC Settles Fees with Japanese Lines after U.S. and Japanese Negotiators Come to Terms in Port Dispute*, FMC NEWS, Oct. 27, 1997, at 1.

¹⁴ See *infra* Section II, Part B.

¹⁵ LANE C. KENDALL & JAMES J. BUCKLEY, *THE BUSINESS OF SHIPPING* 269-88 (6th ed. 1994).

¹⁶ *Id.* at 439.

¹⁷ *Id.* at 269.

conference.¹⁸ In addition, rebates were given to those who agreed to give their business exclusively to the respective conference.¹⁹

Shipping conferences were preferred by shipowners because they served as a practical method for shipowners to assure continuity of service to customers (shippers) with relatively uniform and stable rates—advantages not provided in an environment where intense competition exists.²⁰ Conferences provided business stability to an otherwise unstable environment.²¹

United States officials were cynical towards the conference system because of the restrictions placed on shipowners and conferences and the fact that conference agreements conflicted with antitrust laws.²² In 1912, the Merchant Marine and Fisheries Committee of the House of Representatives (commonly known as the Alexander Committee) addressed these issues, and determined that the conference system should be exempted from antitrust law, subject to scrutiny by a regulatory agency (the Federal Maritime Board).

In response to the Alexander Committee's findings, the Shipping Board was created in 1916 to exercise pre-implementation review of these conference agreements and to monitor potential industry abuses.²³ Today, the Federal Maritime Commission, whose primary purpose is to encourage the development and maintenance of a U.S. merchant marine, holds these responsibilities.²⁴

B. Introduction to Containerization, and its Effect on Shipping

International ocean shipping is an integral part of the economic success of nations because it is essential to each nation's competitiveness in exporting and importing goods.²⁵ Prior to the 1960s, most goods were shipped as breakbulk cargo, which is loaded as single discrete units aboard carriers.²⁶ Each transshipment required individual handling of each unit.²⁷ However, with the development of "containerization" in the 1960s, whole discrete units could be consolidated into one container that could then be

¹⁸ *Id.*

¹⁹ *Id.* at 271.

²⁰ *Id.* at 270.

²¹ *Id.* at 278.

²² *Id.* at 273.

²³ Andrew M. Danas, *Deregulation of the Liner System: The Creation of Countervailing Power in Shippers as a Means to Control Oligopoly Market Power*, 6 J. INT'L. L. BUS. 373, 378 (1984).

²⁴ KENDALL, *supra* note 15, at 402-03, 431 n.9.

²⁵ Danas, *supra* note 23, at 381.

²⁶ See generally *NLRB v. ILA*, 447 U.S. 490, 495 (1980).

²⁷ *Id.*

loaded and unloaded as a single unit.²⁸ This process significantly reduced the amount of time required for unloading and loading cargo.²⁹

Containerization was one of the most significant advances in the shipping industry.³⁰ Containerization opened the door to new ways of transporting goods, intermodal transport in particular.³¹ In addition, containerization addressed 4 key problems existing at the time: first, the time and effort in handling cargo; second, the amount of theft and damage to cargo; third, the time required to transport goods to intended destinations; and, fourth, turn-a-round time in ports.³²

Despite gains in efficiency, containerization shifted the fundamental roles in the industry. Containers can now be transported to and from ships without longshoremen³³ having to handle any of the particular items being shipped in each container.³⁴ While this is quick and efficient, it has reduced the need for, and reduced the job security of, longshoremen.³⁵

Containerization created the opportunity for parties other than longshoremen to be able to load, unload, stuff, and strip containers.³⁶ Instead of these activities taking place at the docks, containers are often loaded at inland shipping points, transported to shipside, and loaded aboard.³⁷ Thus, longshoremen responsibilities are reduced.

The "Rules on Containers"³⁸ ("Rules") were formed by ports and stevedoring unions in response to the lessening work-load caused by "containerization." The Rules on Containers require that some cargo containers owned or leased by marine shipping companies that otherwise would be loaded or unloaded within the local port area (defined as anywhere within a fifty mile radius of the port) instead must be loaded or

²⁸ Danas, *supra* note 23, at 381.

²⁹ DONALD F. WOOD, INTERNATIONAL LOGISTICS 77-78 (1995).

³⁰ KENDALL, *supra* note 15, at 199.

³¹ *Id.* Intermodal Transport denotes "a systems approach to transportation whereby goods are carried in a continuous through movement between origin and destination using two or modes of transportation in the most efficient manner." KENDALL, *supra* note 15, at 441.

³² KENDALL, *supra* note 15, at 222.

³³ "Longshoremen" are "[d]ock laborers who actually perform the loading and discharging of cargo from ships. KENDALL, *supra* note 15, at 442.

³⁴ *ILA v. NLRB*, 613 F.2d 890, 892 (D.C. Cir., 1979), *aff'd*, 447 U.S. 490 (1980).

³⁵ *Id.* at 892-93.

³⁶ Loading cargo into a container is called "stuffing;" unloading cargo from a container is called "stripping."

³⁷ KENDALL, *supra* note 15, at 187.

