Cabotage and the European Community Common Maritime Policy: Moving Towards Free Provision of Services in Maritime Transport

Rossina Petrova*
Abstract

This Comment argues that by adopting a two-stage common maritime policy, with a gradual liberalization of cabotage, the European Community took the right course of action in view of the prevailing internal and international conditions of the maritime market. Part I defines the basic concepts concerning the maritime industry and policy. Part I also presents the legal framework within which the European Community adopts measures on maritime policy. Part II discusses the 1986 Legislative Package, marking the first stage in the development of the Community common maritime policy. Part II then reviews the provisions and impact of Regulation 3577/92 which continued and complemented the development of the EC common shipping policy initiated by the 1986 Legislative Package. Part III maintains that the European Community has succeeded in establishing a common maritime policy, leading not only to the full liberalization of maritime trade between Member States and among Member States and third countries, but also, to the gradual opening up of cabotage routes. Part III further maintains that by tackling the external and internal issues confronting the EC maritime policy separately and in stages, the European Community has acted in its best long-term commercial and strategic interests. This Comment concludes that the European Community has successfully forged a common maritime policy as one of the vehicles towards achieving the single internal market.
CABOTAGE AND THE EUROPEAN COMMUNITY COMMON MARITIME POLICY: MOVING TOWARDS FREE PROVISION OF SERVICES IN MARITIME TRANSPORT

Rossina Petrova*

INTRODUCTION

Since its inception in 1957, the European Community1 ("EC" or "Community") has become a leading economic power,2 with a significant share of the world's commercial exchange.3 The majority of EC trade is still carried out by sea.4 Recent

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3. See Anna Bredima-Savopoulou & John Tzoannos, The Common Shipping Policy of the EC 115-16 (1990) (reviewing Community’s share of world imports and exports for 1982). The Community’s trade with third countries in 1982 represented 21% by value of world imports and 20% of world exports. Id. By comparison, the share of the United States, the second leading trading power, for the same period amounted to 16% of world imports and 10% of world exports. Id.

4. See Commission of the European Communities, Shaping Europe’s Maritime Future; A Contribution to the Competitiveness of Maritime Industries: Communication
figures show that ninety percent of external trade and thirty percent of intra-Community trade rely on maritime transport. It is of primary importance for the European Community, therefore, to maintain a viable and competitive commercial fleet.

The EC maritime industry has not been able, however, to avert the adverse effects of the prolonged crisis in international shipping and the steady growth of the fleets of developing countries. Compared with the fleets of the developing countries,
the Community commercial fleets have suffered a decrease in their competitiveness and strength on the world maritime market.\footnote{11} The EC fleets experienced a considerable decline both in terms of tonnage\footnote{12} and total size relative to other principal world fleets\footnote{13} in the period between 1970 and 1987.\footnote{14} A strong na-

11. See BREDIMA-SAVOPOULOU & TZOANNOS, supra note 3, at 7-30 (comparing growth of combined EC fleets with world total growth of fleets, and growth of fleets in different world regions for period between 1970 and 1987). In 1970, the number of ships of the combined EC fleets comprised 33% of the world total. Id. at 17 tbl.2.1. In 1975, that percentage went down to 27.6. Id. In 1980, the percentage was 24.4. Id. In 1987, the percentage dropped to 19.3, and in 1987, it went down to 18.3. Id. By contrast, while the number of ships of the combined fleets of the developing countries comprised 19.15% of the world total in 1970, that percentage went up to 25.5 in 1975, to 31.15 in 1980, to 38.3 in 1986, and it grew to 39.1 in 1987. Id.

12. Id. Tonnage is measured by the gross registered tons. Id. See 11 The New ENCYCLOPEDIA BRITANNICA 843 (15th ed. 1994) [hereinafter ENCYCLOPEDIA BRITANNICA] (defining tonnage as total number of tons registered or carried, or total carrying capacity of ship). Gross tonnage is "a measurement of total capacity expressed in volumetric tons of 100 cubic feet." Id. In 1970, the combined EC fleets represented 31.9% of the world total, by tonnage. BREDIMA-SAVOPOULOU & TZOANNOS, supra note 3, at 18 tbl.2.2. That percentage went down to 30.23 in 1975, to 28.7 in 1980, to 19.1 in 1986, and in 1987, the percentage dropped to 16.5. Id. At the same time, the combined fleets of the developing countries increased their tonnage as a percentage of the world total tonnage from 25.9 in 1970 to 33.9 in 1975, to 40.4 in 1980, to 51.2 in 1986, and in 1987, the percentage reached 54.8. Id.

13. See Statistical Tables in Lloyd's Register of Shipping for the periods between 1970-1987, reprinted in BREDIMA-SAVOPOULOU & TZOANNOS, supra note 3, at 17-18 (reviewing capacity of principal world merchant fleets between 1970 and 1987). In the 1970s and 1980s, Lloyd's Register of Shipping classified the world's major fleets into five groups. Id. The five groups included the EC, the OECD, the Eastern Bloc, the Far East, and Open Registries. Id. Until 1995, the EC Member States were Belgium, Denmark, France, Germany, Greece, the Irish Republic, Italy, Luxembourg, the Netherlands, the United Kingdom, Portugal, and Spain. TEU, supra note 1, pmbl., O.J. C 224/1, at 2 (1992), [1992] 1 C.M.L.R. at 725-26. The Eastern Bloc countries included Albania, Bulgaria, Cuba, Czechoslovakia, the German Democratic Republic, Hungary, Poland, Romania, the Union of Soviet Socialist Republics, and Vietnam. BREDIMA-SAVOPOULOU & TZOANNOS, supra note 3, at 7. The countries of the Far East were the People's Republic of China, Hong-Kong, South Korea, and Taiwan. Id. Open-registry countries included Bahamas, Bermuda, Cyprus, Liberia, Panama, and the Somali Republic. Id.; ALAN W. CAFRUNY, RULING THE WAVES 91 (1987) (explaining that open registries are registries of countries whose laws allow registration of ships owned by foreign nationals or companies). The practice of allowing a foreign ship to fly the open registry country's flag contrasts with the practice of most countries, where the right to
tional fleet means not only an efficient and competitive maritime trade and brisk economy. Shipping fleets are also status symbols. If the European Community wants to retain its prestige and status as a leading economic power, it must maintain a strong modern fleet.

Free access to maritime services within Member States presents one of the factors contributing to the vitality and competitiveness of the Community fleet. Moreover, the removal of restrictions on the provision of services along cabotage routes within Member States will eliminate another barrier towards establishing the internal market as an area of free movement of fly the national flag is subject to stringent conditions. Id.; see H. Meyers, The Nationality of Ships 133-34 (1967) (clarifying that ships fly flag of state of their nationality as symbol and evidence of their nationality). Flying the flag of a state thus means having that state's nationality. Id. A state is under the obligation to ensure that those who sail under its flag comply with the treaties and other international rules by which that state is bound. Id. at 6; see Robert P. Grime, Shipping Law 18 (1978) (pointing out that "[a] ship that is registered in a particular State flies the flag of that State and is subject to the laws of that State."). Registration on open registries is also known as flag of convenience. CAFRUNY, supra, at 91. The major reasons for acquiring a flag of convenience is to avoid taxation in the shipowner's own state and to bypass more stringent safety requirements of the shipowner's own state. See Edgar Gold, Maritime Transport: The Evolution of International Marine Policy and Shipping Law 268 (1981) (explaining motivation for adopting flag of convenience); C. John Colombos, The International Law of the Sea 387 (1967) (noting that principle motive for acquiring flag of convenience lies in avoidance of taxation and reduction of operational costs through lower crew wages).

14. BREDIMA-SAvoPOULou & TZOANNos, supra note 3, at 7-12.
15. See Greaves, supra note 2, at 119-20 (emphasizing role of maritime industry for Community's economic power and prestige).
16. Id.; CAFRUNY, supra note 13, at 1 (characterizing merchant shipping as "an instrument of national security and self-determination.").
17. Id.
18. See id. at 119-27 (discussing EC maritime transport through early 1990s and need for full liberalization of maritime services for carriage of goods and passengers to, within, and from Community).
19. See Webster's Third New International Dictionary of the English Language Unabridged 310 (3rd ed. 1986) [hereinafter Webster's Dictionary] (defining cabotage as trade or transport in coastal waters or between two points within single country, or as restriction of right to trade and navigation in coastal waters to domestic carriers).
20. See EC Treaty, supra note 1, art. 2, [1992] 1 C.M.L.R. at 588 (asserting that European Community shall have as its task establishment of a common market and that common market shall provide major framework for Community activities); id. art. 3, [1992] 1 C.M.L.R. at 588 (stating that Community activities shall include "an internal market characterized by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital.").
goods, persons, services, and capital. The full liberalization of maritime transport both with respect to intra-Community services and services between Member States and third countries can only be achieved within the framework of a Common Transport Policy. In 1986, the Council of Ministers ("Council") adopted a package of four regulations ("1986 Legislative Package"). The 1986 Legislative Package marked the first stage in the implementation of an EC common maritime transport policy. Council Regulation 3577/92, extending the principle of freedom to provide services to maritime cabotage, marked the second stage towards a common maritime policy. For years the

21. See Council Regulation No. 3577/92, pmbl., O.J. L 364/7 (1992) [hereinafter Regulation 3577/92] (applying principle of freedom to provide services to maritime transport within Member States as means of establishing internal market that "will comprise an area in which the free movement of goods, persons, services and capital is ensured.").

22. See EC Treaty, supra note 1, art. 61 (1), [1992] 1 C.M.L.R. at 617 (stating that freedom to provide services in the transport field "shall be governed by the provisions of the Title relating to transport."). Because Article 61(1) makes the freedom to provide transport services subject to the rules of Articles 74-84 governing transport, free provision of services in this sector can only be implemented through the introduction of a Common Transport Policy by means of legislative acts adopted by the Council of Ministers ("Council"). Greaves, supra note 2, at 122. The Council functions as a Community legislative body. GEORGE A. BERMANN ET AL., CASES AND MATERIALS ON EUROPEAN COMMUNITY LAW 51 (1993). The Council consists of representatives of each Member State at ministerial level. EC Treaty, supra note 1, art. 146, [1992] 1 C.M.L.R. at 679. See also id. arts. 145-54, [1992] 1 C.M.L.R. at 679-82 (describing composition and functions of Council).


25. See Greaves, supra note 2, at 128-38 (describing cabotage as a problem 1986 Legislative Package did not address and referring to pending legislative proposals on issue of cabotage).


27. See Commission Communication II, supra note 10, COM (96) 81 Final, at 8-11
Council deliberated Regulation 3577/92, and even after its adoption, Regulation 3577/92 represented a delicate compromise between opposing positions taken by Member States.

