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## The EEC's Unfair Pricing Practices Regulation: New Wave of Competition or Protectionism in Community Shipping?

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# The EEC's Unfair Pricing Practices Regulation: New Wave of Competition or Protectionism in Community Shipping?

David S. Smith

## **Abstract**

This Note argues that, while the Pricing Regulation is a positive step in the development of a common market within the EEC, it is protectionist in its approach to developing nations. Part I analyzes the complaint against Hyundai in the context of the international shipping industry. Part II examines the EEC's conflicting policy goals in adopting the Pricing Regulation. Part III discusses the dichotomy between the Pricing Regulation itself and the EEC's trade policy within the Community. This Note concludes that the EEC must reconcile its policy of elimination barriers to free trade within the Community with its interest in protecting its domestic market from competition outside the Community.

# THE EEC'S UNFAIR PRICING PRACTICES REGULATION: NEW WAVE OF COMPETITION OR PROTECTIONISM IN COMMUNITY SHIPPING?

## INTRODUCTION

The European Economic Community<sup>1</sup> ("EEC" or "Community") faces growing competition in the shipping industry from developing maritime nations.<sup>2</sup> The Community's share of world shipping is declining, as are the size of its shipping fleet, the number of jobs, and the profits derived from the industry.<sup>3</sup> At the same time, developing nations are resorting to protectionist measures to promote their own national fleets and to increase their share of world trade.<sup>4</sup> The developing nations are seeking the economic growth and international prestige associated with national fleets.<sup>5</sup> For its part, the EEC recently enacted what it calls an unfair pricing practices regulation<sup>6</sup> ("Pricing Regulation") to protect its fleets from the re-

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1. The European Economic Community was founded in 1957. Treaty Establishing the European Economic Community, Mar. 25, 1957, 1973 Gr. Brit. T.S. No. 1 (Cmd. 5179-II) (official English trans.), 298 U.N.T.S. 11 (1958) (unofficial English trans.) [hereinafter Treaty]. The EEC currently comprises 12 Member States: Belgium, Denmark, Federal Republic of Germany, France, Great Britain, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, and Spain. Treaty Between the Member States of the European Communities and the Kingdom of Spain and the Portuguese Republic to the European Economic Community and to the European Atomic Energy Community, O.J. L 302/9 (1985). For a discussion of the structure of the EEC, see D. LASOK & J. BRIDGE, AN INTRODUCTION TO THE LAW AND INSTITUTIONS OF THE EUROPEAN COMMUNITIES (4th ed. 1987).

2. *Progress Towards a Common Transport Policy in Maritime Transport*, COM(85) 90 final (Mar. 14, 1985) [hereinafter *Common Transport Policy*]. The developing maritime nations are the former colonies in Africa, Asia, and Latin America. ADEMUNI-ODEKE, PROTECTIONISM AND THE FUTURE OF INTERNATIONAL SHIPPING 15 (1984). The term "developing nations" will be used to refer to those third-world nations that offer a lower level of consumer products to their inhabitants than the European nations and the United States do to theirs. *Id.* at 15. While the designation "developing nation" implies an inferior economic status, some of these nations, particularly those of Southeast Asia, have increased their shares of the EEC market. E. FREY-WOUTERS, THE EUROPEAN COMMUNITY AND THE THIRD WORLD 183 (1980).

3. *Common Transport Policy*, *supra* note 2, at 34-35.

4. ADEMUNI-ODEKE, *supra* note 2, at 13.

5. A. HERMAN, SHIPPING CONFERENCES 161 (1983).

6. Council Regulation No. 4057/86, O.J. L 378/14 (1986) [hereinafter *Pricing Regulation*]. The Pricing Regulation established a procedure to combat the unfair pricing practices of third countries causing damage to EEC liner shipping. *Id.* art. 1, O.J. L 378/14, at 15.

strictive practices of non-EEC nations and to maintain its monopoly in the shipping industry.<sup>7</sup> In July 1987, eight EEC shipping lines filed a complaint under the Pricing Regulation with the Commission of the European Communities ("Commission") against Hyundai Merchant Marine ("Hyundai"), a South Korean shipping line.<sup>8</sup> This complaint will test the efficacy of the Pricing Regulation in implementing the EEC's maritime policies.

This Note argues that, while the Pricing Regulation is a positive step in the development of a common market within the EEC, it is protectionist in its approach to developing nations. Part I analyzes the complaint against Hyundai in the context of the international shipping industry. Part II examines the EEC's conflicting policy goals in adopting the Pricing Regulation. Part III discusses the dichotomy between the Pricing Regulation itself and the EEC's trade policy within the Community. This Note concludes that the EEC must reconcile its policy of eliminating barriers to free trade within the Community with its interest in protecting its domestic market from competition outside the Community.

## I. *TRADE TENSIONS IN THE INTERNATIONAL SHIPPING INDUSTRY*

The highly competitive structure of the international shipping industry set the stage for the battle between the EEC and developing nations for access to world shipping cargo.<sup>9</sup> This competition has exacerbated trade tensions between the EEC and developing nations in the shipping industry.

### A. *Structure of the International Shipping Industry*

There are three main types of ships in the shipping indus-

7. *Id.* art. 1, O.J. L 378/14, at 15.

8. EUROPE, AGENCE INTERNATIONALE D'INFORMATION POUR LA PRESSE DOCUMENTS (No. 4665) 11 (Nov. 23-24, 1987); see also *Making Waves for World Shipping*, FIN. TIMES, Nov. 16, 1987, at 6, col. 1 (for a discussion of the background of the complaint) [hereinafter *Making Waves*].

9. ADEMUNI-ODEKE, *supra* note 2, at 24-25. There is an imbalance in the distribution of the world shipping fleet, with the developing nations trying to increase shipping trade and the traditional nations trying to preserve their monopoly. *Id.*; see also E. GOLD, MARITIME TRANSPORT 275-81 (1981) (for a discussion of the problems developing nations faced in entering the shipping industry).

try:<sup>10</sup> cargo liner carriers,<sup>11</sup> dry bulk carriers,<sup>12</sup> and liquid bulk carriers.<sup>13</sup> Liner carriers offer services to a variety of shippers for a fixed route at a fixed time.<sup>14</sup> Bulk carriers are usually chartered by one shipper at a time, and do not operate on fixed schedules.<sup>15</sup> The nations that operate all these shipping services can also be categorized into three groups.<sup>16</sup> The first group, the traditional maritime nations, consists of the industrialized countries of Western Europe, North America, Japan, Australia, and New Zealand.<sup>17</sup> The second group, the developing nations, consists of states in the process of developing their own shipping fleets, such as South Korea, Singapore, the Philippines, Malaysia, Indonesia, as well as Hong Kong.<sup>18</sup> The third group consists of the nations of Eastern Europe, whose

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10. A. HERMAN, *supra* note 5, at 3. Approximately 80% of world trade is carried by ship. *Id.* World shipping cargo "is carried in vessels sailing under different flags having the right, under the freedom of the seas principle, to move to almost every port on the globe." *Id.*; see also ADEMUNI-ODEKE, *supra* note 2, at 231-43 (description of the freedoms enjoyed by traditional shipping lines).