³⁸ See *New York Shipping Ass'n. v. ILA*, 854 F.2d 1338 (D.C. Cir. 1988); *California Cartage Co. v. NLRB*, 822 F.2d 1203 (D.C. Cir. 1987); *NLRB v. ILA*, 447 U.S. 490 (1980) [hereinafter *ILA I*]; *NLRB v. ILA*, 473 U.S. 61 (1985) [hereinafter *ILA II*]; *American Trucking Ass'n*, 734 F.2d 966 (D.C. Cir. 1987); *Council of North Atlantic Shipping Ass'n. v. New York Shipping Ass'n*, 672 F.2d 171 (D.C. Cir. 1982); *Volkswagenwerk v. FMC*, 890 U.S. 261 (1968).

unloaded by longshoremen at the pier.³⁹ These collective-bargaining agreements are considered "work preservation agreements," thus permitted under Section 8(b)(4)(b) of the National Labor Relations Act.⁴⁰ Under the "work preservation doctrine," efforts to preserve work for employees displaced by technological innovation are permitted activities under the National Labor Relations Act.⁴¹ However, activities and agreements that seek to acquire work of other employees are considered unlawful under the congressional proscription.⁴²

C. *FMC Involvement in Collective Bargaining Agreements*

The Rules on Containers were the subject of great dispute, not only as to whether the Rules were exempted under congressional proscriptions against unfair labor practices, but also because the FMC sought to "police" the "Rules" under their shipping statutes.⁴³ As a result of these disputes, the FMC has been left with what amounts to a broad authority to involve itself in labor matters where collective bargaining agreements affect competition "directly and substantially," and if the problems clearly predominate over labor interests raised by the agreements.⁴⁴ However, the FMC does recognize its limits, and has recognized the existence of labor exemptions in cases where FMC intervention is not vital to enforcement of its legislative mandate.⁴⁵ The FMC recognizes that the labor-management agreements are permitted the full scope of labor-management discretion in arriving at the agreements, but will assert its jurisdiction when such agreements prevent the proper exercise of FMC authority under the shipping statutes.⁴⁶

³⁹ See *ILA v. NLRB*, 613 F.2d 890 (D.C. Cir., 1979), *aff'd*, 447 U.S. 490 (1980) (explaining the "Rules on Containers").

⁴⁰ See *ILA I*, 447 U.S. at 81.

⁴¹ *Id.* at 75.

⁴² *Id.* at 81.

⁴³ See *New York Shipping Ass'n*, 672 F.2d at 1338; *California Cartage Co.*, 822 F.2d at 1203; *ILA I*; *ILA II*; *American Trucking Ass'n*, 734 F.2d at 966; *Council of North Atlantic Shipping Ass'n*, 672 F.2d at 171; *Volkswagenwerk*, 890 F.2d at 261 (1968).

⁴⁴ George H. Hearn, *Recent Law of the Federal Maritime Commission and Collective Bargaining*, 6 J. MAR. L. & COM. 31, 32-33 (1974).

⁴⁵ *Id.* at 46.

⁴⁶ *Id.*; see also *New York Shipping Ass'n v. FMC*, 854 F.2d 1338 (D.C. Cir. 1988) (upholding FMC jurisdiction to review the "Rules on Containers," and finding that the "Rules" were unlawful under the shipping laws).

D. FMC Statutory Authority to Regulate Conditions Unfavorable to Shipping in the Foreign Trade

Section 19 of the Merchant Marine Act of 1920 authorizes the Maritime Commission to act against conditions unfavorable to shipping in the foreign trade.⁴⁷ Section 19 of the Merchant Marine Act gives the FMC wide authority:

to make rules and regulations affecting unfavorable⁴⁸ conditions in shipping in the foreign trade . . . whether in any particular trade or upon any particular route or in commerce generally, including intermodal movements, terminal operations, . . . which arise out of or result from foreign laws, rules or regulations or from competitive methods or practices employed by owners, operators, agents, or masters of a vessel of a foreign country.⁴⁹

In investigating such practices, under 46 U.S.C. App. § 876 (6), the FMC may require any person, common carrier, tramp operator . . . to file with the Commission a report, answers to questions, documentary material, or other information which the Commission considers necessary or appropriate.

If the Commission finds that conditions are unfavorable to shipping under 46 U.S.C. App. § 876(1)(b), the Commission has five courses of action available. First, the FMC may "limit sailings to and from U.S. ports."⁵⁰ Second, the FMC may "suspend, in whole or in part, tariffs filed with the Commission for carriage to or from United States ports."⁵¹ Third, the FMC may "suspend, in whole or in part, an ocean common carrier's rights to operate under an agreement filed with the Commission."⁵² Fourth, the FMC may "impose a fee, not to exceed \$1,000,000 per voyage."⁵³ In addition, finally, the FMC may "take any other action the Commission finds necessary and appropriate to adjust or meet any condition unfavorable to shipping in the foreign trade of the United States."⁵⁴

⁴⁷ 46 U.S.C. app. § 876(1)(b) (1994).

⁴⁸ The FMC defines conditions as unfavorable to shipping in the foreign trade in broad terms. The FMC may determine conditions to be unfavorable if the conditions are discriminatory, different from those imposed on other vessels competing in the trade, unfair as between shipping entities, or if the conditions are "otherwise unfavorable to shipping in the foreign trade of the United States." 40 C.F.R. § 585.301(6)(c) (1998).

⁴⁹ 46 U.S.C. app. § 876 (1)(b) (1994).

⁵⁰ 46 U.S.C. app. § 876 (9)(a).

⁵¹ 46 U.S.C. app. § 876 (9)(b).

⁵² 46 U.S.C. app. § 876 (9)(c).

⁵³ 46 U.S.C. app. § 876 (9)(d).

⁵⁴ 46 U.S.C. app. § 876 (9)(e).