This Comment argues that by adopting a two-stage common maritime policy, with a gradual liberalization of cabotage, the European Community took the right course of action in view of the prevailing internal and international conditions of the maritime market. Part I defines the basic concepts concerning the maritime industry and policy. Part I also presents the legal framework within which the European Community adopts measures on maritime policy. Part II discusses the 1986 Legislative Package, marking the first stage in the development of the Community common maritime policy. Part II then reviews the provisions and impact of Regulation 3577/92 which continued and complemented the development of the EC common shipping policy initiated by the 1986 Legislative Package. Part III maintains that the European Community has succeeded in establishing a common maritime policy, leading not only to the full liberalization of maritime trade between Member States and between Member States and third countries, but, also, to the gradual opening up of cabotage routes. Part III further maintains that by tackling the external and internal issues confronting the EC maritime policy separately and in stages, the European Commu-

(analyzing 1986 Legislative Package and Regulation 3577/92 as Community measures striving to create single maritime market).


29. See Regulation 3577/92, supra note 21, art. 6, O.J. L 364/7, at 9 (1992) (allowing for gradual phasing out of existing cabotage restrictions along coasts of Southern Member States). In view of the prevailing socio-economic conditions in the Southern Member States, Regulation 3577/92 gave those States time and opportunity to adjust their shipping industries to the new regime of free access to cabotage routes within Member States. See Commission of the European Communities, Implementation of Council Regulation 3577/92 applying the principle of freedom to provide services to maritime cabotage (1995-1996) and on the economic and social impact of the liberalization of island cabotage: Report from the Commission to the Council, COM (97) 296 Final, at 20-26 (June 1997) [hereinafter Commission Report II] (assessing socio-economic impact of liberalization of cabotage on Northern and Southern Member States).
nity has acted in its best long-term commercial and strategic interests. This Comment concludes that the European Community has successfully forged a common maritime policy as one of the vehicles towards achieving the single internal market.

I. MARITIME INDUSTRY AND POLICY, AND LEGAL FRAMEWORK FOR EC MARITIME POLICY

The maritime industry is an international industry concerned with the shipping of passengers and goods over navigable waters. Because of its close ties with international trade, shipping plays a major role in the economy and political relations of a state. The Community’s power to legislate in the sphere of maritime transport derives from Article 84(2) of the EC Treaty. EC action in the maritime transport area must also observe the general EC Treaty rules of nondiscrimination on the basis of nationality, freedom to provide services, and competition.

30. See Nagendra Singh, Maritime Flag and International Law xiii (1978) (describing international character of shipping industry); Grime, supra note 13, at 1 (noting inevitable international element in shipping activities, "since ships and cargoes, by nature, travel between countries."); Ademun-Odeke, Shipping in International Trade Relations 3 (1988) [hereinafter Shipping] (referring to international nature of shipping industry).
31. See Black’s Law Dictionary, supra note 5, at 968 (defining maritime as pertaining to navigable waters, or to commerce on navigable waters).
32. See Shipping supra note 30, at 3-6 (describing close interdependence of international trade and shipping services); Rochdale Report, supra note 8, at 1 (stating that “[m]ost of the [shipping] industry’s business is concerned with international trade.”); C afruny, supra note 13, at 2 (referring to shipping as constituting “operations of the global marketplace for the transportation of commodities.”).
33. See C afruny, supra note 13, at 1 (stating that “a basic infrastructure of international trade, shipping is a key source of power in world politics” and describing industry as “an independent producer of wealth, an important lever of national economic development, and a crucial element of military power.”); Singh, supra note 30, at xiii (pointing out overall commercial importance of shipping industry and intimate relation “between the attributes of national sovereignty... and economic interests involved in the maintenance” of shipping services).
34. See EC Treaty, supra note 1, art. 84(2), [1992] 1 C.M.L.R. at 626 (granting Council power to lay down provisions for sea transport); Greaves, supra note 2, at 120-21 (discussing EC Treaty provisions bearing on Community’s power to regulate maritime transport).
35. See EC Treaty, supra note 1, art. 6, [1992] 1 C.M.L.R. at 591 (prohibiting discrimination on grounds of nationality).
A. Maritime Industry and Policy

The maritime industry is a complex industry covering a variety of shipping activities and the conditions governing the industry operations in each sector depend on the specific characteristics of that sector.\(^3\) Shipping activities break down into different sub-sectors depending on the type of good or passenger transported.\(^4\) The regularity of the services provided also distinguishes between different types of shipping activities.\(^5\) The major elements of a government’s maritime policy are protectionism,\(^6\) employment,\(^7\) international maritime affairs,\(^8\) and competition policy.\(^9\)

1. Maritime Industry Defined

The maritime industry involves the carriage of goods and passengers over navigable water.\(^10\) In terms of EC maritime policy, and the EC Treaty, the maritime industry concerns the busi-

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38. See Rochdale Report, supra note 8, at 1 (defining shipping industry); Commission Communication II, supra note 10, COM (96) 84 Final, at 2 (noting complex nature of maritime industry and interdependence of its sectors).

39. See Bredima-Savopoulou & Tzannos, supra note 3, at 12 (describing basic sectors of shipping industry). The basic categories of shipping activities according to the kind of good transported are carriage of cargo in bulk, carriage of general cargo, which requires packaging, and carriage of cargo in containers. Id.; Carpenter, supra note 13, at 6, 184 (looking at major types of shipping activities). Carriage of passengers constitutes another sector of the maritime industry. See Commission Report II, supra note 29, COM (97) 296 Final, at 7 (designating passenger trades as separate type of shipping activity).

40. See Edward F. Stevens, Shipping Practice 1 (1979) (distinguishing between liner services and tramp services). Liner trades run direct lines and regular services between certain ports. Id. A tramp ship transports goods on the basis of a voyage or time contract for “non-regularly scheduled or non-advertised sailings.” Regulation 4056/86, supra note 24, art. 1(3)(a), O.J. L 378/4, at 6 (1986) (defining tramp vessel services as distinguished from liner services).

41. See Bredima-Savopoulou & Tzannos, supra note 3, at 36 (describing protectionism measures government adopts to aid and protect its merchant shipping).

42. See id. (defining employment element of maritime policy as government’s stand on employing non-national seamen on board national vessels).

43. See id. (including state’s membership in international maritime organizations and conventions as separate element of maritime policy).

44. See id. at 62 (noting that government’s approach to liner conferences, price-fixing practices, and cargo-sharing arrangements define government’s competition policy).

45. See id. at 12 (discussing maritime industry). In terms of the EC maritime policy and Article 84 of the EC Treaty, the maritime industry concerns the business of transporting goods and persons in ships across the sea for commercial return. Id. It excludes operations on inland waterways. Id.
ness of transporting goods and persons in ships across the sea for commercial return.\textsuperscript{46} In the context of EC maritime policy then, the maritime industry excludes operations on inland waterways.\textsuperscript{47}

Shipping activities fall into various sub-sectors.\textsuperscript{48} The maritime industry often breaks down the diverse shipping activities into sub-sectors on the basis of the type of good or passenger transported.\textsuperscript{49} The types of activities according to this criterion include the transportation of cargoes in bulk, which can be liquid\textsuperscript{50} or dry\textsuperscript{51} bulks.\textsuperscript{52} The transportation of general cargo\textsuperscript{53} is another shipping activity.\textsuperscript{54} Ships may also carry containers.\textsuperscript{55} The transportation of passengers by sea represents another type of shipping activity.\textsuperscript{56} Tourist services in the form of cruising services constitute another sub-sector.\textsuperscript{57}

A different classificatory criterion looks at the regularity of the service offered.\textsuperscript{58} Liner\textsuperscript{59} services are services which provide

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\textsuperscript{46} See ROCHDALE REPORT, supra note 8, at 25 (defining EC maritime industry as “the business of transporting goods and persons in ships from a dockside point across the sea for commercial return.”).

\textsuperscript{47} See EC Treaty, supra note 1, art. 84, [1992] 1 C.M.L.R. at 626 (stating in section 1 that provisions of Title IV, which governs transport, shall apply to transport by rail, road, and inland waterway). Section 2 grants the Council permission to decide whether and by what procedure appropriate provisions may be laid down for sea and air transport. Id. Maritime transport is thus clearly treated separately from other types of Community transport. Greaves, supra note 2, at 123.

\textsuperscript{48} See BREDIMA-SAVOPOULOU & TZOANNOS, supra note 3, at 12 (defining shipping industry).

\textsuperscript{49} Id.

\textsuperscript{50} Id. Oil and oil products are examples of liquid cargo. Id.

\textsuperscript{51} Id. Examples of dry cargo are iron ore, grain, and coal. Id.

\textsuperscript{52} Id. See also BLACK’S LAW DICTIONARY, supra note 5, at 195 (defining bulk as “merchandise which is neither counted, weighed, nor measured.”).

\textsuperscript{53} See BREDIMA-SAVOPOULOU & TZOANNOS, supra note 3, at 12-13 (defining general cargo as finished manufactured products).

\textsuperscript{54} Id.; see Commission Report II, supra note 29, COM (97) 296 Final, at 8 tbl.3 (analyzing cargo trades as falling into bulk cargo and general cargo).

\textsuperscript{55} BREDIMA-SAVOPOULOU & TZOANNOS, supra note 3, at 12-13. See PROTECTIONISM, supra note 10, at 49 (discussing increased use of containers in recent years).

\textsuperscript{56} BREDIMA-SAVOPOULOU & TZOANNOS, supra note 3, at 13. See also Commission Report II, supra note 29, COM (97) 296 Final, at 7-8 (assessing importance of passenger trades in EC countries).

\textsuperscript{57} BREDIMA-SAVOPOULOU & TZOANNOS, supra note 3, at 13.

\textsuperscript{58} Id.

\textsuperscript{59} See PROTECTIONISM, supra note 10, at 344 (characterizing liner as “[a] ship plying a fixed route or routes, sailing according to a predetermined schedule, which offers cargo and/or passenger space at fixed rates to those who wish to have goods transported or to make journeys.”).
regular, scheduled transportation between specific ports. Tramp services are services which operate to carry cargo in ships hired wholly or partly for the carriage of cargoes on the basis of a voyage or time charter or any other form of contract. Liner trades tend to operate through organized liner conferences, whose purpose is to absorb the effect of short-term fluctuations in market prices and secure stable service on established routes and goods. Liner conferences thus escape the determination of freight rates by free market mechanisms. Tramp vessel services, in contrast, employ freight rates which are established in accordance with conditions of supply and demand.