11. A. HERMAN, *supra* note 5, at 3. The cargo liner carriers operate on specific routes with fixed schedules and fixed rates. *Id.* They carry various cargo loads from different shippers to different receivers. *Id.* The main features of liner service are the frequency of service and the distribution of cargo among several ports. *Id.*

12. A. HERMAN, *supra* note 5, at 3. Bulk carriers carry the seven bulk commodities: oil, iron and manganese ores, coal, grain, bauxite, and phosphates. *Id.* Bulk carriers are usually chartered by one shipper at a time. *Id.* Tramp service, a form of bulk carriage, competes with liners when cargo is scarce, or when the tramp has room for more cargo. *Id.* at 3 n.4. "Liner operators, or common carriers, are distinguished from 'tramp' operators who charter the vessel to one or more shippers on the basis of a time or voyage charter at freely negotiated rates. Tramp operators do not operate over regularly established routes nor do they advertise their sailing." Bayer, *Antitrust Comes to Maritime Transport in the European Economic Community*, 34 FED. BAR NEWS & J. 299, 306 n.2 (1987).

13. A. HERMAN, *supra* note 5, at 3.

14. *Id.*

15. *Id.*

16. ADEMUNI-ODEKE, *supra* note 2, at 15; see also A. HERMAN, *supra* note 5, at 157 (further discussion of the distinctions between the traditional and developing nations).

17. ADEMUNI-ODEKE, *supra* note 2, at 15. The traditional nations advocate free trade policy because they benefit from such a system. *Id.* at 27. The United Kingdom developed its fleet through the use of protectionist practices, and did not advocate freer trade until the middle of the 20th century. *Id.* at 27-28. In addition, France and Italy have provided financial assistance to their shipping industries. *Id.* at 31.

18. ADEMUNI-ODEKE, *supra* note 2, at 13. The developing nations advocated a nationalist approach to shipping, allowing each nation to use protectionism to establish and develop its own national fleet. *Id.* at 26. The developing nations lacked the manpower, capital, technical know-how, established ports, and infrastructure to establish their own fleets without protectionist practices. *Id.* at 13.

shipping industries are state-run.<sup>19</sup>

The traditional nations dominated world shipping before World War II.<sup>20</sup> Their shipping lines operated free of state intervention,<sup>21</sup> and were subject to common standards of commercial treatment.<sup>22</sup> The traditional nations recognized the concept of flag equality, under which a shipping nation was expected to treat the ships of all other nations in the same manner.<sup>23</sup> The traditional standards of shipping were embodied in the 1948 Convention of the International Maritime Organization ("IMO").<sup>24</sup> One function of the IMO is to promote the wide availability of maritime services by discouraging discriminatory, unfair, and restrictive practices affecting marine trans-

19. ADEMUNI-ODEKE, *supra* note 2, at 15. For example, the Soviet Union offers liner services at a much lower rate than other carriers for a variety of political and commercial reasons. A. HERMAN, *supra* note 5, at 99. The difference in Soviet accounting methods from Western methods makes it difficult to prove that the Soviets are offering liner services below cost. *Id.*

20. ADEMUNI-ODEKE, *supra* note 2, at 24; *see also* E. GOLD, *supra* note 9, at 233-40 (for a discussion of the economic system that emerged from World War II).

21. ADEMUNI-ODEKE, *supra* note 2, at 11.

22. *Id.* at 231. The commonly accepted standards of commercial treatment in international treaty practice are the standard of reciprocity, standard of the most favored nation, and standard of national treatment. *Id.* These standards were not intended to grant specific material rights to nations, but rather "to establish a pattern from which material rights could be achieved." *Id.*

Under the standard of reciprocity, each party agrees to grant the same rights and privileges that the others grant in return. *Id.* Under the standard of most favored nation, a state must extend to a receiving state all rights and advantages that it concedes to a third state, so that the receiving state is never in a position inferior to any third state. *Id.* Under the standard of national treatment, each state is to treat foreign nationals as it treats its own nationals. *Id.* at 231-32. Any discrimination in shipping could be an infringement of these standards of commercial treatment. *Id.* at 232. Although the traditional nations blame the developing nations for the breakdown in these standards, in practice almost every nation has departed from these standards in one way or another. *Id.*

23. ADEMUNI-ODEKE, *supra* note 2, at 232-34. The formal concept of flag equality envisions the treatment of all shipping nations in the same manner. *Id.* The material concept of flag equality is the resulting equality of treatment. *Id.* The crucial concept of such equality is that it can be achieved either with or without state intervention. *Id.*

24. ADEMUNI-ODEKE, *supra* note 2, at 252; *see* Convention on the Intergovernmental Maritime Consultative Organization, done Mar. 6, 1948, 9 U.S.T. 621, T.I.A.S. No. 4044, 289 U.N.T.S. 48. The International Maritime Organization is a specialized agency of the United Nations that facilitates cooperation among governments in shipping, gives advice to other international shipping bodies, and discourages discriminatory, unfair, and restrictive shipping practices. ADEMUNI-ODEKE, *supra* note 2, at 253. The IMO Convention has been ratified by over one hundred nations, including many of the traditional, developing, and Warsaw Pact nations. *Id.*

port.<sup>25</sup> The traditional approach was also expressed in the provisions of the 1919 Convention of the International Labor Organization ("ILO"),<sup>26</sup> which set minimum standards and work conditions for seamen.<sup>27</sup>

The traditional nations conduct most of their trade with developing nations through the liner conference system.<sup>28</sup> In a liner conference, a group of line owners engaged on a particular trade route agree among themselves to limit competition and to set freight rates and schedules.<sup>29</sup> One function of the liner conferences is to insulate shippers from the short-term effect of market fluctuations, which often cause variations in the price of transport that bear no relation to actual cost.<sup>30</sup>

As net consumers of shipping services, developing nations faced deteriorating balance-of-payments problems in the 1960s and 1970s.<sup>31</sup> The freight rates set by the liner conferences aggravated this imbalance in the flow of foreign ex-

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25. ADEMUNI-ODEKE, *supra* note 2, at 253.

26. E. GOLD, *supra* note 9, at 331; see Instrument for the Amendment of the Constitution Adopted by the International Labour Conference at its Twenty-Ninth Session, Oct. 9, 1946, 62 Stat. (pt. 3) 3485, T.I.A.S. No. 1868, 15 U.N.T.S. 35. The original constitution of the International Labor Organization formed part XIII of the Treaty of Versailles of 28 June 1919. L. SOHN, *INTERNATIONAL ORGANIZATION AND INTEGRATION* 465 (student ed. 1986). In 1946, the ILO severed its connection with the League of Nations and became a specialized agency of the United Nations. *Id.* The ILO regulates international labor conditions in order to achieve full employment, a minimum living wage to all employed, and adequate protection for the health of workers in all occupations. 62 Stat. (pt. 3) at 3558, T.I.A.S. No. 1868, at 84-86, 15 U.N.T.S. at 108-10.

27. Bredimas, *The Common Shipping Policy of the EEC*, 18 COMMON MKT. L. REV. 9, 28 (1981).

28. ADEMUNI-ODEKE, *supra* note 2, at 33. A liner conference "is an organization of cargo shipping companies providing regular, scheduled sailings on a particular trade route." Note, *Economic Analysis of the United Nations Code of Conduct for Liner Conferences*, 29 STAN. L. REV. 853, 855 (1977). Liner conferences regulate conduct of members by setting uniform rates, allocating a shipping quota to member lines, and limiting the number of visits per port. *Id.* at 856. A member line can be expelled from the conference if it violates the established regulations. *Id.* The developing nations contend that liner conferences charge excessive rates and refuse to admit developing nations' shipping fleets to participate in conference trade. A. HERMAN, *supra* note 5, at 157-58; see also E. GOLD, *supra* note 9, at 349-50 (for further discussion of the role of liner conferences in shipping).