In addition, upon request by the Commission, the collector of customs at the port or place of destination in the United States shall refuse clearance to a vessel of a country that is named in a rule or regulation issued by the Commission under Section 19.⁵⁵ The Secretary of the department in which the Coast Guard is operating shall deny entry to any port or place in the United States or the navigable waters of the United States.⁵⁶ The Secretary may also detain that vessel at the port or place in the United States from which it is about to depart.⁵⁷

E. Use of Sanctions Under Section 19 of the Merchant Marine Act of 1920

Until 1997, the Federal Maritime Commission had never imposed sanctions on a foreign government, foreign flag operators, or other entities.⁵⁸ The FMC had, however, threatened the use of sanctions, under Section 19 of the Merchant Marine Act, in some instances. Examples of incidents in which the imposition of sanctions was contemplated, either in proposed rules or suspended final rules, include actions taken in the United States-Korea trade (NVOCCs⁵⁹ and intermodal matters⁶⁰), United States-Taiwan trade,⁶¹ and the United States-Venezuelan trade.⁶² Though sanctions were proposed in each of these situations, the threats of sanctions were removed once the unfavorable conditions were corrected.⁶³

Unlike these past threats of sanctions, the FMC actually imposed sanctions on the Japanese liner operators, and the liner operators were actually required to pay \$1.5 million in fines. The sanctions were imposed based on unfavorable restrictive port practices in Japanese ports.⁶⁴ These

⁵⁵ 46 U.S.C. app. § 876 (10)(a).

⁵⁶ 46 U.S.C. app. § 876 (10)(b).

⁵⁷ *Id.*

⁵⁸ See Federal Maritime Commission, Federal Maritime Commission Trade Actions, (Mar. 1997) (unpublished manuscript available on file with the Federal Maritime Commission)[hereinafter Federal Maritime Actions].

⁵⁹ *Id.*

⁶⁰ Actions to Adjust or Meet Conditions Unfavorable to Shipping in the United States/Korea Trade, 26 S.R.R. 585 (Nov. 13, 1992), in Federal Maritime Actions.

⁶¹ Actions to Address Adverse Conditions Affecting United States Carriers in the United States/Taiwan Trade, 25 S.R.R. 1690 (Oct. 11, 1991), in Federal Maritime Actions.

⁶² Actions to Adjust or Meet Conditions Unfavorable to Shipping in the United States/Venezuela Trade, 26 S.R.R. 204 (March 25, 1992), in Federal Maritime Actions.

⁶³ See 26 S.R.R. 585; 25 S.R.R. 1690; 26 S.R.R. 204; Actions to Adjust or Meet Conditions Unfavorable to Shipping in the United States/Korea Trade, 26 S.R.R. 591 (Nov. 13, 1992), in Federal Maritime Actions.

⁶⁴ The imposition of unilateral sanctions is unlike the efforts of the European Union, who in response to restrictive port practices, has sought resolution of such practices through World Trade Organization proceedings. *EU/Japan: EU Bides Time with Japan on Harbour Rules*, EUR. REP., Sept. 10, 1997,

practices included 1) port requirements that do not allow shipping lines to make operational changes without the permission of JHTA, 2) the JHTA's absolute and unappealable discretion to withhold permission for the proposed operational changes, 3) the lack of written criteria for JHTA decisions, 4) threats by the JHTA to use its authority to punish and disrupt the business operations of its detractors, 5) JHTA use of its authority to extract fees and impose operation restrictions, such as Sunday work limits, 6) the JHTA's use of "prior consultation" authority to allocate work among its member companies, by barring carriers and consortia from freely choosing or switching operators and by compelling shipping liners to hire additional, unneeded stevedore companies or contractors, 7) the Government of Japan's restrictive licensing standard which prevents new entrants from entering into Japan's stevedoring industry and, 8) the inability of U.S. carriers to perform stevedoring or terminal operating services in Japan because of Japanese licensing requirements, while Japanese carriers (or their related companies or subsidiaries) can conduct such activities in Japan and in the United States.⁶⁵

American President Lines and Sea-Land Service, both U.S. liner operators, had urged the FMC to impose sanctions. In addition, the carriers noted "that the European Commission, at the behest of European carriers, had urged the Government of Japan for years to secure the elimination of port restrictions," and that the \$100,000 sanctions are "an assessment which is far less than the economic impact on the U.S. carriers of the cumulative adverse effects of the prior consultation system, that is, the abuse of unbridled market power by the harbor services industry in Japan."⁶⁶

In contrast, the Japanese liner operators, Mitsui O.S.K. Lines ("MOL"), Kawasaki Kisen Kaisha ("K-Line"), and Nippon Yusen Kaisha ("NYK"), argued 1) that they are private companies, 2) that they are not in control of policies of the Ministry of Transport ("MOT"), the Japanese governmental body that regulates such matters, and, 3) that they "deplore a statutory application which would punish [them] irrespective of the lawful character of [their] carrier operations in the Japan-U.S. oceanborne trades."⁶⁷ Furthermore, the Japanese carriers argued that the role of the MOT was not properly characterized because the MOT treats prior consultation negotiations as matters for the private sector, except when they break down,

available in 1997 WL 13046469.

⁶⁵ See Port Restrictions, Final Rule.

⁶⁶ *Id.*

⁶⁷ *Id.*

and that under Japanese laws there is a policy of non-interference in employer-union bargaining.⁶⁸

III. THE REASONABLENESS OF THE FEDERAL MARITIME COMMISSION'S IMPOSITION OF UNILATERAL SANCTIONS

As discussed, Section 19 is intended to be applied extraterritorially. In the current case involving the Japanese carriers, the matter of whether this jurisdiction authorizes the FMC to reach into the internal labor matters of Japan is an important issue. Under the broad authority granted in the statute, and U.S. courts' standards for reviewing statutes, it seems that the FMC's action was legally permissible. But, in light of the sensitive nature of the U.S. intrusion into the internal labor matters of Japan, the U.S. Government and the FMC should seek fairer, and more credible mechanisms, when they seek reform in these delicate situations, such as through the World Trade Organization.