2. Major Elements of Maritime Policy

The key issues of a government's maritime policy include

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60. *Id.*; see Bредела-Sавопоулу & Τζοαννος, *supra* note 3, at 13 (describing liner services).

61. See Protectionism, *supra* note 10, at 345 (defining tramp ships as ships available on open market for hire for single voyage or for longer periods to carry any available cargo).

62. See Regulation 4056/86, *supra* note 24, art. 1(3) (a), O.J. L 378/4, at 6 (1986) (explaining that tramp vessel services designate transport of cargo in ships hired for specified time or voyage against rates of freight that "are freely negotiated case by case in accordance with conditions of supply and demand."). Freight rates are transportation charges which depend on the size, weight, or amount of goods transported. *Black's Law Dictionary*, *supra* note 5, at 666.

63. See Protectionism, *supra* note 10, at 344 (defining liner conferences as "association of liner owners engaged in particular trade who have agreed upon uniform freight rates."). Liner conferences regulate the liner trade in shipping. *Id.* at 33; see Stevens, *supra* note 40, at 3 (explaining that shipping companies which are members of conference meet and discuss matters of general interest, set freight rates for specific goods, and generally control and protect interests of all members).

64. See *Black's Law Dictionary*, *supra* note 5, at 1379 (characterizing short-term as ordinarily due within one year).

65. See Protectionism, *supra* note 10, at 24 (discussing role of liner conferences in world maritime industry).

66. See *Black's Law Dictionary*, *supra* note 5, at 666 (defining freight rate as transportation charge for goods carried based on weight of goods, number of packages, or on mileage).

67. See *Shipping*, *supra* note 30, at 17-18 (describing arrangements of dividing cargo trade equally among liner conferences members). By entering into cargo arrangements fixed over longer periods of time, liner conferences remain immune to the effect of short-term market fluctuations. See Protectionism, *supra* note 10, at 24-25 (discussing liner conferences and determination of freight rates).

68. See Regulation 4056/86, *supra* note 24, art. 1(3) (a), O.J. L 378/4, at 6 (1986) (stating that freight rates in tramp trades are determined on the basis of supply and demand).
protectionism, employment, international maritime affairs, and competition policy. The most frequently employed forms of protectionism are flag preference and state aid and assistance. The United Nations Conference on Trade and Development ("UNCTAD") is a major factor shaping international

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69. See Bredima-Savopoulou & Tzoannos, supra note 3, at 36 (defining protectionism as referring to mechanisms government employs to aid and protect its merchant shipping); Protectionism, supra note 10, at 71 (reviewing major practices governments employ to protect their own fleets).

70. See Bredima-Savopoulou & Tzoannos, supra note 3, at 36 (relating employment issues, in maritime policy context, to rules governing employment and remuneration of seamen).


72. See Bredima-Savopoulou & Tzoannos, supra note 3, at 62 (explaining competition policy in terms of a government’s attitude toward system of liner conferences and practices of price-fixing and cargo-sharing arrangements).

73. See Shipping, supra note 30, at 66-70 (characterizing flags as symbols of nationalism and as means of identifying nationality of ships); Colombos, supra note 13, at 291 (stating that “[t]he flag which a ship flies is the evidence of her nationality”); Singh, supra note 30, at 1 (describing maritime flag as identification mark of ship). A ship, just like any other unit of transport, must bear an identification mark because an unidentifiable “object of traffic would elude fixation of responsibility for its acts . . . and thus defy maintenance of law and order.” Id. The flag is one of three marks of identification in the case of ships. Id. The other two are the number and name of the ship, and the ship’s documents and certificates which each ship must carry. Id.; see Colombos, supra note 13, at 295 (asserting that ships must carry papers, which provide more efficient means of testing ship’s nationality). The flag determines the nationality of the ship and this in turn determines the national law which governs the ship. Singh, supra note 30, at 3; see Stevens, supra note 40, at 84 (explaining that vessel becomes subject to country whose flag she is flying). The members of the crew are subject to the laws of the country under whose flag the ship is sailing. Stevens, supra note 40, at 84. The flag is a direct result of the registration of the ship. See Singh, supra note 30, at 3 (detailing connection between maritime flag and registration of ship). All ships must be registered, both when purchased new, directly from the shipyard, and when bought second-hand. Id. at 3-4.

74. See Protectionism, supra note 10, at 16-17 (describing types of protectionist mechanisms governments customarily employ in international shipping). Flag preference refers to a government’s shipping policy which favors certain flags, generally the domestic flag, in giving cargoes and granting privileges. Id. at 344.

75. Id. at 16-17. State aid and assistance consists mainly of financial aid and fiscal relief to shipping. Id. at 147.

With respect to competition policy in the maritime industry, the main issues concern a state’s membership in the system of liner conferences. With respect to competition policy in the maritime industry, the main issues concern a state’s membership in the system of liner conferences.

a. Employment

The employment element of a government’s maritime policy primarily concerns the legality of employing non-nationals on board national flag vessels. Because of its ties with international trade, the maritime industry often brings nationals of different countries to work together on a shipping transaction. At the same time, the aim of providing steady employment for national seafarers may cause a government to reserve maritime employment for its own seafarers, and to the exclusion of non-nationals.

Within the European Community, a 1973 decision of the European Court of Justice ("ECJ") made the policy of free

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5815 (1964) (establishing the United Nations Conference on Trade and Development ("UNCTAD")). The U.N. General Assembly established UNCTAD as a response to the increased political presence of the newly independent states of Africa and Asia. Sweeney, supra note 71, at 484 n.10. In view of the difficulties facing those states with respect to their independent economic development, UNCTAD’s purpose is to use trade and aid to assist third-world countries to develop their national economies. Id.

77. See Sweeney, supra note 71, at 483-84 (referring to role of UNCTAD in achieving "the progressive harmonization and unification of international trade law regarding the vital shipping industry.").

78. See BREDIMA-SAVOPOULOU & TZOANNOS, supra note 3, at 62-65 (looking at competition policy in context of maritime industry).

79. See BREDIMA-SAVOPOULOU & TZOANNOS, supra note 3, at 48 (noting that governments may treat maritime sector differently from other economy sectors with respect to employment of non-nationals).

80. See PROTECTIONISM, supra note 10, at 9-11 (detailing importance of maritime transport for growing world commercial exchange).

81. Id. It would be possible nowadays for a ship built, for example, in Japan to have a Greek owner and be manned by a crew of mixed nationality, including, for instance, Italian officers and Philippino crew. Id. The ship owner may also have received financing from a New York bank and insured the vessel in London. Id.


84. See BERMANN ET AL., supra note 22, at 50 (identifying European Court of Justice
movement of labor\textsuperscript{85} and nondiscrimination on the basis of nationality\textsuperscript{86} applicable to the maritime transport sector.\textsuperscript{87} The employment of other EC nationals on board a vessel flying the flag of a Member State should therefore be as free and unimpeded as the employment of workers in any of the other EC industries.\textsuperscript{88} A major qualification to the free employment of seafarers on board EC ships takes into account passenger safety considerations.\textsuperscript{89} Member States may require that a certain percentage of the crew members, and, in particular, those nominated on muster-rolls\textsuperscript{90} to assist passengers in emergency situations, have communication skills sufficient for that purpose.\textsuperscript{91}

\textsuperscript{85} See EC Treaty, supra note 1, art. 5(c), [1992] 1 C.M.L.R. at 588 (providing for the free movement of persons, as between Member States).

\textsuperscript{86} EC Treaty, supra note 1, art. 48(2), [1992] 1 C.M.L.R. at 612. Article 48(2) states:

\begin{quote}
Such freedom of movement [of workers] shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.
\end{quote}

\textit{Id.}


\textsuperscript{88} See id. at 371, ¶¶ 32-33, [1974] 2 C.M.L.R. at 219 (asserting that general EC Treaty rules apply to maritime transport).


\textsuperscript{90} See BLACK'S LAW DICTIONARY, supra note 5, at 1019 (defining muster-roll as list of "a ship's company, required to be kept by the master or other person having care of the ship, containing the name, age, national character, and quality of every person employed in the ship.").

\textsuperscript{91} Council Directive 94/58, supra note 89, art. 8(2), O.J. L 319/28, at 31 (1994). Article 8(2) requires that Member States shall ensure that:

on board passenger ships, personnel nominated on muster lists to assist passengers in emergency situations are readily identifiable and have communication skills that are sufficient for that purpose, taking into account an appropriate and adequate combination of any of the following criteria:

(a) the language or languages appropriate to the principal nationalities of passengers carried on a particular route;
Those skills may include speaking the language or languages appropriate to the principal nationalities of passengers carried on a particular route.92

Among the EC fleets, the fleets of Belgium, Denmark, Germany, Greece, the Netherlands, and the United Kingdom regularly employ non-national seafarers from third countries, particularly from the Philippines, India, Bangladesh, and South Korea.93 The major economic incentive for the employment of seafarers from third countries on board EC flagged vessels is the opportunity to hire third-country crew members at wages and other conditions of employment which reflect the labor conditions in the seafarers’ country of origin.94 Hiring seafarers from developing countries thus translates into labor cost savings for the EC maritime industry.95

b. International Maritime Affairs

In historical terms, international trade and shipping services developed out of the transport services between a metropolitan country and a colony96 for the purpose of expanding the export

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(b) the likelihood that an ability to use elementary English vocabulary for basic instructions can provide a means of communicating with a passenger in need of assistance whether or not the passenger and crew member share a common language; . . . .
(d) the extent to which complete safety instructions have been provided to passengers in their native language or languages;
(e) the languages in which emergency announcements may be broadcast during an emergency or drill to convey critical guidance to passengers and to facilitate crew members in assisting passengers.