29. E. GOLD, *supra* note 9, at 350.

30. ADEMUNI-ODEKE, *supra* note 2, at 24.

31. *Id.* at 48. The developing nations are "chronically short of foreign exchange and the need to pay freight rates in convertible currencies worsens their already shaky balance of payments." A. HERMAN, *supra* note 5, at 158.

change.<sup>32</sup> Furthermore, developing nations lacked the resources to establish national fleets in a shipping industry dominated by liner conferences.<sup>33</sup> Thus, the governments adopted specific measures to encourage shipping.<sup>34</sup> These nations permitted flag preferences,<sup>35</sup> including cargo reservation<sup>36</sup> and flag discrimination,<sup>37</sup> and state subsidies to encourage the development of national fleets.<sup>38</sup> Such practices conflicted with the traditional nations' ostensibly free-trade approach.<sup>39</sup>

In 1974, the United Nations Conference for Trade and Development adopted the Code of Conduct for Liner Conferences<sup>40</sup> ("Liner Code") with the overwhelming support of de-

32. A. HERMAN, *supra* note 5, at 158. The prices for imported manufactured goods were increasing, while the value of the developing nations' exports was decreasing, resulting in a deficit in their balance of payments. ADEMUNI-ODEKE, *supra* note 2, at 24-25.

33. ADEMUNI-ODEKE, *supra* note 2, at 7. A major grievance of developing nations is the lack of capital required to build new fleets, or even to buy second-hand vessels to use for shipping. A. HERMAN, *supra* note 5, at 161. The developing nations complain about a lack of capital to invest in establishing fleets and seek financial support from the traditional nations. *Id.* In addition, the establishment of a national fleet "will give the young nations stronger bargaining power in rate negotiations and will increase competition among the carriers." *Id.* They recognize the importance of shipping to their national security, international trade, and overall economic development. ADEMUNI-ODEKE, *supra* note 2, at 9. For developing nations, "the flag of the ship assumes the role of identity of economic nationhood, emulation of power and independence and a symbolic value of industrial competence." *Id.* at 305.

34. ADEMUNI-ODEKE, *supra* note 2, at 26.

35. *Id.* at 71. Flag preference is the sharing of cargo with shipping lines based on their nation of origin. *Id.*

36. *Id.* at 74. Cargo reservation is a form of flag preference, under which a nation sets aside specific freight for its own lines in spite of its costs or inefficiencies. *Id.*

37. *Id.* at 73. Flag discrimination is another form of flag preference that "seeks to reserve a portion of the volume of cargo flowing between the trading partners, with the object of directly favoring certain shipowners . . ." *Id.*

38. *Id.* at 148. Maritime subsidies "are payments by the state to producers or distributors in order to reduce prices, and . . . are inevitably linked to transportation and international trade." *Id.* Since World War II, both traditional nations and developing nations have resorted to state intervention and subsidies favoring the maritime industry. *Id.* at 149. Among the subsidies granted to the maritime industry are direct grants of aid to vessels operating in international service, operational subsidies to place the cost of operating ships on a parity with foreign competitors, and grants to encourage the construction and modernization of shipping fleets. *Id.* at 152-59.

39. *Id.* at 231. The developing nations were not part of the formulation of the traditional maritime rules, and do not feel bound by them. *Id.* at 232.

40. The United Nations Conference of Plenipotentiaries on a Code of Conduct for Liner Conferences, April 6, 1974, U.N. Doc. TD/CODE/11 Rev. I and Corr. I (1974) [hereinafter Liner Code], reprinted in 13 I.L.M. 917 (1974). The Liner Code went into effect in 1983, as soon as at least 24 nations carrying a combined tonnage



veloping nations.<sup>41</sup> The Liner Code criticizes the traditional nations' monopoly in the shipping industry,<sup>42</sup> and grants developing nations greater access to liner conference trade.<sup>43</sup> The most important provision of the Liner Code states that in trade between two states, each nation's shipping lines have equal rights to eighty percent of the trade, with third countries having a right to the remaining twenty percent.<sup>44</sup> This "40-40-20" formula was designed to benefit developing nations by allowing them much greater access to liner trade than they had prior to the adoption of the Liner Code.<sup>45</sup>

After some disagreement among Member States,<sup>46</sup> the EEC finally approved the Liner Code in 1979,<sup>47</sup> but exempted trade between Member States and members of the Organization of Economic Cooperation and Development ("OECD").<sup>48</sup>

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of not less than 25% of the world liner tonnage ratified it. *Id.* pt. I, ch. VII, art. 49, reprinted in 13 I.L.M. at 941. For a critique of the Liner Code, see *Economic Analysis*, *supra* note 28, at 853.

41. A. HERMAN, *supra* note 5, at 170. The European reaction was mixed. Bredimas, *supra* note 27, at 11. France, Germany, and Belgium favored the Liner Code, while the United Kingdom and Denmark opposed it. *Id.*

42. Liner Code, *supra* note 40, pt. I, ch. II, art. 1, reprinted in 13 I.L.M. at 919-20. The Liner Code was intended to combat the discriminatory practices of traditional nations in international commerce. E. GOLD, *supra* note 9, at 349-50. The Liner Code entered into force in 1983, when the final nation necessary for the Code to come into force signed. A. HERMAN, *supra* note 5, at 176.

43. Liner Code, *supra* note 40, pt. I, ch. II, art. 2, reprinted in 13 I.L.M. at 920-21.

44. *Id.*

45. ADEMUNI-ODEKE, *supra* note 2, at 77. The developing nations believed that the Liner Code was an "international recognition of their legitimate right to use bilateralism as a mechanism to establish and develop their own national merchant marines." *Id.*

46. Bredimas, *supra* note 27, at 11.

47. Council Regulation No. 954/79, O.J. L 121/1 (1979). The EEC approved the Liner Code when it became obvious that some Member States would adopt it even if the Community opposed it. Bredimas, *supra* note 27, at 11. While France and Belgium believed the Liner Code would increase their share of world trade, the United Kingdom opposed it. *Id.* "It appears, however, that the EEC in accepting the Code was more conscious of its value in combating the incursions of Soviet tonnage into Common Market trades, often operating outside the conferences, than of contributing to the realisation of the legitimate aspirations of the [developing nations]." ADEMUNI-ODEKE, *supra* note 2, at 301.

48. Council Regulation No. 954/79, O.J. L 121/1, at 4 (1979). The Organization of Economic Cooperation and Development ("OECD") was established by convention December 14, 1960, originally as the Organization for European Economic Co-operation, and entered into force September 30, 1961. The OECD "is an instrument for intergovernmental cooperation on matters relevant to economic and social policy by the market-economy industrialised countries." R. BLANPAIN, THE OECD

This exemption effectively excluded seventy-five percent of the world's conference trades from the Liner Code's provisions.<sup>49</sup> As a result, developing nations' access to conference trades has not been substantially increased by the Liner Code.<sup>50</sup> Thus, developing nations have continued to employ protectionist practices to encourage their own national fleets.<sup>51</sup>

In response to the restrictive pricing practices of developing nations, and in response to pressure by domestic shipping interests, the EEC Member States have taken action to maintain their dominance in the shipping industry.<sup>52</sup> For example, in 1961 West Germany enacted legislation that restricted shipping trade from nations that excluded German ships from shipping trade.<sup>53</sup> Italy adopted a similar measure in 1963, and the United Kingdom followed suit in 1980.<sup>54</sup> After decades of tension, a confrontation between developing and EEC nations was therefore inevitable.