A. *Judicial Review*

Judicial review of FMC Section 19(1)(B) actions is authorized under 28 U.S.C. § 2342(3)(b)(i), which states "[t]he court of appeals . . . has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of . . . all rules, regulations, or final orders of . . . the Federal Maritime Commission issued pursuant to Section 19 of the Merchant Marine Act, 1920 (46 U.S.C. App. § 876)"⁶⁹ Because the FMC is an administrative body, the standard of judicial review is set out in *Chevron v. National Resources Defense Council*.⁷⁰ Under *Chevron*, an agency's construction of a statute is reviewed first by looking to the statute in question.⁷¹ If that statute is clear on its face, then the Court's review ends.⁷² If, however, Congress has not directly addressed the issue in question, the Court will determine whether the agency's application was a permissible construction of the statute.⁷³ The agency's application must be set forth by

⁶⁸ *Id.*

⁶⁹ 28 U.S.C. § 2342(3)(b)(i) (1994).

⁷⁰ *Chevron v. National Resources Defense Council*, 467 U.S. 837 (1984).

⁷¹ *Id.* at 842.

⁷² *Id.* at 842.

⁷³ *Id.* at 843.

regulation.⁷⁴ Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.⁷⁵

Section 19(1)(B) of the Merchant Marine Act of 1920 was intended to be applied extraterritorially.⁷⁶ This act was amended in 1991 to further identify intermodal movements, terminal operations, and other shipping-related activities as activities that are within the review and regulation of the FMC.⁷⁷

Because of the broad language of the statute, the FMC's jurisdiction to issue sanctions over the Japanese carriers, under U.S. law, cannot be questioned. Though the JHTA argues that its abuses are purely private sector matters, the FMC specifically noted in its Final Rule that, "in accordance with Japanese laws and regulations, JHTA operates with the permission of, and under the supervision of the Ministry of Transportation ("MOT"), which can annul JHTA's incorporation if it acts contrary to the public interest."⁷⁸ MOT is also authorized to give oversight or guidance, as confirmed by the Japanese carriers, to bring about the "restoration, improvement, and continuance" of the system.⁷⁹ Moreover, "the MOT is vested with broad regulatory authority over JHTA member companies, including licensing authority and the right to disapprove rates and business plans."⁸⁰

Alternatively, if a court were to find the statute unclear as to this particular issue, the court would then be required to determine whether the FMC's action was "arbitrary and capricious."⁸¹ However, the FMC's identification of conditions unfavorable to shipping in the foreign trade would seem to make a finding that the FMC's action was "arbitrary and capricious" difficult to establish. First, under the Japanese port system, U.S. carriers are unable to obtain licenses from the MOT, giving U.S. carriers no choice but to submit their shoreside planning and operations to JHTA control.⁸² This licensing system protects the existing Japanese firms from competition with U.S. and other foreign companies.⁸³ Secondly, the JHTA's pre-prior consultation requirement, which allows the JHTA to arbitrarily permit or deny carriers access to the prior consultation process, gives the

⁷⁴ *Id.* at 844.

⁷⁵ *Id.*

⁷⁶ See 46 U.S.C. § 876(1)(b) (1994), which states that the FMC is authorized "[t]o make rules and regulations affecting shipping in the foreign trade . . . which arise out of foreign laws, rules"

⁷⁷ *Id.*

⁷⁸ See Port Restrictions, Final Rule.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Chevron v. National Resources Defense Council*, 467 U.S. 837, 844 (1984).

⁸² See Port Restrictions, Final Rule.

⁸³ *Id.*

JHTA extraordinary leverage which it uses to prevent competition and maintain agreed-upon allocation of work among member companies.⁸⁴

Section 19 is not clear as to whether it was intended to allow the FMC to interfere with collective bargaining within another country. The court, in applying the *Chevron* standard, must look to determine whether the agency's construction of the statute was "reasonable."⁸⁵ The issue is whether the FMC's application of Section 19 to reform labor matters within Japan was "reasonable" under the statute.

Congressional intent supports the position that the FMC's action was reasonable. In amending Section 19 in 1991, Congress recognized that the FMC should interpret Section 19 broadly.⁸⁶ It is also clear that Congress intended to enlarge, or at least clarify, the scope of Section 19 authority to include "intermodal movements and certain land-based activities which are integral to shipping."⁸⁷ The amendment was created to give the FMC broadened authority to act until "all unfair trading practices are eliminated from the international maritime trade [emphasis added]."⁸⁸ Additionally, after the Japanese sanctions were issued, the Senate acknowledged its support of the FMC's actions.⁸⁹ Such broad language indicates that the FMC's authority is intended to be all-inclusive of any activities which the FMC interprets to be "unfavorable to shipping in the foreign trade," regardless of whether the matters are domestic or international in nature.

B. *FMC Authority to Review Collective-Bargaining Agreements*

Federal courts have held that the FMC has the authority to review collective bargaining agreements, and to find them unlawful, when such agreements interfere into the province afforded the FMC under the shipping statutes.⁹⁰ Thus, even if collective-bargaining agreements, such as the "Rules on Containers," are upheld as lawful under the National Labor Relations Act, the U.S. Supreme Court has held that the FMC has the authority to determine whether these types of agreements violate FMC

⁸⁴ *Id.*

⁸⁵ *Chevron*, 467 U.S. at 844.

⁸⁶ 135 CONG. REC. E2868 (daily ed. Aug. 4, 1989) (Statement of Rep. Lent).

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ See S. Res. 140, 15th Cong. (1997) (enacted). Though this resolution was brought after the fact, courts have shown that pronouncements as to the meaning of previously enacted statutes may be appropriate for guidance in appropriate circumstances. See *Takazato v. FMC*, 633 F.2d 1276, 1281 (9th Cir. 1979) (supporting pronouncements of legislative committees of previously enacted statutes).