Id. 92. Id.
94. See BREDIMA-SAVOPOULOU & TZOANNOS, supra note 3, at 50-51 (relating employment trends in maritime industries of EC Member States in 1970’s and 1980’s).
95. Id.
96. See 9 THE OXFORD ENGLISH DICTIONARY 701 (2d ed. 1989) (defining metropolitan as “belonging to the mother country, as distinct from colonial territories.”). The word metropolitan derives from metropolis, which means “chief center or seat of some form of activity.” Id. See also Sweeney, supra note 71, at 482-88 (discussing rise and fall of European colonial empires in period between fifteenth and twentieth centuries). The First British Empire lasted from 1497 until 1783, when the Peace Treaty with the United States put an end to the British rule in North America. Id. at 487 n.17. The Second British Empire spanned Australia, India, New Zealand, and Africa, and lasted
The European colonial powers established and maintained overseas colonies in order to increase the wealth of their own nations by insuring a continuous flow of raw materials, at controlled prices, from the shores of Africa, Asia, and the Americas. The prevailing economic theory of the sixteenth and seventeenth centuries, mercantilism, asserted that a nation's strength and prosperity depended on the amassing of reserves of gold and silver. To achieve prosperity, the metropolitan countries first had to create, and then expand, foreign trade, and develop production for export while limiting imports to raw materials. Consequently, even without cabotage restrictions reserving the trade to national ships, the shipping services of the metropolitan country inevitably gained a dominant position. In most cases, this dominant position sur-

from 1788 to 1931, when Britain and the independent self-governing former colonies entered into the British Commonwealth of Nations. Id. The First British Empire drove the French out of North America and India, but France established its colonial power in Africa after 1830, and the French empire ruled over North, Central and West Africa, Indochina and the South Pacific until 1960. Id. The Spanish colonial empire began with Columbus' first voyage to America and collapsed in 1898, with Spain's defeat in the war with the United States over Cuba. Id. at 482-83 n.6. The Portuguese Empire existed from 1497 to 1974 and comprised colonies in parts of Africa, Asia, and South America. Id. at 485-86 n.14. The Dutch colonial expansion started in 1602, when the Dutch drove the Portuguese and Spanish from Southeast Asia and South Africa, and ended in 1949, when the Netherlands East Indies gained their independence. See 1 SÉSAM ATLAS BIJ DE WERELDGESCHIEDENIS 245 (1987) (tracing beginning of Netherlands colonies in Africa and Asia); 2 id. 225 (describing disintegration of world colonial powers). In more modern times, Germany, Italy, and Belgium established their colonies in Africa. Id. at 109-119. The German colonial empire lasted only from 1870 to 1918, and the Belgian colonial rule extended from 1885 to 1960. Id. Italy kept her colonies between 1911 and 1941. Id.

97. See SHIPPING, supra note 30, at 3-6 (discussing role of shipping in international relations and trade).

98. See Sweeney, supra note 71, at 482-88 (narrating history of colonial empires that Britain, France, Spain, Portugal, Netherlands, Germany, Belgium, and Italy maintained from fifteenth to seventeenth centuries).

99. See id. at 487-88 (detailing policies underlying European colonial expansion).

100. See W. CUNNINGHAM, THE GROWTH OF ENGLISH INDUSTRY AND COMMERCE IN MODERN TIMES 177 (6th ed. 1925) (describing mercantilism as seventeenth century economic policy whose central aim was amassing of treasure in form of gold and silver).

101. See id. (noting that inducing influx of precious metals was mercantilists' main objective).

102. See id. (describing mercantilists' belief that "the encouragement of export trade, and diminution of imports would leave a balance [of precious metals] in favor of the [metropolitan] country.").

103. See SHIPPING, supra note 30, at 3-6 (describing development of international trade out of shipping services between metropolitan countries and their colonies);
vived the change of status of the former colonies.\textsuperscript{104}

Because shipping is vital in international trade,\textsuperscript{105} a developed maritime industry plays a major role in the economic and political integration of the developing countries into the world economy.\textsuperscript{106} Only the existence of a strong national fleet and the consequent control over shipping services can ensure the developing countries continuous and uninterrupted integration into the world economy.\textsuperscript{107} As a result, in the post-World War II period, developing countries followed a consistent policy of subsidizing and protecting their newly created national fleets.\textsuperscript{108}

Mounting pressure, mainly from developing countries in the years following World War II, led to the establishment of UNCTAD whose main purpose is to use trade and aid to assist third-world countries in developing their national economies.\textsuperscript{109} The signing of the United Nations Convention on the Code of Conduct for Liner Conferences\textsuperscript{\textsuperscript{110}} ("U.N. Liner Code") in 1974

\textsuperscript{104}GOLD, supra note 13, at 274 (noting connection between colonial trade and development of world trade and prosperity).

\textsuperscript{105}See SHIPPING, supra note 30, at 3-6 (referring to weak position of developing countries on world maritime market following their independence); GOLD, supra note 13, at 276 (mentioning domination of world shipping by developed countries in 1950s and 1960s).

\textsuperscript{106}See id. (noting dependance of international trade on shipping services); GOLD, supra note 13, at 276 (relating central role of maritime transport for development of international trade). In historic terms, "[f]om time immemorial, [maritime transport] . . . has been the backbone of commercial viability." Id. Thus for example, within a single century, from the mid-1800s to the mid-1900s, the wealth and prosperity of the European colonial countries increased over ten times. Id. at 274. The major source of the prosperity of the European colonial powers was the trade with their colonies. Id.

\textsuperscript{107}Id.; see PROTECTIONISM, supra note 10, at 7-15 (discussing development and problems of protectionism in international shipping).

\textsuperscript{108}See id.; see PROTECTIONISM, supra note 10, at 2-11 (focusing on role of national fleet for promotion of national trade). See also PROTECTIONISM, supra note 10, at 7-15 (discussing importance of maritime transport in international trade); GOLD, supra note 13, at 279 (describing developing countries' argument that shipping is "a vital service to them, and . . . regardless of profitability, they needed reliable maritime transport."

\textsuperscript{109}See Shipping, supra note 30, at 153-246 (analyzing prevailing conditions of world trade and shipping in period following World War II).

\textsuperscript{110}See Sweeney, supra note 71, at 484 n.10 (explaining purpose of UNCTAD).
further affected the relations among the world’s maritime industries. The cargo-sharing provisions of the U.N. Liner Code make the U.N. Liner Code discriminatory and protectionist in nature.

The U.N. Liner Code received much support from the developing countries, but a mixed reception from the developed maritime nations. Among the EC Member States, France, Belgium, and Germany voted in its favor, while the United Kingdom and Denmark opposed the U.N. Liner Code. The divergence of opinion concerning joining the U.N. Liner Code presented the European Community with a problem. The different positions that EC Member States took toward ratification of the U.N. Liner Code was likely to result in wide divergence between individual Member States’ shipping practices within the Community. The EC Treaty requires, however, that the Community approach matters concerning transport within a Common Transport Policy. Adopting a common position on the


111. See SHIPPING, supra note 30, at 16-18 (discussing long negotiations before signing of U.N. Liner Code and opposition to U.N. Liner Code by developed countries, particularly United Kingdom, United States of America, and Denmark). The developed maritime nations found the regulation of liner conferences undesirable because restrictions on free competition in the liner conference system was likely to increase prices. Id. at 17.

112. U.N. Liner Code, supra note 110, art. 2. Article 2 distributes maritime transport according to the 40-40-20 formula, i.e., 40% of the sea trade is carried by liner vessels of the exporter country, 40% by liners of the importer country and 20% is left open to third country carriers. Id. at 13 I.L.M. at 920-21.

113. See SHIPPING, supra note 30, at 17-18 (detailing effect of Article 2 of U.N. Liner Code on relations between developed and developing countries).

114. See id. at 16 (relating response of world maritime industries to U.N. Liner Code).

115. Id.

116. Id.


118. See SHIPPING, supra note 30, at 16 (relating effect of U.N. Liner Code on Community’s efforts at common transport policy).

119. Id.

120. See EC Treaty, supra note 1, art. 74, [1992] 1 C.M.L.R. at 623 (asserting that
U.N. Liner Code became an important EC objective,121 and in 1979, the Council passed Council Regulation 954/79122 ("Regulation 954/79") which committed the EC Member States to the U.N. Liner Code's provisions.123 Regulation 954/79 required Member States to adopt124 the U.N. Liner Code subject to certain modifications, the most important of which was that the cargo-allocation provisions of the U.N. Liner Code will not apply in conference trade between Member States.125 The U.N. Liner Code in its entirety, however, will apply to the trades between Member States and developing countries.126

c. Competition Policy

The most common concern of a government's competition policy, in the maritime market context, relates to the system of liner conferences, which involves price-fixing127 and market sharing128 arrangements.129 The extent to which liner confer-

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122. See id. (encouraging Member States to ratify or accede to U.N. Liner Code).


124. See 1996 C.M.I. Y.B. 468 (listing U.N. Liner Code signatories). Today, the only maritime Member States which have not ratified the U.N. Liner Code are Greece and Ireland. Id.

125. See Regulation 954/79, supra note 110, art. 4(2), O.J. L 121/1, at 2 (1979) (stating that Article 2 of U.N. Liner Code "shall not be applied in conference trades between Member States."). Article 3(1) of Regulation 954/79 provides that the share allocated under the U.N. Liner Code to EC lines participating in liner conferences "shall be redistributed . . . on the basis of a unanimous decision by those shipping lines which are members of the conference and participate in the redistribution." Id. art. 3(1), O.J. L 121/1, at 2 (1979). Article 3(2) further provides that the "share finally allocated to each participant shall be determined by the application of commercial principles." Id. art. 3(2), O.J. L 121/1, at 2 (1979). Article 4(2) also allows Member States to apply the same principles in conference trade between Member States and other OECD countries, provided the conference members can reach suitable reciprocal agreements on the redistribution of cargo allocation. Id. art. 4(2), O.J. L 121/1, at 2 (1979).

126. See id. art. 4(3), O.J. L 121/1, at 2 (1979) (stating that Article 4(2) shall not affect opportunities for participation of developing countries in conference trades).

127. See BLACK'S LAW DICTIONARY, supra note 5, at 1189 (defining price-fixing as "[t]he cooperative setting of price levels or range by competing firms, which would otherwise be set by natural market forces."); CAFRUNY, supra note 13, at 55 (stating that "at a minimum, conferences fix freight rates on particular trade routes," thus eliminating price competition among its members).

128. See BLACK'S LAW DICTIONARY, supra note 5, at 971 (referring to market share
ences restrict free competition on the maritime market depends on whether the conferences are open or closed. Open conferences keep liner trades open to new members, while closed conferences resist admission of new members. Closed conferences, furthermore, often preclude outside shipping lines that are not members of a conference from access to the relevant liner trade. Within the frameworks of UNCTAD and the Organization for Economic Co-operation and Development ("OECD"), all EC Member States except Greece have sought to reconcile the usefulness of the existing liner conferences for securing regular and frequent services, on the one hand, and the need to limit the conference practices that distort competition, on the other. All EC Member States, apart from Ireland and Greece, have respectively ratified the U.N. Liner Code. EC Member States, in general, favor the closed conference system, which means that entry into a conference is limited to

as percentage of market "controlled by a firm."); SINGH, supra note 30, at 109 (explaining that liner conferences aim at reserving cargoes for their members).

129. See BREDIMA-SAVOPOULOU & TZOANNOS, supra note 3, at 62 (analyzing competition policy as element of a government's maritime policy); ROCHDALE REPORT, supra note 8, at 116 (defining conference as "any type of formal or informal agreement between shipowners that restricts competition."); CAFRUNY, supra note 13, at 57 (characterizing shipping conferences as "the most obvious form of restraint on competition.").