### B. *The European Shipping Lines' Complaint Against Hyundai*

The complaint against Hyundai is the first attempt by the EEC's shipping lines to test the efficacy of the 1987 Pricing Regulation.<sup>55</sup> It reveals that EEC shippers fully intend to use the Pricing Regulation to combat the unfair trade practices of developing nations.<sup>56</sup> The complaint may also be the first of a series of complaints directed at the EEC's shipping competitors, including the Soviet Union.<sup>57</sup> The Comité des Associations d'Armateurs des Communautés Européennes

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GUIDELINES FOR MULTINATIONAL ENTERPRISES AND LABOUR RELATIONS 1976-1979, at 25 (1979); see Convention on the Organization for Economic Cooperation and Development, Dec. 14, 1960, 12 U.S.T. 1728, T.I.A.S. No. 4891, 888 U.N.T.S. 141.

49. ADEMUNI-ODEKE, *supra* note 2, at 302.

50. *Id.* at 302.

51. *Id.* at 57. The developing nations promote their own national fleets "as a means of attempting to rectify this disequilibrium." *Id.*

52. *Id.* at 119. The OECD nations "have continued to take action to resist the growth of these discriminatory practices and to show that they are contrary to international trade." *Id.*

53. *Id.* at 120.

54. *Id.* at 120-21.

55. See *Making Waves*, *supra* note 8.

56. *Id.*

57. *EEC Group to Study Soviet Freight Rates*, Lloyd's List, Aug. 14, 1987, at 1, col. 1.

("CAACE"),<sup>58</sup> a trade association of European shippers, filed the complaint against Hyundai on behalf of eight EEC shipping lines.<sup>59</sup> Seven of these shipping lines were members of the Australia-to-Europe liner conference, and the eighth was the only other EEC shipping line on the route.<sup>60</sup> The complaint alleges that Hyundai cut rates to uneconomical levels on the Australia-to-Europe route,<sup>61</sup> received favorable loan rates and repayment terms from the South Korea State Bank,<sup>62</sup> received preferential flag reservation treatment from the South Korean government,<sup>63</sup> and received state subsidies for the purchase of the ships that it operated on the route.<sup>64</sup> Moreover, the complaint broadly attacks the South Korean industrial infrastructure.<sup>65</sup>

The complaint further alleges that South Korean shipping practices have caused a seven-percent decrease in utilization of capacity of EEC shippers and a decline in profits on the route, thereby making it impossible for the EEC lines to cover their

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58. CAACE is the trade association of European shippers. Bredimas, *supra* note 27, at 12.

59. *Making Waves*, *supra* note 8.

60. *Id.* The seven liner conference members are Associated Container Transportation Australia Ltd., P & O Containers, Compagnie Générale Maritime, Hapag-Lloyd, Nedlloyd, Lloyd Triestino, East Asiatic Co., and Compagnia Naviera Marasia. *EEC Shipping Row with South Korea Looming*, Lloyd's List, Aug. 11, 1987, at 1, col. 1 [hereinafter *Shipping Row*].

61. EUROPE, AGENCE INTERNATIONALE D'INFORMATION POUR LA PRESSE DOCUMENTS (No. 4660) 10 (Nov. 16-17, 1987). While Hyundai began servicing the Australia-to-Europe route only in late 1986, it is estimated that Hyundai took five percent of the trade on the route in 1987. *Id.*

62. *Id.* The EEC shippers claim Hyundai "has massive outstanding debts which have been refinanced on favourable terms by the Korean Government bank." *Making Waves*, *supra* note 8. These loans, along with other subsidies, are part of the South Korean government's aid to the Hyundai industrial group. *Id.* In the 1980s, the Korean Maritime and Port Administration offered tax reductions and subsidies to shippers to merge. King, *Korea Weeding Out Weak Lines*, AM. SHIPPER, Mar. 1984, at 8 [hereinafter *Weak Lines*]. In 1985, Hyundai bought Korea Marine Transport Company, Ltd., with government assistance. *Hyundai Buys 65% of KMTC*, AM. SHIPPER, Nov. 1985, at 22; see also ADEMUNI-ODEKE, *supra* note 2, at 116-18 (for a discussion of actions taken by the South Korean government to encourage expansion of its national fleets).

63. EUROPE, AGENCE INTERNATIONALE D'INFORMATION POUR LA PRESSE DOCUMENTS (No. 4660) 10 (Nov. 16-17, 1987).

64. *Id.*

65. *Id.*; see also *Weak Lines*, *supra* note 62 (for a discussion of Korean government practices to encourage shipping).

costs.<sup>66</sup> The complaint claims that Hyundai, and not the declining U.S. dollar or the depressed state of the Australian economy, has caused the decline on the route.<sup>67</sup> Finally, the EEC lines allege that Hyundai is able to charge a freight rate that is thirty percent lower than the average rate on the route because of the assistance Hyundai receives from the South Korean government.<sup>68</sup> Hyundai has responded to the complaint by stating that it is a private line facing the same competitive pressures as other shippers.<sup>69</sup>

In November 1987, the Commission announced the commencement of an inquiry into Hyundai's pricing practices.<sup>70</sup> Because of the Commission's lengthy consultation and investigative procedures, resolution of the complaint is unlikely in the near future.<sup>71</sup>

## II. SHIPPING REGULATIONS IN THE EEC

The Pricing Regulation was adopted as one of four regulations applying to the maritime transport sector.<sup>72</sup> The other regulations apply Articles 85 and 86 of the Treaty of Rome<sup>73</sup>

66. See *Weak Lines*, *supra* note 62.

67. *Id.* Although economic problems in Australia led to a decrease in imports, the largest drop in freight rates occurred only after Hyundai began operating on the route. *Shipping Row*, *supra* note 60. The U.S. dollar is the predominant currency in shipping. EUROPE, AGENCE INTERNATIONALE D'INFORMATION POUR LA PRESSE DOCUMENTS (No. 4685) 16 (Dec. 19, 1987).

68. EUROPE, AGENCE INTERNATIONALE D'INFORMATION POUR LA PRESSE DOCUMENTS (No. 4660) 10 (Nov. 16-17, 1987).

69. *Hyundai Denies Allegations*, *Lloyd's List*, Aug. 11, 1987 at 1, col. 1.

70. See generally EUROPE, AGENCE INTERNATIONALE D'INFORMATION POUR LA PRESSE DOCUMENTS (No. 4660) 10 (Nov. 16-17, 1987).

71. EUROPE, AGENCE INTERNATIONALE D'INFORMATION POUR LA PRESSE DOCUMENTS (No. 4665) 11 (Nov. 23-24, 1987). In an address in July 1987, Commissioner Sutherland called for the formation of the Advisory Committee required under the Pricing Regulation. Address by Commissioner Sutherland, Comm'n Press Release, Meeting of Director General of Competition IP(87) 282 (July 1987) (available at the *Fordham International Law Journal* office). This Committee must meet and consider the complaint before any investigation can begin. Pricing Regulation, *supra* note 6, arts. 6-7, O.J. L 378/14, at 16. After consultation, the Commission can begin an investigation, normally covering pricing practices at least six months prior to the initiation of the proceeding. *Id.* art. 7, O.J. L 378/14, at 16. During the investigation, the Commission must check all information with shipowners, agents, shippers, freight forwarders, conferences, and associations. Bentley & Ronayne, *Anti-dumping Extended to Shipping Prices*, 12 EUR. L. REV. 212, 217 (1987).