⁹⁰ *Council of North Atlantic Shipping Ass'n. v. FMC*, 672 F.2d 171, 188 (D.C. Cir. 1981).

laws.⁹¹ The FMC may be invading the province of the National Labor Relations Board, but the federal courts have held that the FMC may do so in carrying out its statutory mandate.⁹²

In *New York Shipping Ass'n. v. FMC*, a District of Columbia Federal Court of Appeals upheld the FMC's authority to review and prohibit collective bargaining agreements under the Shipping Act of 1916.⁹³ In supporting the FMC's ruling, the Court focused on whether interference with the federal labor laws was unavoidable in carrying out FMC proscriptions under the shipping statutes.⁹⁴ The federal court upheld the FMC's decision noting that, in regulating tariffs, which included the agreements on the "Rules on Containers," the FMC was carrying out its primary role in protecting carriers, shippers, and ports from unfair or discriminatory practices.⁹⁵

The FMC's action was upheld, but the court did not apply a *Chevron* analysis, and did not give the FMC deference in interpreting the meaning of a shipping law by using a *Chevron* analysis.⁹⁶ The court refused to yield to the interpretation of the FMC because the FMC was not interpreting the statute in the administration of its shipping laws, but, rather, interpreted the statute as delimiting the FMC's authority.⁹⁷ The court stated: "[I]t would be inappropriate for us to defer to the agency, where, as here, it is interpreting not the meaning of a statute that Congress charged it to administer, but rather a statute merely delimiting its jurisdiction as against that of the authorities charged with the administration of the labor laws."⁹⁸

The specific FMC action under the statute here does not seek to delimit the FMC's authority, but the "administration" of Section 19. The FMC would then have broader deferential authority under Section 19 than it had under the Shipping Act's delimiting language in *New York Shipping Ass'n. v. FMC* because the focus is on the "administration" of a shipping law, rather than an interpretation of the limits to such authority.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *New York Shipping Ass'n v. FMC*, 854 F.2d 1338 (D.C. Cir. 1988).

⁹⁴ *Id.* at 1363-64.

⁹⁵ *Id.* at 1374-75.

⁹⁶ *Id.* at 1363.

⁹⁷ *Id.*

⁹⁸ *Id.*

C. *Policy Implications of FMC Regulation of Extraterritorial Collective-Bargaining Agreements*

The FMC's imposition of sanctions in this case demonstrates the hypocrisy of U.S. lawmaking. FMC regulation, though lawful under U.S. statutes, serves to intrude into the domestic matters of another sovereign nation. The FMC action here is much more abrasive than FMC involvement in domestic, collective bargaining matters. Here, the collective-bargaining matters took place within a foreign country, and the FMC action is not just interfering with federal labor laws, but foreign labor laws.

The sanctions were imposed based on unfavorable restrictive port practices in Japanese ports. Japan supports a policy of non-interference with employer-employee labor matters; this is a policy similar to what exists in the United States.⁹⁹ The FMC's action illustrates a situation where the United States government policies would support such arrangement here in the United States, but invalidate the same type of action when such arrangements exist in a foreign country—a double-standard in U.S. lawmaking.¹⁰⁰ Furthermore, the acceptance of FMC interference with domestic collective-bargaining agreements does not justify FMC interference with how a sovereign nation addresses its internal labor matters.

NLRB v. Int'l Longshoremen's Ass'n. ("ILA II") is an example of how the problem would be addressed in the United States.¹⁰¹ In that case, the Supreme Court reviewed issue of whether the "Rules on Containers," adopted in U. S. ports, were valid work-preservation agreements. These rules were created as a result of a reduction in the amount of work available for longshoremen, as shipping companies furthered the practice of loading and unloading their containers away from piers through freight consolidators who combined the goods of various shippers into a single shipment.¹⁰² The rules required that if containers owned or leased by shipping companies were to be stuffed or stripped locally by anyone other than the employees of the beneficial owner of the cargo, that work had to be done at the piers by ILA labor.¹⁰³

⁹⁹ See Port Restrictions, Final Rule.

¹⁰⁰ See *Cockroft Hits at FMC in Ports Row*, LLOYD'S LIST, Sept. 27, 1997, available in 1997 WL 7495523 (criticizing the hypocrisy of some in the U.S. administration and other governments, as well as world bodies such as the WTO and the IMF, for using the "free trade should be separate from social and labor issues" argument on some occasions and not on others. "We consider this an appalling interference in the rights of Japanese government and unions to regulate their own affairs.").

¹⁰¹ *NLRB v. Int'l Longshoremen's Ass'n.*, 473 U.S. 61 (1985).

¹⁰² *Id.* at 65.

¹⁰³ *ILA I*, 447 U.S. 490 (1980). In this case, the court addressed whether the NLRB, in determining the permissibility of the "Rules on Containers" under federal labor law, properly reviewed the matter. The Court held that the NLRB failed to consider the surrounding circumstances, such as whether the union's

In *ILA II*, the Supreme Court's test was whether the union's objective was directed toward a "secondary purpose," a purpose beyond work-preservation (e.g. work-acquisition).¹⁰⁴ The Court acknowledged that no dispute existed as to the fact that the rules were directed towards the preservation of jobs against the diminishing volume of work for longshoremen.¹⁰⁵

In the United States, arrangements similar to those that exist in Japanese ports would be protected from unlawful interference by the National Labor Relations Board as valid work-preservation agreements.¹⁰⁶ The gist of the FMC's complaint is against the "prior consultation requirement" and the discretion the JHTA has in determining port requirements in Japan.¹⁰⁷ These conditions are not a creation of government, but of private, labor-management relations that take place among the various shipping associations in Japanese ports.¹⁰⁸ The system had been in effect since 1986, and was developed "to prevent labor unrest and to protect the jobs of harbor workers."¹⁰⁹ Such a long-standing system was developed as an effort to maintain work levels after the industry shifted from labor-intensive breakbulk to containerized cargo.¹¹⁰ Japanese carriers argue that "the system was created to maintain labor stability and avoid the need for face to face confrontations between carriers and unions," in response to "containerization."¹¹¹ The Japanese carriers point out that "the inauguration of container service, which occurred in the 1960s and 1970s, raised serious issues and led to disruption in waterfront labor relations in many maritime nations, including the U.S."¹¹² This

objective was for the purpose of work preservation, and thus remanded the case. The issue of whether the Rules on Containers are lawful under the NLRA was brought forward in *ILA II*, 473 U.S. 61 (1985), to determine whether such agreements are lawful under the NLRA.