130. See BREDIMA-SAVOPOULOU & TZOANNOS, supra note 3, at 62 (discussing relation between liner conferences and government's competition policy).

131. See id. at 62-64 (describing distinction between open and closed liner conferences); B.M. DEAKIN & T. SEWARD, SHIPPING CONFERENCES: A STUDY OF THEIR ORIGINS, DEVELOPMENT AND ECONOMIC PRACTICES 1 (1973) (explaining that open conferences "may be joined by any shipowner without the consent of existing members.").

132. See SINGH, supra note 30, at 109 (discussing closed liner conferences); DEAKIN & SEWARD, supra note 131, at 1 (clarifying that new members can join closed conferences only with consent, usually by unanimous vote, of existing members).

133. See BREDIMA-SAVOPOULOU & TZOANNOS, supra note 3, at 62 (discussing effect of liner conferences on free competition as depending on whether conference is closed or open, and on position of closed conferences with respect to non-member liner companies); SINGH, supra note 30, at 109 (describing closed conference practices).

134. See OECD Convention, supra note 10 (defining OECD purpose and membership).

135. See BREDIMA-SAVOPOULOU & TZOANNOS, supra note 3, at 64 (relating how Greek government has opted for more stringent international rules allowing all qualified shipping companies to join liner conferences). Id. The Greek position reflects the great difficulties Greek shipping companies have experienced in their attempts to join liner conferences. Id.

136. Id.

137. See 1996 C.M.I. Y.B., supra note 124, at 468 (listing all states that have ratified U.N. Liner Code).

138. See BREDIMA-SAVOPOULOU & TZOANNOS, supra note 3, at 15 (noting prevalence
the shipping companies with which existing member companies wish to cooperate.\textsuperscript{139} EC Member States' governments have, however, pursued open policies concerning liner companies which are not members of a closed liner conference, aimed at keeping liner conferences in which Member States participate open to outsiders.\textsuperscript{140}

d. Protectionist Activities

Protectionism in shipping takes different forms,\textsuperscript{141} the most widely-spread of which are various manifestations of flag preference and state aid and assistance.\textsuperscript{142} The major categories of flag preference are cargo reservation\textsuperscript{143} and cabotage restric-

of closed conferences in system of liner conferences in which Member States participate); \textit{Capruny}, \textit{supra} note 13, at 196 (referring to preference of West European shipping companies for closed conferences). Liner conferences developed originally from the liner companies serving the trade between the European metropolitan countries and their colonies. \textit{Bredima-Savopoulou & Tzannos}, \textit{supra} note 3, at 15; \textit{see} \textit{Capruny}, \textit{supra} note 13, at 53-54 (tracing development of liner conferences to nineteenth century trades with colonies); \textit{Protectionism, supra} note 10, at 33 (stating that liner conferences were initially established to organize and control trade between colonial powers and their overseas possessions); \textit{Gold, supra} note 13, at 115-16 (noting that by end of 19th century, conference agreements covered major part of shipments from Europe to South America, Africa, India, Australia, and Far East). The traditionally strong ties between the former metropolitan countries and their colonies persist today in the closed conferences dominating the EC liner trades. \textit{See Bredima-Savopoulou & Tzannos, supra} note 3, at 15 (analyzing EC liner trades).

139. \textit{See Bredima-Savopoulou & Tzannos, supra} note 3, at 15 (explaining meaning of closed conferences).

140. \textit{See id.} at 64 (describing EC Member States' position regarding outsiders). Outsiders are liner companies which are not members of liner conferences. \textit{Id.}

141. \textit{See Protectionism, supra} note 10, at 11 (overviewing existence and role of protectionism in international shipping).

142. \textit{Id.} at 16-17 (analyzing types of protectionist measures states customarily employ in their shipping policy).

143. \textit{See id.} at 72 (explaining cargo reservation as generic term covering cargo sharing and cargo preference). Both cargo sharing and cargo preference involve state action, in the form of adopting legislation or concluding treaties, aimed at reserving a certain portion of trade for vessels flying the national flag. \textit{See George H. Hearn, Cargo Preference and Control, 2 J. Mar. L. & Com. 481, 481-82 (1971) (analyzing underlying principles and essence of cargo reservation practices). Cargo sharing means literally "sharing" available cargo among participating parties and is the most fair of the restrictive shipping practices governments employ. B.N. Metaxas, THE ECONOMICS OF TRAMP SHIPPING 24-26 (1971). Under cargo preference practices, a government allocates available cargo giving priority to its domestic carriers, or trading partners, rather than leave cargo distribution to free market forces. \textit{Protectionism, supra} note 10, at 73. Another method of effecting cargo preference is to reserve high quality cargoes which generate higher freight rates to ships flying the national flag, while distributing the bulky, low quality cargoes to other ships. \textit{Id.}
tions.\textsuperscript{144} Financial aid\textsuperscript{145} and fiscal relief\textsuperscript{146} to the national maritime industry are the usual forms of state aid and assistance.\textsuperscript{147}

i. Cabotage

Cabotage or coasting trade,\textsuperscript{148} refers to the trade or navigation in coastal waters between two points within a country.\textsuperscript{149} Cabotage also refers to the right to engage in trade and navigation in coastal waters and to the restriction of that right to domestic carriers.\textsuperscript{150} The term in essence denotes the discriminatory practice of keeping foreign flags out of coastal waters\textsuperscript{151} and

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\textsuperscript{144} SeeColombos, \textit{supra} note 13, at 583 (defining cabotage as practice of excluding foreign vessels from coastal trade).
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\textsuperscript{145} See Protectionism, \textit{supra} note 10, at 147 (identifying operating subsidies as main form of financial aid). A subsidy is a "grant of money made by government in aid of the promoters of any enterprise, work, or improvement in which the government desires to participate, or which is considered a proper subject for government aid, because such purpose is likely to be of benefit to the public." Black's Law Dictionary, \textit{supra} note 5, at 1428.
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\textsuperscript{146} See Protectionism, \textit{supra} note 10, at 147 (describing fiscal relief as depreciation privileges government extends to shipping industry). Depreciation privileges refer to the reasonable allowance a taxpayer may deduct from her taxable income "for the exhaustion, wear and tear (including a reasonable allowance for obsolescence) of property used in the trade or business, or of property held for the production of income." I.R.C. § 167(a) (1986). The Internal Revenue Code ("I.R.C.") is that body of law which codifies all federal tax laws in the United States of America. Black's Law Dictionary, \textit{supra} note 5, at 816.
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\textsuperscript{147} Protectionism, \textit{supra} note 10, at 147.
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\textsuperscript{149} See Black's Law Dictionary, \textit{supra} note 5, at 202 (identifying cabotage with coasting trade "so that it means navigating and trading along the coast between the ports thereof."). Cabotage is the contrast to navigation on the open sea and to over-sea trade between distant parts of the globe. Oppenheim, \textit{supra} note 148, at 329. Open sea designates the "mass of any great body of water, as distinguished from its margin or coast, its harbors, bays, creeks, inlets." Black's Law Dictionary, \textit{supra} note 5, at 1091.
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\textsuperscript{150} See Webster's Dictionary, \textit{supra} note 19, at 310 (stating that cabotage is "trade or transport in coastal waters or between two points within a country especially by other than domestic carriers."). Etymologically the word derives from the French \textit{caboter}, "to sail along the coast", which originated from the Spanish \textit{cabo} meaning "promontory," which in turn developed from the Latin for head, caput. Id. The term cabotage originally indicated navigation from cape to cape along the same coast-line without going out into the open sea. Oppenheim, \textit{supra} note 148, at 329. The original meaning of cabotage has expanded over the centuries to include navigation and trade between two ports of the same state, irrespective of whether the ports are on the same coast or on different coasts. Id. at 330.
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\textsuperscript{151} See Protectionism, \textit{supra} note 10, at 75-76 (referring to cabotage as discriminatory exclusion of foreign flag ships from coastal waters); L. Oppenheim, International Law, A Treatise, Vol. I - Peace 625 n.4 (H. Lauterpacht ed., 9th ed. 1955)
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thus often constitutes an element of a government's maritime policy as a category of flag preference. The idea behind cabotage restrictions is to promote the development of national merchant fleets. The U.S. Jones Act of 1920 is a well-known case in point, requiring U.S.-built, U.S.-owned, and U.S.-manned vessels to carry out all coastal trade.

With respect to the European Community, in 1985, one year before the enactment of the 1986 Legislative Package on maritime policy, cabotage restrictions were in force in France.


The U.S. Congress has maintained protectionist legislation, such as the Jones Act, because Congress believes that a viable merchant fleet is requisite for both commercial and defensive purposes. See Hearn, supra note 143, at 481-82 (outlining cargo preference systems of United States as expression of protectionist policy in maritime industry and purpose behind cargo preference policy); Merchant Marine Act of 1936, 46 App. U.S.C. § 1101. Section 1101 asserts that

[i]t is necessary for the national defense and development of its foreign and domestic commerce that the United States shall have a merchant marine (a) sufficient to . . . provide shipping service essential for maintaining the flow of [its] domestic and foreign water-borne commerce at all times [and] (b) capable of serving as a naval and military auxiliary.

Id.
Germany, Greece, Italy, Portugal, and Spain.\(^\text{157}\) Denmark maintained cabotage restrictions for the trade with the Faroes.\(^\text{158}\) At that time, in all of the above Member States, except for Germany, cabotage involved mostly services to islands,\(^\text{159}\) for example, islands in the Aegean Sea,\(^\text{160}\) Madeira,\(^\text{161}\) the Balearies,\(^\text{162}\) Corsica,\(^\text{163}\) and Sicily.\(^\text{164}\) Because coastal trade provides vital services of goods and passenger carriage to various parts of their countries,\(^\text{165}\) it has national security implications,\(^\text{166}\) thus the Member States defended the maintenance of cabotage restric-

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\(^\text{157}\) See Bredima-Savopoulou & Tzannos, supra note 3, at 42-43 (reviewing existence of cabotage restrictions in EC Member States).

\(^\text{158}\) Id.; see 5 Encyclopedia Britannica, supra note 12, at 736 (explaining that Faroe Islands are autonomous dependency of Denmark situated between Great Britain and Iceland).

\(^\text{159}\) Id.

\(^\text{160}\) See 1 Encyclopedia Britannica, supra note 12, at 197 (defining Aegean Sea as sea situated in area between Greek mainland and Asia Minor).

\(^\text{161}\) See 9 id. at 175 (noting that Madeira is name of island situated in Atlantic Ocean, about 400 miles from North-West coast of Africa).