72. COMM'N, SIXTEENTH REPORT ON COMPETITION POLICY ¶ 37 (1986).

73. Treaty, *supra* note 1, arts. 85, 86, 1973 Gr. Brit. T.S. No. 1, at 32-34, 298 U.N.T.S. at 48.

("Treaty") to sea transport,<sup>74</sup> lift restrictions on shipping services controlled by EEC nationals,<sup>75</sup> and coordinate EEC actions to safeguard free access to cargos in ocean trades.<sup>76</sup> Article 85 prohibits agreements that set prices, limit or control production, or share markets.<sup>77</sup> Article 86 prohibits companies with dominant shares of the EEC market from abusing their positions.<sup>78</sup> In general, the EEC sought to promote equality and competition among shipping lines established within the EEC,<sup>79</sup> reconcile conflicting views of the Liner Code,<sup>80</sup> and protect the shipping fleets of EEC Member States from unfair pricing practices by developing nations.<sup>81</sup>

The EEC also attempted to harmonize the views of two different camps within the Community.<sup>82</sup> The so-called fundamentalists, led by France, favored a global approach that would address all maritime issues at once and in a consistent manner.<sup>83</sup> The other, led by the United Kingdom, favored a

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74. Council Regulation No. 4056/86, O.J. L 378/4 (1986), 2 Common Mkt. Rep. (CCH) ¶ 2764.

75. Council Regulation No. 4055/86, O.J. L 378/1 (1986).

76. Council Regulation No. 4058/86, O.J. L 378/21 (1986).

77. Treaty, *supra* note 1, art. 85, 1973 Gr. Brit. T.S. No. 1, at 32-33, 298 U.N.T.S. at 48. Article 85 prohibits collusion between undertakings that "have as their object or result the prevention, restriction or distortion of competition within the Common Market." *Id.* art. 85(1). In particular, the Treaty prohibits agreements that consist of "(a) the direct or indirect fixing of purchase or selling prices or any other trading conditions; (b) the limitation or control of production, markets, technical development, or investment . . ." *Id.*

78. Treaty, *supra* note 1, art. 86, 1973 Gr. Brit. T.S. No. 1, at 34, 298 U.N.T.S. at 48. Article 86 prohibits "action by one or more enterprises to take improper advantage of a dominant position within the Common Market or in a substantial part of it . . ." *Id.* Abuse of a dominant position may consist of "(a) the direct or indirect imposition of any inequitable purchase or selling prices or of any other inequitable trading conditions; (b) the limitation of production, markets or technical development to the prejudice of consumers . . ." *Id.*

79. *Common Transport Policy*, *supra* note 2, at i.

80. *Bredimas*, *supra* note 27, at 10-12. The Member States disagreed about the need for the Liner Code. *Id.* at 11. France, Germany, and Belgium favored it, while the United Kingdom and Denmark opposed it. *Id.*

81. *Common Transport Policy*, *supra* note 2, at i. The Member States had to "come to grips with the growing threat to Community interests of protectionist policies and practices of other countries which make it difficult or impossible to maintain a commercially competitive system." *Id.*; see also COMM'N, EIGHTH REPORT ON COMPETITION POLICY ¶ 40 (1979) (for a discussion of the policies that the EEC tried to address in regulating in the shipping industry).

82. *Bredimas & Tzoannos*, *In Search of a Common Shipping Policy for the E.C.*, 20 J. COMMON MKT. STUDIES 95, 113 (1981).

83. *Id.* at 113.

“mosaic” approach that would deal with maritime issues one at a time as they arose.<sup>84</sup> Because of these related but conflicting viewpoints, the EEC was slow to adopt an overall package.<sup>85</sup>

A. *Development of European Competition Law  
in the Shipping Industry*

As of 1987, sea and air transport were the only areas of the European economy in which the EEC had failed to adopt regulations implementing its competition rules, Articles 85 and 86 of the Treaty of Rome.<sup>86</sup> The competition rules could not be applied consistently to shipping among Member States without Community-wide procedures specifying investigatory and enforcement powers of the EEC.<sup>87</sup> Indeed, there was a

84. *Id.* These differences arose from the different emphasis given to shipping in each national economy. *Id.* While France views its shipping sector as a trunk industry, subservient to trade and ship building, the United Kingdom views shipping as a means to generate employment and balance its payments. *Id.*

85. Bredimas, *supra* note 27, at 31. The common shipping policy was slow to evolve “due to the belated interest of the Member States and their conflicting interests in shipping matters. For the time being, the Community institutions have confined themselves to a piece-meal approach by regulating certain fields where common action was necessary.” *Id.*

86. C. BELLAMY & G. CHILD, *COMMON MARKET LAW OF COMPETITION* 70 (3d ed. 1987). The competition rules are contained in Articles 85 through 94 of the Treaty, but the basic competition rules of the Treaty are contained in articles 85 and 86. *See generally* V. KORAH, *AN INTRODUCTORY GUIDE TO EEC COMPETITION LAW AND PRACTICE* 1 (3d ed. 1986). The EEC has a common transport policy, contained in Articles 74 through 84, to develop integrated transportation within the Community. D. LASOK & J. BRIDGE, *supra* note 1, at 382. However, this policy applies only to rail, road, and inland waterway transport. C. BELLAMY & G. CHILD, *supra*, at 69-70. Air and sea transport were exempted from the common transport policy by Article 84(2). Treaty, *supra* note 1, art. 84(2), 1973 Gr. Brit. T.S. No. 1, at 31, 298 U.N.T.S. at 47. The EEC applied the competition rules of the Treaty to rail, road, and inland waterway transport. Council Regulation No. 1017/68, J.O. L 175/1 (1968), O.J. Eng. Spec. Ed. 1968(I), at 302, 2 Common Mkt. Rep. (CCH) ¶ 2761. Air and sea transport remained exempt from the competition policy by a regulation enacted in 1962. Council Regulation No. 141, J.O. C 2753 (1962), 2 Common Mkt. Rep. (CCH) ¶ 2401; C. BELLAMY & G. CHILD, *supra*, at 69-70. *See generally* Close, *Article 84 EEC: The Development of Transport Policy in the Sea and Air Sectors*, 5 EUR. L. REV. 188 (1980) (for a discussion of the status of air and sea transport under the Treaty). For a discussion of the application of the competition rules to air transport, see Comment, *Competition and Deregulation: Nouvelles Frontières for the EEC Air Transport Industry?*, 10 *FORDHAM INT'L L.J.* 808 (1987). In 1987, the Council adopted a regulation implementing the competition rules to air transport. Council Regulation No. 3975/87, O.J. L 374/1 (1987).