¹⁰⁴ *ILA II*, 473 U.S. at 81.

¹⁰⁵ *Id.* at 79.

¹⁰⁶ See *ILA I*; *ILA II*.

¹⁰⁷ See Port Restrictions, Final Rule.

¹⁰⁸ The two labor groups, the Japan Shipowner's Association and the Japan Foreign Steamship Association, contend that the prior consultation system is a private-sector, labor-management agreement. Furthermore, the groups maintain that a decision reached on a review without participation of the labor unions violates the International Labor Organization Treaty guaranteeing the right to collective bargaining. *Port Workers go on 24-hour Strike at 50 Ports*, JAPAN WKLY. MONITOR, Nov. 24, 1997, available in LEXIS, News Library, Cumwms File.

¹⁰⁹ *Application for Stay Order of Federal Maritime Commission*, No. 97-1194 at 12 (D.C. Cir., 1997) (available from the United States Court of Appeals for the District of Columbia Circuit; also available from the Federal Maritime Commission).

¹¹⁰ *FMC Probing Japanese Port Practices for Bias Toward U.S. Flag Carriers*, TRAFFIC WORLD, Sept. 25, 1995, available in LEXIS, News Library, Arcnws File.

¹¹¹ See Port Restrictions, Final Rule. See also *Application for Stay Order of Federal Maritime Commission*, No. 97-1194 at 12 (D.C. Cir., 1997).

¹¹² *Id.*

system has been defended as necessary because employment situations can be influenced by decisions where to load and unload cargoes as well as by decisions on which cargo-handling companies will be used by shipping firms.¹¹³ Thus, the primary intention of the collective-bargaining agreements is the preservation of work, as in *ILA II*.

The FMC has not established that the Japanese port practices were created with a purpose of excluding non-Japanese carriers. Instead, the detrimental effects upon U.S.-foreign carriers may be more reasonably explained as the "incidental effects of primary activity," which the Supreme Court in *ILA II* upheld as lawful in the United States.¹¹⁴ For the U.S. to allow such activity within U.S. borders but to prohibit it when done by foreign governments illustrates a double standard in U.S. lawmaking.¹¹⁵

It should also be noted that in *ILA II*, the court recognized that the "Rules" represented "a negotiated compromise of a volatile problem bearing directly on the well-being of our national economy."¹¹⁶ The FMC has not taken account of any economic effect on the Japanese economy, and it is not required to. However, if the well being of a nation's economy is a factor to be considered in determining the permissibility of work-preservation agreements, it seems at least reasonable that the U.S. should respect Japan's sovereignty in protecting the effect on Japan's economy. Instead, the FMC has shown no such regard.

The FMC's imposition of unilateral sanctions has been called a "bludgeon" attempt at correcting the port practices in Japan.¹¹⁷ In response to the unilateral actions of the FMC, "Japan's Diet passed a law authorizing immediate retaliation if a foreign government fines Japanese carriers or denies them access to ports."¹¹⁸ Furthermore, Japanese government ministers have attacked the actions by hinting at the possibility of a negative impact on overall Japan-U.S. trade ties.¹¹⁹ Analogizing the FMC's Section

¹¹³ *Id.*

¹¹⁴ *ILA II* at 84.

¹¹⁵ The United States would probably object if another country sought to regulate its internal labor matters by sanctioning U.S. private businesses.

Washington's choice of three ship lines as targets smacks of arbitrariness. Those carriers may benefit from the JHTA system, but so do many other Japanese companies. One can only guess how Washington would react if, for example, a foreign government were to hit three U.S. companies to protest a U.S. business practice.

Opening Japan's Ports, J. COM., Apr. 3, 1997, available in LEXIS, News Library Cumwms File.

¹¹⁶ *ILA II* at 84.

¹¹⁷ *Opening Japan's Ports*, *supra* note 115, at 6A.

¹¹⁸ *Japan Reacts to FMC Port Sanctions*, AM. SHIPPER, Feb. 1998, at 57.

¹¹⁹ Anthony Rowley, *Japanese Ministers and Shipowners Blast U.S. Move*, BUS. TIMES (Singapore), Feb. 28, 1997, at 1.

19 usage to Section 301, another unilateral trade remedy which has been heavily criticized by foreign governments, the FMC played both "prosecutor and judge, in which defendant's are tried in absentia, and in which Congress . . . ordained certain guilty verdicts in advance . . ." ¹²⁰ Ironically, it has also been argued that even the Executive Branch was taken by surprise, and was put "in a tenuous position where it was pressured into supporting the stance of the FMC, though the administration clearly sought to take action by less abrasive measures." ¹²¹ Because Japanese government ministers have conceded that the port practices could be reformed, ¹²² collaborative efforts, rather than such aggressive and unilateral efforts taken by the FMC, might work better in such situations.

The Japanese liner operators also seek deregulation and greater transparency in Japanese ports. ¹²³ However, such action must be taken cautiously. ¹²⁴ If deregulation and liberalization of the ports takes place too rapidly, the risk of cartels, monopolies, or excessive competition could result. ¹²⁵ Deregulation takes coordination, rather than conflict. ¹²⁶

When the U.S. takes such action it reinforces the belief that our country is not interested in a "fair" international system of resolving disputes, but a system which only serves the United States' best interests. Under such circumstances, the credibility of the United States in recognizing the sovereignty of other nations, and in supporting the resolution of international disputes through multilateral methods, is called into question. The United States should support a more credible alternative, such as a multilateral method of dispute resolution.