\(^\text{162}\) See Webster's Dictionary, supra note 19, at 166 (describing Balearic Islands as group of islands in Mediterranean Sea off coast of Spain including especially Majorca, Minorca, and Ibiza).

\(^\text{163}\) See id. at 515 (defining Corsica as French island in Mediterranean Sea).

\(^\text{164}\) See id. at 2110 (explaining that Sicily is Italian island in Mediterranean Sea, west of Italian peninsula).

\(^\text{165}\) See Sweeney, supra note 71, at 552 (noting importance of cabotage for guaranteeing year round access to mainland for island dwellers in Mediterranean and North Sea areas); Bredima-Savopoulou & Tzannos, supra note 3, at 42 (noting role of coastal shipping for constant and uninterrupted carriage of goods and passengers between different points along Member States' coasts). In countries with a long coastal line or with terrain consisting of a number of separate land areas such as island archipelagoes, as in the case of Greece, the Northern parts of the United Kingdom, Denmark, and Norway, a shipping fleet linking the various parts of the country becomes essential. Shipping, supra note 30, at 5.

\(^\text{166}\) See Bredima-Savopoulou & Tzannos, supra note 3, at 42 (referring to Member States' argument that production of maritime services entail national security dimension). Greece, for example, was particularly concerned about its national defense due to the location of a significant number of Greek islands in close proximity to Turkey, with which relations have not always been good. Id. at 158. Greece was unwilling to relinquish control over maritime services to and from those islands. Id. See also Shipping, supra note 30, at 5-6 (describing most nations' unwillingness to permit any dependence on foreign shipping services in coastal trade). By imposing cabotage restrictions, a state establishes control over coastal services which are a means of transport essential for maintaining efficient national communication and economic unification. Id. A well-developed communication infrastructure is vital for a state's national defense. Id. Strong merchant fleets also serve as military auxiliaries in time of war or national emergency. Hearn, supra note 156, at 482.
tions on strategic grounds.\textsuperscript{167}

ii. Other Protectionist Activities

Cargo reservation is another major form of flag preference protectionism.\textsuperscript{168} Specific state practices coming under the heading of cargo reservation include cargo sharing\textsuperscript{169} and cargo preference.\textsuperscript{170} Cargo sharing describes the distribution of available cargo among a country's national shipping companies and the shipping companies of the country's trading partners.\textsuperscript{171} The U.N. Liner Conference provides an example of a multilateral cargo sharing agreement.\textsuperscript{172} The U.N. Liner Code allocates forty percent of the trade to vessels of the exporting country, forty percent to vessels of the importing country, and leaves the remaining twenty percent of the trade to third-country shipping lines.\textsuperscript{173}

Cargo preference refers to the practice of enacting laws

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\item[\textsuperscript{167}] See BREDIMA-SAVOPOULOU & TZOANNOS, supra note 3, at 42 (discussing arguments by EC Member States for maintaining cabotage restrictions).
\item[\textsuperscript{168}] See PROTECTIONISM, supra note 10, at 71 (describing cargo reservation as category of flag preference).
\item[\textsuperscript{169}] See CAFRUNY, supra note 13, at 26 (defining cargo sharing as practice of dividing cargoes among fleets of trade-generating nations).
\item[\textsuperscript{170}] See PROTECTIONISM, supra note 10, at 71 (analyzing sub-elements of cargo reservation); CAFRUNY, supra note 13, at 59 (defining cargo preference as type of flag preference reserving cargoes for vessels under national flag).
\item[\textsuperscript{171}] See PROTECTIONISM, supra note 10, at 71 (discussing cargo sharing); CAFRUNY, supra note 13, at 26 (defining cargo sharing).
\item[\textsuperscript{172}] See SINGH, supra note 30, at 109-110 (1978) (characterizing U.N. Liner Code as spelling out rational criteria for cargo sharing in world maritime transport); PROTECTIONISM, supra note 10, at 72 (noting that U.N. Liner Code serves as good example of principles behind cargo sharing); BREDIMA-SAVOPOULOU & TZOANNOS, supra note 3, at 41 (referring to U.N. Liner Code as typical cargo sharing arrangement).
\item[\textsuperscript{173}] U.N. Liner Code, supra note 110, art. 2(4), 13 I.L.M. at 920-21. Article 2(4) of the U.N. Liner Code states:
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When determining a share of trade within a pool of individual member lines and/or groups of national shipping lines ... the following principles regarding their right of participation in the trade carried by the conference shall be observed, unless otherwise mutually agreed:
\begin{enumerate}
\item[(a)] The group of national shipping lines of each of two countries the foreign trade between which is carried by the conference shall have equal rights to participate in the freight and volume of traffic generated by their mutual foreign trade and carried by the conference;
\item[(b)] Third-country shipping lines, if any, shall have the right to acquire a significant part, such as 20 per cent, in the freight and volume of traffic generated by that trade.
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\textit{Id.}
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mandating that national flag vessels carry a certain proportion of export and import cargo in various trades.\textsuperscript{174} Cargo preference, as a protectionist state policy, is most advanced in the Latin American region.\textsuperscript{175} On the average, fifty percent of all export and import cargoes to and from the countries of Latin America must move on national vessels.\textsuperscript{176}

The most common forms of state aid and assistance that governments resort to in order to improve their merchant fleets' competitive position are financial aid and fiscal relief to the maritime industry.\textsuperscript{177} Financial aid often comes in the shape of maritime subsidies.\textsuperscript{178} The purpose of maritime subsidies is to maintain services, which are essential to the public welfare or national interest, at a price that the public can readily afford.\textsuperscript{179} Without governmental financial aid the services in question would come

\begin{itemize}
\item \textsuperscript{174} See \textit{Cafruny}, \textit{supra} note 13, at 59 (noting that cargo preference refers to practice of reserving cargoes for domestic vessels); \textit{Protectionism}, \textit{supra} note 10, at 73 (defining cargo preference as governmental policy aimed at setting up order for carrier preference in favor of domestic carriers); Hearn, \textit{supra} note 142, at 481 (describing cargo preference as practice of many countries to ensure certain amounts of their ocean commerce for their national merchant fleets). The most frequent form of cargo preference covers allotting government-financed or government-controlled exports, military-related cargoes, or foreign aid shipments to ships of the national flag. \textit{Cafruny}, \textit{supra} note 13, at 59. See also \textit{Singh}, \textit{supra} note 30, at 77 (justifying cargo preference practice on grounds of government possession and control over cargoes which are subject of cargo preference).
\item \textsuperscript{175} See \textit{Cafruny}, \textit{supra} note 13, at 159-62 (reviewing cargo preference practices in world shipping); Hearn, \textit{supra} note 143, at 489-91 (examining cargo preference laws in Latin American countries); \textit{Michael Morris, International Politics and the Sea: The Case of Brazil} 267-82 (1979) (analyzing major common characteristics of shipping policies of Latin American countries).
\item \textsuperscript{176} See \textit{Cafruny}, \textit{supra} note 13, at 160 (reporting on significant cargo preferences under national law in developing countries). In 1984, Argentina, Chile, Colombia, and Uruguay reserved 50\% of imports and exports for domestic carriers. \textit{Id.} The Dominican Republic reserved 40\% of the seagoing trade to her national flag ships, and Peru reserved 30\%. \textit{Id.} Brazil mandated that 100\% of government-related goods travel on Brazilian ships. \textit{Id.} See also Hearn, \textit{supra} note 143, at 489-91 (describing cargo preference practices in each Latin American country).
\item \textsuperscript{177} See \textit{Protectionism}, \textit{supra} note 10, at 147 (describing major forms of state aid to shipping).
\item \textsuperscript{178} \textit{Id.;} see \textit{Cafruny}, \textit{supra} note 13, at 57 (characterizing subsidies as promotional government measure designed to assist national flag shipping). A subsidy is a payment to individuals or businesses by a government for which the government receives no products or services. \textit{Protectionism}, \textit{supra} note 10, at 147.
\item \textsuperscript{179} See \textit{Protectionism}, \textit{supra} note 10, at 148 (defining maritime subsidies); \textit{Grant Gilmore & Charles L. Black, Jr., The Law of Admiralty} 970-71 (1975) (noting that grant of operating subsidy to U.S. shipping industry requires determination of public interest).
\end{itemize}
to the public at a much higher price. The operational maritime subsidy in the United States provides a typical example of a state subsidy to the shipping industry. In the United States, the operational subsidy is based on the difference between the fair and reasonable cost of insurance, maintenance, repairs not compensated by insurance, and wages of officers and crew.

Governments may also extend special protection to the national maritime industry by adjustments in government fiscal policy. Tax depreciation allowances to the shipping industry are a major form of fiscal relief. Depreciation refers to a reduction in the value of fixed assets. The effect of depreciation

180. PROTECTIONISM, supra note 10, at 147. In the United States, for example, the federal government subsidizes airlines to carry mail, railroads and other means of public transportation, and the merchant marine industry to build and operate ships. Id.; see GILMORE & BLACK, supra note 179, at 970-71 (tracing development of U.S. program of maritime subsidies). Since World War I, the U.S. shipping industry has been unable to compete in international maritime transport without U.S.-government help. GILD, supra note 15, at 192. See also SIR OSBORNE MANCHE, INTERNATIONAL SEA TRANSPORT 74 (1945) (describing U.S. shipping as instrument of national policy maintained at large cost to serve total needs of commerce and defense).

181. See CAIRNS, supra note 13, at 66 (tracing beginnings of U.S. “elaborate system of subsidies to shipping” in 1920s and 1930s); GILMORE & BLACK, supra note 13, at 195 (describing U.S. Merchant Marine Act of 1936 as “the first maritime-policy formulation anywhere” serving as model for all later U.S. shipping legislation). The Merchant Marine Act of 1936 set up a subsidy system aimed at removing the competitive disadvantage to the U.S. merchant fleet due to the higher cost of U.S. flag operation in comparison with non-American shipping companies. See 46 App. U.S.C. §§ 1171-1182 (providing for “operating-differential subsidy” to vessels); GILMORE & BLACK, supra note 179, at 969-70 (describing U.S. state subsidies to shipping industry).

182. 46 App. U.S.C. § 1173. Exceptionally high operating costs can be due to reasons beyond the control of the shipowner. PROTECTIONISM, supra note 10, at 152. In the United States, the high national wage level puts the operation of U.S. vessels at a particular disadvantage. Id.; see GILMORE & BLACK, supra note 179, at 970 (ascribing high cost of U.S. vessel operation to high crew wages).

183. See CAIRNS, supra note 13, at 60 (describing forms of fiscal relief as expression of protectionist policies).

184. Id. at 19; PROTECTIONISM, supra note 10, at 161-64 (analyzing depreciation as type of state aid governments extend to national maritime industries).