87. COMM'N, *FIFTH REPORT ON COMPETITION POLICY* ¶ 14 (1976). Because the Treaty contains only the bare principles of competition policy, Article 87 requires that the Council issue regulations to implement detailed competition rules. D. LASOK

dispute among Member States, shippers, and the Commission as to whether and to what extent the competition rules applied to sea transport.<sup>88</sup> Some Member States contended that the competition rules did not apply to shipping at all.<sup>89</sup>

According to the prevailing view, each Member State could apply the competition rules to shippers in accordance with its own laws.<sup>90</sup> This approach would result in conflicting bodies of national case law developing within the EEC.<sup>91</sup> The Commission took the view that it had the power to investigate abuses in the shipping industry and to propose measures to end them.<sup>92</sup>

The possibility of inconsistent application of the competition rules at the national level posed a danger to the liner conferences.<sup>93</sup> The EEC recognized the stabilizing effect of liner conferences on freight rates and employment in the shipping industry,<sup>94</sup> and sought to exempt them from application of the

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& J. BRIDGE, *supra* note 1, at 385; see Treaty, *supra* note 1, art. 87, 1973 Gr. Brit. T.S. No. 1, at 33, 298 U.N.T.S. at 49. Articles 88 and 89 provide transitory measures until the Council enacts regulations pursuant to Article 87. D. LASOK & J. BRIDGE, *supra*, at 386; see Treaty, *supra* note 1, arts. 88, 89, 1973 Gr. Brit. T.S. No. 1, at 34, 298 U.N.T.S. at 49-50.

88. Bredimas & Tzoannos, *supra* note 82, at 99.

89. *Id.* These Member States claimed that art. 84(2) exempted sea transport from all Treaty provisions. *Id.*

90. *Id.* "Under Article 88, the relevant authorities in Member States are to rule on the admissibility of agreements, decisions and concerted practices and on abuses of dominant position in accordance with the law of their country and with the provisions of Article 85, in particular paragraph 3, and the provisions of Article 86." COMM'N, FIFTH REPORT ON COMPETITION POLICY ¶ 14 (1976). Article 88 is a transitional rule, to be effective until the Council enacts regulations implementing the competition rules. Treaty, *supra* note 1, art. 88, 1973 Gr. Brit. T.S. No. 1, at 34, 298 U.N.T.S. at 49. Because the Member States vary in the powers granted to national courts, the Article 88 procedure could create confusion in the enforcement of competition rules. Comment, *supra* note 86, at 822.

91. *Application of Competition Rules to Sea Transport Proposed*, Common Mkt. Rep. (CCH) ¶ 10,339 (1981) [hereinafter *Application of Competition*].

92. Bredimas, *supra* note 27, at 30. Article 89 permits the Commission to investigate infringements of the competition rules and propose measures to remedy the infringement. Treaty, *supra* note 1, art. 89, 1973 Gr. Brit. T.S. No. 1, at 34, 298 U.N.T.S. at 49-50.

93. *Application of Competition*, *supra* note 91. Without regulations by the Commission to effect the competition rules for sea transport, "the law as it now stands does not allow for the consistent application of the rules of competition to sea and air transport . . . [making] for uncertainty in the law, and this is to the disadvantage of shippers, airlines and users." COMM'N, FIFTH REPORT ON COMPETITION POLICY ¶ 14 (1976).

94. See Council Regulation No. 954/79, O.J. L 121/1 (1979).

competition rules.<sup>95</sup> However, the liner conferences violate the competition rules because they share cargo, practice flag discrimination, set freight rates, and receive state subsidies.<sup>96</sup> If the Member States applied inconsistent standards to the liner conferences, the EEC's goal of eliminating trade barriers among Member States would be defeated.<sup>97</sup>

In 1981, the Commission attempted to resolve these conflicting interests by issuing a draft regulation to apply Articles 85 and 86 of the Treaty to sea transport, but exempting liner conferences.<sup>98</sup> This draft initially met with some displeasure within the EEC.<sup>99</sup> Member States were reluctant to extend the Commission's power into an area that traditionally had been one of national concern.<sup>100</sup> For their part, certain European shippers opposed the exemption of liner conferences and demanded measures that required the liner conferences to negotiate with them on a fairer basis.<sup>101</sup> The Commission issued a revised proposal in 1985 that attempted to address these concerns.<sup>102</sup> At the same time, the Commission issued the Pricing Regulation to win support for the competition regulation.<sup>103</sup>

95. COMM'N, TENTH REPORT ON COMPETITION POLICY ¶ 7 (1980). The Community sought to recognize the stabilizing role of liner conferences, at the same time ensuring that they did not violate the EEC's competition rules. *Id.* ¶ 9.

96. ADEMUNI-ODEKE, *supra* note 2, at 300.

97. *Completing the Internal Market: White Paper from the Commission to the European Council*, COM(85) 310 final, ¶ 1 (June 14, 1985).

98. Proposal for a Council Regulation Laying Down Detailed Rules for the Application of Articles 85 and 86 of the Treaty to Maritime Transport, O.J. C 282/4 (1981). The preamble states: "[T]his Regulation must be inspired by the double necessity, on the one hand to provide for implementing rules that enable the Commission to assure that competition is not unduly distorted within the common market and on the other based to avoid excessive regulation of the sector." *Id.* preamble, O.J. C 282/4, at 4.

99. See, e.g., *European Shippers Seek Narrower Exceptions to Stimulate More Competition Among Conferences*, 42 Antitrust & Trade Reg. Rep. (BNA) No. 1059, at 739 (Apr. 8, 1982). In particular, the British Shippers' Council sought a legal duty for conferences to negotiate rates with shippers and for a shorter term for loyalty agreements between shippers and conferences. *British Interests Criticize EEC Plan to Extend Competition Rules to Shipping*, 43 Antitrust & Trade Reg. Rep. (BNA) No. 1072, at 67, 68 (1982).

100. COMM'N, THIRTEENTH REPORT ON COMPETITION POLICY ¶ 48 (1984).

101. See *supra* note 99 and accompanying text.

102. See *Common Transport Policy*, *supra* note 2.

103. See *Making Waves*, *supra* note 8, at 6, col. 2. "The Community industry had to pay a price for getting anti-dumping provisions into the maritime package, in the shape of a promise to give up a large part of its old internal EC route-sharing and price-fixing accords." *Id.* "The complement of the Commission's proposal on the



### B. *The Unfair Pricing Practices Regulation*

In 1978, the European Council authorized a study of the pricing practices of non-EEC nations in the shipping industry.<sup>104</sup> The study revealed that certain trading practices by third countries had damaged EEC shipping interests.<sup>105</sup> In particular, the EEC liner fleets and their share of the world market had decreased from 1975 through 1983, while third countries' share had increased.<sup>106</sup> The EEC thereby concluded that it had to address the pricing practices adopted by these third countries if it was to maintain its preeminent position in the shipping industry.<sup>107</sup>

In drafting the Pricing Regulation, the Commission analyzed the countervailing duty provisions of the General Agreement on Tariffs and Trade<sup>108</sup> and determined that these provisions could not be applied satisfactorily to liner shipping.<sup>109</sup> A regulation with a simplified rate structure was proposed, to compare freight rates charged for the same commodity on the same route, without detailed reference to the costs of moving particular commodities.<sup>110</sup>

The Pricing Regulation establishes a procedure to respond to third countries whose unfair pricing practices cause or threaten to cause injury to EEC shipowners or interests.<sup>111</sup> It applies only to the liner shipping of third countries, and not

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application of the competition articles of the Treaty is the problem of how to deal with unfair pricing practices. The two questions obviously impact on each other and in the Commission's view it would be appropriate to make progress on both simultaneously." *Common Transport Policy*, *supra* note 2, at 34.

104. See Council Decision Concerning the Activities of Certain Third Countries in the Field of Cargo Shipping, O.J. L 258/35 (Sept. 19, 1978).