¹²⁰ Robert E. Hudec, *Thinking About the New Section 301: Beyond Good and Evil*, in *AGGRESSIVE UNILATERALISM: AMERICA'S 301 TRADE POLICY AND THE WORLD TRADING SYSTEM* 114 (Jagdish Bhagwati & Hugh T. Patrick eds., 1990).

¹²¹ David LaGesse, *Dispute Might Bar Many Japanese Ships From American Ports*, DALLAS MORNING NEWS, Oct. 17, 1997, at 1A.

¹²² Linda Sieg, *Japan Agrees Port Practices Need to be Reformed*, Reuters (Far East), Feb. 28, 1997, available in LEXIS, News Library, Cumws File.

¹²³ Bradley Martin, *Japanese Lines Also Want Port Deregulation*, J. COM., Sept. 16, 1998, at 11A.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.* Interestingly, the U.S. has engaged in a similar investigation of Chinese port policies under § 19 of the Merchant Marine Act. *FMC Launches Inquiry into Chinese Shipping Policies*, FMC, Aug. 12, 1998, at NR 98-03. Like the Japanese government and carriers, Chinese authorities seek negotiation rather than confrontation to reach a solution. David Taylor, *China Hopes to Resolve Dispute with U.S. Amicably*, BUS. TIMES (Singapore), Sept. 1, 1998, at 1.

IV. WORLD TRADE ORGANIZATION DISPUTE RESOLUTION AS AN ALTERNATIVE TO UNILATERAL MEASURES

Though neither maritime nor shipping conditions are presently "covered" under the WTO's jurisdiction,¹²⁷ undoubtedly such delicate matters would be more fairly and wisely adjudicated under an impartial, multilateral body.¹²⁸ Without a clear showing that the Japanese government, Japan Harbor Transportation Authority, or Japanese carriers intended to create conditions "unfavorable to shipping" in the U.S. or foreign trade, the Japanese system is really just an internal domestic labor matter which incidentally effects international shipping conditions. For the U.S. and the FMC to attempt to unilaterally reform such conditions is an impingement on Japanese sovereignty.¹²⁹ In light of the seriousness of the problem, common sense dictates that such matters would be more fairly resolved by an international, impartial body, than through an independent agency, such as the FMC. In light of the seriousness of the reforms being sought, and the inherent bias from which the FMC works,¹³⁰ it would be more reasonable in the future to address such matters by multilateral dispute resolution procedures, such as WTO dispute resolution mechanisms.¹³¹

The WTO would have provided a fairer mechanism for review of Japan's allegedly restrictive port practices. First, the WTO would have provided certain procedural advantages in providing for a fair and timely adjudication of the issues.¹³² Secondly, by addressing the matter through WTO procedures, the U.S. would have decreased the abrasiveness of its

¹²⁷ The WTO has determined certain "covered" areas for which member countries have agreed to have adjudicated before WTO Dispute Settlement Bodies ("DSB"). For a list of "covered agreements" see *Agreements Covered by the Understanding*, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Appendix 1, 33 I.L.M. 1244 (1994) [hereinafter *Understanding*].

¹²⁸ The WTO Dispute Settlement Understanding ("DSU") emphasizes dispute resolution through impartial Dispute Settlement Bodies ("DSBs"). See *Understanding Annex 2*. This matter is not currently addressable under the WTO dispute resolution; rather, this comment is an illustration and argument why maritime shipping services should be brought within the WTO agreements, or other multilateral dispute resolution mechanism.

¹²⁹ It should be noted that the Japanese government concurs that the port conditions need to be changed; however, for the U.S. to be forcing the issue is another matter which impinges on Japanese sovereignty.

¹³⁰ See *supra* Section III.

¹³¹ On October 17, 1997, the United States and Japan reached an agreement as to the following reforms: 1) the creation of an expedited licensing process for American ships entering Japan ports; 2) the creation of an alternative system so U.S. shippers can negotiate with terminal operators directly without having to go through "traditional" port procedures, such as the "prior consultation" requirement; and, 3) the assurance of the Japanese government that it will make efforts to give the reforms a fair chance to become effective. Martin Crutsinger, *U.S.-Japan Trade Pact Brings Huge Relief*, S.F. EXAMINER, Oct. 18, 1997, at A-16.

¹³² See *Understanding* art. 17.

actions in seeking to reform Japanese port practices.¹³³ Third, by adjudicating the matter before the WTO, the U.S. could have legitimized its commitment to a multilateral trading system.¹³⁴

If this matter were brought before the WTO, certain procedural mechanisms would be working to provide for fairer review of Japan's allegedly restrictive port practices.¹³⁵ First, the Dispute Settlement Body would establish a panel of three appointed members who must serve in their "individual capacities," and not as "government representatives."¹³⁶ Objectivity is the focus of panel functions in making findings of facts and determinations as to whether "covered agreements" have been violated.¹³⁷ Thus, under such a system, the political bias of FMC officials would not be a problem.¹³⁸ Second, decisions of a Dispute Settlement Body could be appealed to the Appellate Body, allowing for further review of the issue.¹³⁹

These procedural advantages are provided within certain time frames. Upon complaint, and request for a panel, a panel must be established by the earliest Dispute Settlement Body meeting, or upon request, within fifteen days of a request for the convening of a Dispute Settlement Body meeting.¹⁴⁰ Written submissions to the panel must be submitted for immediate transmission to the panel.¹⁴¹ The panel has six months to issue its report,¹⁴² unless the Dispute Settlement Body is informed of reasons why it is not possible.¹⁴³ Upon issuance of the panel report, member countries have sixty days to formally notify the Dispute

¹³³ See *Opening Japan's Ports*, J. COM., Apr. 3, 1997, available in LEXIS, News Library, Cumws File (comparing the EU's actions in going to the WTO to a "large scalpel," and U.S.'s measures to a "bludgeon.")