185. See PROTECTIONISM, supra note 10, at 161 (analyzing depreciation). Fixed assets are assets of permanent or long-term nature used in the operation of a business and not intended for sale, for example, equipment, plant, or property. BLACK’S LAW DICTIONARY, supra note 5, at 118. Three factors determine the amount of the depreciation allowance. See 1 BORIS I. BITTNER & LAWRENCE LOKKEN, FEDERAL TAXATION OF INCOME, ESTATES AND GIFTS 23-3 (2d ed. 1989) (defining concept of depreciation and methods of determining depreciation allowance). The period of time during which the taxpayer expects to use the depreciable property, known as the property’s useful life, is one of the three factors. Id. Another factor is the original purchase price of the property. Id. The other factor is the value of the property at the end of the property’s useful life,
allowances is to decrease tax obligations and correspondingly improve the cash flow resulting from an investment in ships, which ultimately results in promotion of national shipping.

EC Member States have expressed a clear preference for a liberal approach to maritime transport. This preference underlies the Member States' common commitment to promote the principle of free access to shipping in international trade in free and fair competition. Despite this general commitment, EC Member States have pursued some measure of protectionist

which determines the property's salvage value. The depreciation allowance is determined by allocating the excess of the property's original cost over the property's salvage value among the taxable years during the property's useful life. Under the straight line method, the excess of cost over salvage is spread in equal amounts over the years of the property's useful life. Because the life of a ship is a function of use rather than of time, the maritime industry employs the production method, which calculates depreciation in proportion to the number of hours of operation of the ship, rather than the ship's projected useful life. Protectionism, supra note 10, at 161. Under an accelerated method, the depreciation allowance is relatively large when the taxpayer first places the property in service and steadily declines in succeeding periods. Bittker & Lokken, supra, at 29-24.

See Bredima-Savopoulou & Tzoannos, supra note 3, at 38 (looking at role of fiscal concessions in maritime industries).

See CAFRUNY, supra note 13, at 19 (relating effect of tax depreciation allowances on national shipping industries).

See Fred L. Block, Origins of International Economic Disorder: A Study of U.S. International Monetary Policy from World War II to the Present 32-42 (1977) (making distinction between "liberal internationalism" and "national capitalism" in post-World War II world economy). The liberal internationalism approach in the post-World War II era called for free trade in an open world market, where rival powers would no longer need to create exclusive commercial spheres. CAFRUNY, supra note 13, at 74. Liberalism also pressed for the dissolution of the existing imperial blocs and the establishment of a system based on equal opportunity for all nations instead. Id. The national capitalism approach, by contrast, insisted on preserving the existing imperial blocs and exclusive economic spheres as a means of solving the problem of post-war reconstruction. See id. at 73-75 (describing international economic climate in post-World War II period).

See Bredima-Savopoulou & Tzoannos, supra note 3, at 37 (presenting EC Member States' stance on protectionist activities in maritime transport); CAFRUNY, supra note 13, at 230-31 (noting that understanding limitations of purely national policies, EC Member States have sought to repel commercial and political challenges stemming from protectionist practices by third countries).

Bredima-Savopoulou & Tzoannos, supra note 3, at 37; see Commission Communication II, supra note 10, COM (96) 81 Final, at 20 (emphasizing EC objective of securing free access and fair competitive conditions throughout global shipping market); OECD, Code of Liberalisation of Current Invisible Operations, Annex A, 59 n.1 (1962) [hereinafter OECD Code] (asserting adherence of governments of OECD Member States to principle of free and fair competition in international shipping and trade).
intervention in the maritime market.\textsuperscript{191} Cargo reservation in international trade exists in France, Portugal, and Spain.\textsuperscript{192} Council Regulation 954/79, which committed the EC Member States to the U.N. Liner Code, institutionalized cargo sharing in the liner trades.\textsuperscript{193} With respect to state aid, shipping companies in France, Germany, Italy, Portugal, Spain, and the United Kingdom receive operating subsidies from their governments.\textsuperscript{194} In all Member States there also exist special subsidies to shipping lines for the operation of services on certain unprofitable routes which are considered important for the national interest, for example routes to remote islands.\textsuperscript{195} Accelerated depreciation allowances\textsuperscript{196} exist for ship owning enterprises in all EC Member States except Greece.\textsuperscript{197}

B. Legal Framework for EC Maritime Policy

The major objectives of the Community are to promote a

\begin{itemize}
\item \textsuperscript{191} See BREDIMA-SAVOPOULOU \& TZOANNOS, supra note 3, at 37 (reviewing protectionist activities by Member States).
\item \textsuperscript{192} Id. at 39-41. France, for example, reserves 40\% of coal imports and 100\% of government controlled shipments for national flag carriers. Id. Portugal reserves 100\% of government controlled cargo for Portuguese flag vessels. Id. Spain also requires that all government controlled shipments move in Spanish flag ships. Id.
\item \textsuperscript{193} Id. at 41; see U.N. Liner Code, supra note 110, art. 2(4), 13 I.L.M. at 920-21 (distributing maritime transport according to 40-40-20 formula, i.e., 40\% of sea trade is carried by liner vessels of exporter country, 40\% by liners of importer country, and 20\% is left open to third country carriers).
\item \textsuperscript{194} See BREDIMA-SAVOPOULOU \& TZOANNOS, supra note 3, at 41 (reviewing operating subsidies in Member States); GOLD, supra note 13, at 196-200 (tracing history of state aid to shipping industry in France, Germany, and Italy back to 1920s and 1930s); CAFRINGY, supra note 13, at 133-35, 214-21 (describing subsidies to maritime industry in France, Germany, and the United Kingdom). Among the EC Member States, the German shipping industry has received the lowest amount of subsidies. Id. at 215. Subsidies to the French shipping industry have been comparatively heavy. Id. at 210-11, 217.
\item \textsuperscript{195} BREDIMA-SAVOPOULOU \& TZOANNOS, supra note 3, at 37.
\item \textsuperscript{196} See BITTKE & LOKKEN, supra note 185, at 23-4 (explaining accelerated depreciation as special depreciation allowance whereby allowance is relatively large during initial years of property's life and then steadily declines in succeeding years).
\item \textsuperscript{197} See BREDIMA-SAVOPOULOU \& TZOANNOS, supra note 3, at 38 (describing fiscal relief systems promoting shipping industries of Member States); PROTECTIONISM, supra note 10, at 162-63 (detailing German depreciation system as exemplifying concept of depreciation allowance); CAFRINGY, supra note 13, at 216-21 (referring to significant levels of support to shipowners in form of special depreciation allowances in Germany, France, and United Kingdom). The Greek taxation system grants no special tax concession to shipping enterprises. BREDIMA-SAVOPOULOU \& TZOANNOS, supra note 3, at 38. See also GOLD, supra note 13, at 197 (characterizing Greek shipping as traditionally completely free-enterprising and operating without state support).
\end{itemize}
harmonious development of economic activities, sustainable economic growth, economic and social cohesion, and solidarity among Member States by establishing a common market.\textsuperscript{198} For these purposes, Article 3(f) provides that the activities of the Community shall include a common policy in the sphere of transport.\textsuperscript{199} Community action in the sphere of transport, including maritime transport, must observe the fundamental Community principles\textsuperscript{200} of nondiscrimination on the basis of nationality,\textsuperscript{201} the freedom to provide services,\textsuperscript{202} and EC competition rules.\textsuperscript{203}

\textsuperscript{198} See EC Treaty, supra note 1, art. 2, [1992] 1 C.M.L.R. at 588. Article 2 states: The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing the common policies or activities referred to in Articles 3 and 3a, to promote throughout the Community a harmonious and balanced development of economic activities, sustainable and non-inflationary growth respecting the environment, a high degree of convergence of economic performance, a high level of employment and of social protection, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States.

\textsuperscript{199} Id. art. 3(f), [1992] 1 C.M.L.R. at 588. According to Article 74 of the EC Treaty, the objectives of the Treaty in transport matters "shall . . . be pursued by Member States within the framework of a common transport policy." Id. art. 74, [1992] 1 C.M.L.R. at 623.

\textsuperscript{200} See Greaves, supra note 2, at 120-21 (reviewing EC Treaty provisions bearing on EC maritime policy).

\textsuperscript{201} See EC Treaty, supra note 1, art. 6, [1992] 1 C.M.L.R. at 591 (stating that "within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.").

\textsuperscript{202} Id. arts. 59-66, [1992] 1 C.M.L.R. at 616-18. Specifically, Article 59 of the EC Treaty states that "restrictions on freedom to provide services within the Community shall be progressively abolished . . . in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended." Id. art. 59, [1992] 1 C.M.L.R. at 616. Article 60 further specifies that "the person providing a service may, in order to do so, temporarily pursue his activity in the State where the service is provided, under the same conditions as are imposed by that State on its own nationals." Id. art. 60, [1992] 1 C.M.L.R. at 617. Article 61 of the EC Treaty asserts that "freedom to provide services in the field of transport shall be governed by the provisions of the Title relating to transport." Id. art. 61, [1992] 1 C.M.L.R. at 617.

\textsuperscript{203} Id. arts. 85-94, [1992] 1 C.M.L.R. at 626-34. There are two sets of competition rules, Articles 85 to 90, which apply to undertakings, and Articles 92 to 94, which relate to "Aids granted by States". Id. Article 85 of the EC Treaty states in relevant part:

1. The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or
1. Need for Maritime Policy

Due to its strong links with international trade, maritime transport is an international industry.\textsuperscript{204} More than other transport modes, shipping tends therefore to be subject to international agreements, regulations, and trends.\textsuperscript{205} The UNCTAD and the U.N. Liner Conference have become important channels of regulating international maritime trade.\textsuperscript{206} The principles of the OECD Code of Liberalisation of Current Invisible Operations\textsuperscript{207} ("OECD Code"), which covers maritime transport, have further guided EC Member States' activities in international shipping.\textsuperscript{208} The OECD Code provides for complete free-

\begin{quote}
\textbf{distortion of competition within the common market, and in particular those which:}

(a) directly or indirectly fix purchase or selling prices to any other trading conditions;

(b) limit or control production, markets, technical development, or investment;

(c) share markets or sources of supply . . .
\end{quote}

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.


Article 92(1) of the EC Treaty provides in pertinent part:

1. Save as otherwise provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favoring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market.

\textit{Id.} art. 92(1), [1992] 1 C.M.L.R. at 630.