105. See *Common Transport Policy*, *supra* note 2, at 34-35. The Commission stated that certain countries, particularly the Soviet Union and other socialist countries, underquoted freight rates and diverted high paying cargo to their own lines. *Id.*

106. *Id.*

107. See *id.* at 35.

108. *Id.* at 35; See General Agreement on Tariffs and Trade, Oct. 30, 1947, art. VI, 61 Stat. (pt. 5) A3, at A24, T.I.A.S. No. 1700, at 19-21, 55 U.N.T.S. 188, 212-16.

109. *Common Transport Policy*, *supra* note 2, at 36. While the general level of freight rates is related to the revenue needed to cover costs, the rates for carrying individual commodities have been traditionally elastic, based on what the market will bear. *Id.* The various factors in determining the cost of moving an individual commodity sometimes result in extremely complex rate structures. *Id.*

110. See *id.*

111. See Pricing Regulation, *supra* note 6, art. 1, O.J. L 378/14, at 15.

to any of the bulk shipping categories.<sup>112</sup> The Pricing Regulation defines unfair pricing practices as those that result from "non-commercial advantages."<sup>113</sup> If the Commission finds that unfair pricing practices exist, it shall propose a redressive duty to the Council that raises the third country's freight rate to a level that equals the rate charged by the EEC lines on the route.<sup>114</sup> The Council may impose a duty by enacting a regulation, taking into account both the Member States' shipping policies<sup>115</sup> and the impact of a duty on developing nations.<sup>116</sup> Where a complainant objects to a Council decision not to impose a duty, or to the amount of a duty imposed, the complainant can appeal to the European Court of Justice.<sup>117</sup>

### III. *BALANCING PROTECTIONISM OUTSIDE THE EEC AND FREE TRADE WITHIN*

The EEC sought to address a series of conflicting policy goals in adopting the package of regulations on maritime transport. First, the EEC adopted the Liner Code allowing de-

112. *See id.* The Pricing Regulation responds to "unfair pricing practices by certain third country shipowners engaged in international cargo liner shipping." *Id.* The Commission did not yet want to extend regulations to bulk shipping "in view of a lack of experience in this area." COMM'N, TENTH REPORT ON COMPETITION POLICY ¶ 7 (1980).

113. Pricing Regulation, *supra* note 1, art. 3(b), O.J. L 378/14, at 15. Article 3(b) provides:

"unfair pricing practices" means the continuous charging on a particular shipping route to, from or within the Community of freight rates for selected or all commodities which are lower than the normal freight rates charged during a period of at least six months, when made possible by the fact that the shipowner enjoys non-commercial advantages which are granted by a State which is not a member of the Community . . . .

*Id.*

114. *Id.* art. 13, O.J. L 378/14, at 19.

115. *Id.* art. 11-12, O.J. L 378/14, at 19.

116. *See* EUROPE, AGENCE INTERNATIONALE D'INFORMATION POUR LA PRESSE DOCUMENTS (No. 4646) 16 (Oct. 24, 1987). A delegation from CAACE sought a compromise in dealing with West African nations because of the differences between their political and legal systems and those of the EEC. *Id.*

117. Bentley & Ronayne, *supra* note 71, at 217. Although the Pricing Regulation does not specifically allow such an appeal, the European Court of Justice has held that other EEC dumping regulations allow appeal. *See* *Timex v. Council and Commission*, Case 264/82, 1985 E.C.R. 861, 870-71, ¶ 32, Common Mkt. Rep. (CCH) ¶14,143, at 15,785 (allowing an appeal of the amount of a duty imposed by the Council); *FEDIOL v. Commission*, Case 191/82, 1983 E.C.R. 2913, Common Mkt. Rep. (CCH) ¶ 14,013 (allowing an appeal of a Commission decision not to begin an anti-subsidy proceeding).

veloping nations access to shipping cargo, but exempted a large percentage of conference trade.<sup>118</sup> Then, the EEC applied its competition rules to promote free trade among Member States within the Community.<sup>119</sup> Finally, the EEC adopted the Pricing Regulation to protect the Member States' shipping fleets from competition originating outside the Community.<sup>120</sup>

#### A. *Missing the Boat Within the Community*

The Pricing Regulation will not be as effective as the EEC expects in combatting the restrictive pricing practices of developing nations. For example, under the Pricing Regulation, an unfair pricing practice must be the result of "non-commercial advantages" granted by a third country to its shipper.<sup>121</sup> However, the Pricing Regulation does not define the term "non-commercial advantages."<sup>122</sup> Without specific guidelines, EEC shippers do not have a reliable method of determining whether a third country's shipping line is engaging in unfair pricing practices on a particular trading route.<sup>123</sup>

The Pricing Regulation will also be less effective than expected because it does not provide for a provisional duty stage.<sup>124</sup> The Council may enact a redressive duty, but only

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118. See *supra* notes 46-51 and accompanying text.

119. See *supra* notes 98-103 and accompanying text.

120. Pricing Regulation, *supra* note 6.

121. *Id.* art. 3(b), O.J. L 378/14, at 15.

122. Bentley & Ronayne, *supra* note 71, at 214; see Pricing Regulation, *supra* note 6, art. 3(b), O.J. L 378/14, at 15. The term "non-commercial advantages" probably "would include direct or indirect financial aid, special credit conditions, advantageous tax regimes, the employment of seamen on terms and conditions which do not conform to ILO standards." Bentley & Ronayne, *supra* note 71.

123. See *Common Transport Policy*, *supra* note 2, at 35.

124. Bentley & Ronayne, *supra* note 71, at 218. The lack of a provisional duty stage does not prevent the Council from reaching preliminary determinations on pricing complaints. *Id.* In such a case, the Commission may expedite its investigation and propose a regulation to the Council. *Id.* The Council may then enact the regulation imposing the duty. Pricing Regulation, *supra* note 6, art. 13(4)(b), O.J. L 378/14, at 19. While the Pricing Regulation requires Council action, other EEC antidumping measures allow the Commission itself to impose provisional duties. Bentley & Ronayne, *supra* note 71, at 218. "[T]he practical reality is that the adoption of redressive duties by Council regulation will often take longer than adoption of provisional duties by Commission regulation." *Id.*

In calculating the amount of a redressive duty, the Commission can determine the normal freight rate on a route by a constructed freight rate, taking the cost of a comparable company on a comparable route plus a reasonable margin of profit. *Id.* The Pricing Regulation does not give guidelines for determining a comparable route,

after the completion of lengthy consultation and investigation procedures.<sup>125</sup> Thus, EEC shippers will not be able to obtain immediate relief from alleged unfair pricing practices.<sup>126</sup>

In addition, the Pricing Regulation is not comprehensive because it applies only to liner shipping and not to bulk carriers or passenger transport.<sup>127</sup> In failing to include these services under the Pricing Regulation, the EEC protects only one portion of its shipping industry.<sup>128</sup> The Commission is considering proposals to extend its shipping policy to bulk carriers and passenger transport so that these areas are protected from outside competition.<sup>129</sup>

### B. *Limiting Competition Outside the Community*

The EEC has established a goal of eliminating trade barriers within the Community and completing its free "internal market" by 1992.<sup>130</sup> To achieve this goal, the EEC has adopted a number of regulations in recent years intended to lower trade barriers and promote equality of competition among the Member States.<sup>131</sup> However, at the same time that

nor does it define overhead expenses necessary to determine the normal freight rate. *Id.* at 214-15. As a result, the Commission will have to use other Community anti-dumping regulations as a guideline. *Id.* at 215.