¹³⁴ The WTO's "Agreement Establishing the World Trade Organization" agree to support the objective of developing a more viable and durable multilateral trading system, and reducing barriers to trade. Agreement Establishing the World Trade Organization, 33 I.L.M. at 1144. It should be noted that the European Union has filed a complaint with the WTO about the same restrictive port practices the U.S. has complained about. The U.S. has sought to encourage other nations to pursue such procedures, and has historically been one of the biggest benefactors of WTO dispute resolution. See Stuart S. Malawer, *New Agreements and Cases in the WTO*, N.Y. L.J., Jan. 23, 1998, "Outside Counsel Section" at 1. For the U.S. to attempt these matters unilaterally shows a lack of confidence in the WTO dispute resolution process, and a lack of commitment towards a multilateral system of dispute resolution. See also William A. Niskanen, *Testing WTO's Limits*, J. COM., Nov. 4, 1997, at 8A.

¹³⁵ For the purposes of this Comment, references to "covered" agreements is meant to hypothetically assume that if "maritime/shipping" agreements were covered under the WTO, certain advantages for the U.S. and Japanese carriers would be present which are not present currently under unilateral efforts by the U.S.

¹³⁶ Understanding art. 8(9).

¹³⁷ Understanding art. 11.

¹³⁸ See *Japan Trade Row Escalates*, LLOYD'S LIST, Sept. 26, 1997, available in 1997 WL 4465230.

¹³⁹ See Understanding art. 17.

¹⁴⁰ Understanding art. 6(1).

¹⁴¹ Understanding art. 12(6).

¹⁴² Understanding art. 12(8).

¹⁴³ Understanding art. 12(9).

Settlement Body of their intention to appeal.¹⁴⁴ The Appellate Body then has sixty days to render its final report.¹⁴⁵

Under such procedural safeguards, the U.S. and Japanese governments could be assured of an impartial settlement of the matter. Furthermore, both member countries could rely on the matter being settled within certain time frames. The WTO dispute resolution procedures are thus inherently fairer than might be offered under unilateral actions by a country's independent agency.

In addition to arguing that the unilateral sanctions are permissible under Section 19 of the Merchant Marine Act, the FMC justified its imposition of sanctions because "genuine progress may be possible . . . and workable reforms may well be at hand."¹⁴⁶ However, after more than a year after the FMC's imposition of sanctions, the anticipated reforms have not materialized.¹⁴⁷

In light of the seriousness of the FMC's imposition of sanctions, and the ineffectiveness of this solution, a multilateral dispute resolution system like that used by the WTO, may be a more effective alternative in the future. "The WTO creates a predictable and conducive global legal system to enhance trade relations among states . . . The purpose of the WTO's dispute resolution process is to create a binding and compulsory quasi-judicial system."¹⁴⁸ When the U.S., one of its major litigants, takes advantage of the WTO's dispute resolution procedures, and complies with such decisions, the U.S., as well as the WTO, gain credibility with foreign governments.¹⁴⁹

On the other hand, when the U.S. disguises aggressive unilateralism behind the mask of "complex practices," unilateral sanctions are more likely to subvert the WTO's authority in the area of world trade.¹⁵⁰ "[U]nilateral action is now largely unnecessary due to the negotiation of comprehensive substantive agreements and the development of a rule-oriented dispute resolution process. Moreover, unilateral action is detrimental to the world trading system in an interdependent world."¹⁵¹ When the U.S. deals with its complaints regarding another country's domestic activities in this manner, the U.S. illustrates its indecisive

¹⁴⁴ Understanding art. 16(4).

¹⁴⁵ Understanding art. 17(5).

¹⁴⁶ Response of Federal Maritime Commission and the United States of America to Application for Stay, No. 97-1194, at 18 (D.C. Cir. 1997).

¹⁴⁷ Bradley Martin, *Japan Ports Still a Thorn for US Shippers*, J. COM., Sept. 15, 1998, at 1A.

¹⁴⁸ See Stuart S. Malawer, *WTO: A Quiet Success*, LEGAL TIMES, Sept. 8, 1997, at S42.

¹⁴⁹ *Id.*

¹⁵⁰ Jared R. Silverman, *Multilateral Resolution over Unilateral Retaliation: Adjudicating the Use of Section 301 Before the WTO*, 17 U. PA. J. INT'L ECON. L. 233, 287 (1996).

¹⁵¹ *Id.* at 281.

approach to policy goals, and sends the message to other foreign governments that unilateral action is still the preferred behavior over adjudication through multilateral dispute resolution mechanisms.

V. CONCLUSION

The FMC's imposition of unilateral sanctions under Section 19 of the Merchant Marine Act of 1920 was an inappropriate method of resolving the Japanese port practice dispute. Though the FMC has the authority to take such action under Section 19, imposing such authority, in this context, illustrates a double standard in U.S. law making. Besides the fact that the Japanese carriers did not have control of the port practices in dispute, the FMC imposed these sanctions to reform labor-management agreements within another country. In addition, because a very delicate situation is created when the United States government interferes in this area, an unbiased, multilateral dispute resolution body would more fairly resolve such disputes. Through multilateral dispute resolution, like the World Trade Organization's dispute resolution panel, the U.S. could provide a fair forum for dialogue and resolution while also enhancing its credibility in supporting multilateral dispute resolution.