125. Bentley & Ronayne, *supra* note 71, at 217; see also Pricing Regulation, *supra* note 6, arts. 11-13, O.J. L 378/14, at 19.

126. Bentley and Ronayne, *supra* note 71, at 218. The Commission "must investigate unfair pricing practices by reference to a period covering normally not less than six months immediately prior to initiation. If anti-dumping practice is any guidance, such period would usually be at least 12 months in duration." *Id.* (footnote omitted).

127. See Pricing Regulation, *supra* note 6, art. 1, O.J. L 378/14, at 15.

128. COMM'N, SIXTEENTH REPORT ON COMPETITION POLICY ¶ 37 (1986). The Council has invited the Commission to consider proposals to apply the competition rules to passenger transport and tramp shipping. *Id.* The CAACE has protested the Commission's delay in presenting these additional shipping proposals "in relation to fiscal, social and technical aspects." EUROPE, AGENCE INTERNATIONALE D'INFORMATION POUR LA PRESSE DOCUMENTS (No. 4685) 16 (Dec. 19, 1987). CAACE urges the adoption of additional Community-wide measures to improve the competitiveness of the Member States' shipping fleets before the Member States take action on their own. EUROPE, AGENCE INTERNATIONALE D'INFORMATION POUR LA PRESSE DOCUMENTS (No. 4713) 11 (Feb. 3, 1988).

129. See COMM'N, SIXTEENTH REPORT ON COMPETITION POLICY ¶ 37 (1986).

130. COM(85) 310 final, *supra* note 97, ¶ 1.

131. For example, the EEC has recently implemented regulations applying its competition rules within the Community for both airlines, Council Regulation No. 3975/87, O.J. L 374/1 (1987), and shipping, Council Regulation No. 4056/86, O.J. L 378/4 (1986), Common Mkt. Rep. (CCH) ¶ 2764.

it is promoting this spirit of free trade within the Community, the EEC has erected trade barriers directed at nations outside the Community.<sup>132</sup> The Pricing Regulation is an example of the EEC's pursuit of trade liberalization within the Community at a faster rate than outside the Community.<sup>133</sup>

While implementing regulations to apply a "new free trade policy" within the Community's shipping industry, the EEC has given its shippers a weapon to combat competition from outside the Community.<sup>134</sup> In effect, the EEC is replacing the old system of national trade restrictions in the shipping industry with new, Community-wide restrictions backed by the economic weight of the twelve Member States.<sup>135</sup>

Indeed, if the EEC achieves the "internal market" by 1992, it will become the largest trading bloc in the world.<sup>136</sup> The Community will have a population base of 323 million people and will account for more than forty percent of world

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132. de St. Phalle, *And Now, the Tiger of Europe*, N.Y. Times, Mar. 24, 1988, at A35, col. 3 [hereinafter *Tiger of Europe*]. For example, West Germany recently changed its 14th century Beer Purity Law to allow beer from other Community nations to be imported into Germany, while American beer is still excluded. *Id.* The Community also limits the import of automobiles from non-EEC nations. *Id.* The EEC plans to apply competition within the Community's telecommunications industry by 1992, while excluding non-EEC nations. *Id.* Some Member States' auto manufacturers, fearful of an onslaught of Japanese imports after 1992, are fighting for continued protection. *Toward Real Community?*, TIME, Apr. 18, 1988, at 54, 55 [hereinafter *Real Community?*].

133. See *Tiger of Europe*, *supra* note 128, at 35, col. 3. "Nonetheless it is curious that our European trading partners, who have traditionally espoused a laissez-faire attitude with respect to ocean shipping, choose now to adopt an approach [that] . . . represents a major policy change for them." *Antitrust Comes to Maritime*, *supra* note 12, at 299.

134. See *supra* text accompanying note 107. The shipping industry "is one of the areas where Community action is likely to be more effective because of the greater trading weight of the Community and because only Community action can ensure that such counter-measures do not merely result in the diversion of cargo from one Community port to another." *Common Transport Policy*, *supra* note 2, at ii.

135. See *Tiger of Europe*, *supra* note 132, at 35, col. 2. American firms worry that the talk of EEC integration is rhetoric to cover up discrimination directed at them. *Real Community?*, *supra* note 132, at 55. Alfred Kingon, the United States Ambassador to the EEC, stated, "When I speak to E.C. leaders I receive assurances that the Community will not become Fortress Europe. But when I hear talk of 'nurturing' industries, I become concerned." *Id.*

136. *Id.* With the accession of Greece to the Community, the EEC increased its percentage of world shipping tonnage and became "the most important shipping power and pressure group in the framework of international organisations dealing with shipping . . ." Bredimas, *supra* note 27, at 31.

trade.<sup>137</sup> The resulting economic capacity will enable the EEC to surpass the economies of the United States, Japan, South Korea, Taiwan, Singapore, and Hong Kong, and to wield tremendous clout in the world market.<sup>138</sup>

As the EEC pursues this goal of economic integration, it must recognize that it should treat other trading nations as it treats Member States. Such recognition is essential not only for the interests of world trade generally but also for the Community's own long-term economic growth.<sup>139</sup> While lowering trade barriers within the Community, the EEC should also strive to lower the barriers that it has erected to protect itself from competition outside the Community.<sup>140</sup>

The EEC's shipping policy is part of a dangerous trend that is fostering the creation of "Fortress Europe."<sup>141</sup> This policy will provoke developing nations to retaliate against Community fleets, resulting in long-term damage to important Community shipping interests.<sup>142</sup>

### CONCLUSION

The Pricing Regulation is an example of the EEC's policy of raising trade barriers to third nations while liberalizing trade within the Community. As the EEC becomes an even more formidable trading power, it must recognize the dangers to

137. *Tiger of Europe*, *supra* note 132, at 35, cols. 2-3. The creation of a common market could boost the Community's economic growth by five percent and generate up to 1.8 million jobs by the end of the 1990s. *Real Community?*, *supra* note 132, at 54.

138. *Tiger of Europe*, *supra* note 132, at 35, col. 4.

139. *Id.* at 35, col. 4.

The series of sweeping changes leading up to 1992 will allow the EEC's members to enjoy the privileges that accrue to a major trading power, privileges they could not lay claim to individually. But community and European national leaders must recognize that such privileges come with corresponding obligations to treat all their trading partners fairly.

*Id.*

140. *Id.* at 35, col. 3.

141. *Id.* For example, the EEC has investigated the alleged dumping by Asian nations of screwdrivers, microwave ovens, semiconductors, computer printers, and compact-disk players. *The Europeans Start to Play a Little Rough*, *Bus. Wk.*, Feb. 9, 1987, 47.

142. ADEMUNI-ODEKE, *supra* note 2, at 305. By adopting retaliatory trade measures, the traditional nations fall into the same trap that developing nations did when they resorted to flag preferences and discrimination. *Id.* As a result, retaliatory measures, such as the Pricing Regulation, will lead to further confrontation, rather than consultation and cooperation. *Id.*

world trade posed by its barriers to nations outside the EEC. As it eliminates trade barriers within the Community, the EEC should not use its resulting power as a trading bloc as a weapon against outside nations. The EEC must reconcile these conflicting interests, or 1992 will result in increased tension in world trade.

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