\textsuperscript{204} See Shipping, supra note 30, at 2-3 (describing shipping as important tool of international trade); Protectionism, supra 10, at 10-11 (noting genuinely international nature of maritime transport); Mark Clough & Fergus Randolph, Shipping and EC Competition Law 3 (1991) (stating that "[t]he shipping industry is by its very nature international"); CAFRUNY, supra note 13, at 13 (pointing out that "merchant shipping is, by definition, an international business"). Before the advent of air services, shipping was actually the only truly international mode of travel. Shipping, supra note 30, at 3.

\textsuperscript{205} See Greaves, supra note 2, at 123 (mentioning long history of international regulation in maritime transportation as factor setting maritime transport apart from other means of transport); Clough & Randolph, supra note 204, at 1 (referring to international treaties and agreements on shipping as key feature reflecting special characteristics of shipping industry).

\textsuperscript{206} See Shipping, supra note 30, at 3 (looking at international organizations and agreements influencing international shipping relations).

\textsuperscript{207} OECD Code, supra note 190.

\textsuperscript{208} See Bredima-Savopoulou & Tzoannos, supra note 3, at 37 (describing Member States' commitment to principles of OECD Code); Protectionism, supra note 10, at 228 (noting direct consequences of OECD Code for relations between Community and third countries).
dom of maritime commerce. The EC Member States' attempts to generalize the OECD Code shipping liberalism to world maritime trade in the 1960s and 1970s, however, encountered increasing protectionism and competition from developing countries and the Eastern bloc states. The United States too was pursuing a protectionist policy, reserving a significant proportion of U.S.-generated cargo for U.S. flag vessels. The advent of the container shipping in the early

209. See OECD Code, supra note 190, Annex A, at 59 n.1. The OECD Code provides:

As the shipping policy of the Governments of the Members is based on the principle of free circulation of shipping in international trade in free and fair competition, it follows that the freedom of transactions and transfers in connection with maritime transport should not be hampered by measures in the field of exchange control, legislative provisions in favor of the national flag, by arrangements made by governmental or semi-governmental organizations giving preferential treatment to national flag ships, by preferential shipping clauses in trade agreements, by the operation of import and export licensing systems so as to influence the flag of the carrying ship, or by discriminatory port regulations or taxation measures—the aim always being that liberal and competitive commercial and shipping practices and procedures should be followed in international trade and normal commercial considerations should alone determine the method and flag of shipment.

Id.

210. See Cafruny, supra note 13, at 129 (describing relations and climate in world maritime market in 1960s and 1970s); Rochdale Report, supra note 8, at 46 (noting that cargo reservation practices of U.S. sponsored Latin American Free Trade Area set "a dangerous precedent" with far-reaching consequences).

211. See Cafruny, supra note 13, at 131 (relating how United States accepted OECD Code in its entirety, but expressed reservations regarding application of shipping clauses). Respecting the United States' position with respect to the OECD Code, the Council of the OECD accepted that the OECD Code would not apply to commercial practices under the jurisdiction of the U.S. government. See OECD Code, supra note 190, Annex C, at 105 (stating that provisions of OECD Code shall not apply to actions by United States).

212. See Cafruny, supra note 13, at 130 (describing U.S. protectionist measures and their effect on relations between United States and Western Europe during 1950s and 1960s); Hearn, supra note 142, at 489-95 (discussing cargo reservation agreements between United States and Latin American countries).

213. See Cafruny, supra note 13, at 184-85 (relating history of container shipping). The container originated in the U.S. trucking industry in the 1950s and gradually spread to U.S. liner firms, and from there to the shipping companies of Europe and Japan. Id. The advent of the container revolutionized the shipping industry. Stevens, supra note 40, at 99-101 (describing profound industry changes following introduction of container shipping). General cargo ships carry bulk goods loaded in crates or comparatively small packages, whereas container shipping employs large steel boxes of uniform size, most commonly 8 x 8 x 20 ft and 8 x 8 x 40 ft. Cafruny, supra note 13, at 185; Protectionism, supra note 10, at 545 (defining container as metal box most commonly 8 x 8 x 20 ft and 8 x 8 x 40 ft). The uniform size and form of containers largely
1960s brought further profound changes to the world maritime market. To meet the challenges of increased protectionist practices in shipping and of the adaptation to the highly capital-intensive container technology, the individual EC Member States needed to combine their efforts and find a collective solution to the problems facing the Member States' merchant fleets. The Community needed to develop a common maritime transport policy, whose objective would be to further Community's interests in international maritime trade and promote the establishment of a strong and competitive EC fleet, while complying with principles of shipping policy espoused by the U.N. Liner Code and the OECD Code.

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simplifies loading and unloading and permits multimodal transportation by using the same container on ships, trains, and trucks, thus breaking down the barrier between land and sea. CAFRUNY, supra note 13, at 185. Another advantage of the containerization of shipping is the tremendous speed-up of loading and unloading and consequently of a ship's turn-around time. STEVENS, supra note 40, at 100. Container shipping, however, is highly capital-intensive. Id.; CAFRUNY, supra note 13, at 185.

214. See Protectionism, supra note 10, at 49 (discussing effect of containerization on strength and position of world's maritime industries).

215. See BREDIMA-SAVOPoulos & TZOANNOS, supra note 3, at 14-15 (noting changes in shipping industry as consequence of introduction of containers in shipping and need for EC to respond to changing conditions in world maritime market); ROCHDALE REPORT, supra note 8, at 409 (concluding that introduction of container technology brought in 1970s changes in world shipping industry "probably no less significant than the replacement in the nineteenth century of the wooden ship with that of iron, and of sail by steam."). The introduction of container shipping, with its considerably high capital investment, was a commercial threat to European shipowners. Id. By developing a common maritime policy, the individual Member States could reduce instability in their shipping industries and better meet the challenges of the 1970s. See CAFRUNY, supra note 13, at 10, 202 (looking at development of EC common maritime policy as protective response to adverse changes in maritime market).

216. See Communication and Proposals by the Commission to the Council on Progress Towards a Common Transport Policy: Maritime Transport, COM(85)90 Final 1 (March 1985) [hereinafter 1985 Commission Progress Report] (expressing Commission's belief that "the Community has now reached a stage in the development of its shipping policy which requires a more coherent approach."). A common EC shipping policy would work toward the furtherance of the Community's trading and shipping interests. Id. COM (85) 90 Final, at 1. Because of Member States' commitment to "the free and open regime enshrined in the OECD Code," the creation of a common shipping policy and market should be based on the principles of free and open competition. Id. COM (85) 90 Final, at 16. See also Peter G. Xuereb, Transport Services and External Policy, 9 ST. Louis U. PUB. L. REV. 131, 131 (1990) (stating that for internal market reasons, transport issues require coordinated stance). Such coordinated approach "is implicit in the idea of a single market and a unified Europe, and is of major benefit to international cooperation." Id.; Greaves, supra note 2, at 120 (emphasizing that it was essential for Community to adopt common maritime policy to improve its maritime competitiveness).
2. Legal Framework

EC Treaty provisions that bear directly on the Community power to regulate maritime transport come from two major sources. The relevant general EC Treaty provisions concerning maritime transport include the principle of nondiscrimination on the basis of nationality, the freedom to provide services, and competition rules. The specific acts dealing with maritime transport derive from Article 84(2) of Title IV on transport.

a. The Principle of Nondiscrimination

Article 6 of Part One of the EC Treaty, laying down the fundamental Community principles, prohibits any discrimination on grounds of nationality. The principle of nondiscrimination represents a fundamental postulate of the EC concept and structure. Nondiscrimination and equal treatment of nationals of all Member states serve as a major unifying force in the existence and functioning of the multinational European Community. As a fundamental conceptual principle, nondiscrimination on the basis of nationality underlies each and every Community.
The ECJ has explicitly ruled that the principle of nondiscrimination applies to the field of a common transport policy. With respect to maritime transport, in particular, the most influential case involving the principle of non-discrimination was the French Merchant Seamen case. In that case, France argued that Article 84(2) of the EC Treaty implied that the general provisions of the EC Treaty were inapplicable to sea transport in the absence of a decision to the contrary by the Council. The Court of Justice rejected these arguments and ruled that, so long as the Council has not decided otherwise, Article 84(2) excludes sea and air transport from the rules of Title IV relating to the Common Transport Policy. The ECJ further ruled, however, that, until the Council decides otherwise, sea and air transport are subject to the same general EC Treaty rules as any other mode of transport. The general rules in question were those

225. See id. (noting that principle of nondiscrimination on grounds of nationality applies to all actions by EC institutions and to all EC activities).


228. Id. at 368, ¶ 8, [1974] 2 C.M.L.R. at 227. The French government maintained that "the rules of the Treaty regarding freedom of movement for workers do not apply to transport and, in any event, not to maritime transport so long as the Council has not so decided under article 84(2) of the Treaty." Id.

229. Id. at 371, ¶ 32, [1974] 2 C.M.L.R. at 229.

230. Id. at 371, ¶ 32, [1974] 2 C.M.L.R. at 229. The ECJ emphasized that the application of the rules for free movement of workers to the sphere of maritime transport "is not optional but obligatory for Member State." Id.
relating to nondiscrimination. The ECJ's decisions thus applied the principles of nondiscrimination and free movement of workers, Articles 48 through 51, to maritime transport.

b. Freedom to Provide Services

Title III in Part Two of the EC Treaty contains the articles relating to the freedom to provide services. The principle of nondiscrimination on the basis of nationality lies at the foundation of the freedom to provide services. Article 61, however, states that Title IV relating to transport shall govern the provision of services in the transport sector. In European Parliament v. EC Council ("European Parliament"), the ECJ ruled that because Article 61(1) makes the freedom to provide transport serv-


232. Id. at 371, ¶ 33, [1974] 2 C.M.L.R. at 229.

233. EC Treaty, supra note 1, arts. 59-66, [1992] 1 C.M.L.R. at 616-18 (comprising chapter on provision of services in Title III of Part Three of EC Treaty). Article 59 states that "restrictions on freedom to provide services within the Community shall be . . . abolished." Id. art. 59, [1992] 1 C.M.L.R. at 616-17. Article 60 defines services to include activities of an industrial or commercial character, activities of craftsmen, and activities of the professions. Id. art. 60, [1992] 1 C.M.L.R. at 617. Article 63 empowers the Council to legislate in order to implement the principle of freedom to provide services. Id. art. 63, [1992] 1 C.M.L.R. at 617-18.

234. See id. art. 60, [1992] 1 C.M.L.R. at 617 (dealing with right of establishment permanently or temporarily for purpose of providing services). Article 60 further requires that the person who establishes himself in a Member State in order to provide services in that Member State must be able to pursue his activity "under the same conditions as are imposed by that State on its own nationals." Id.

235. Id. art. 61(1), [1992] 1 C.M.L.R. at 617.

ices subject to the rules of Articles 74-84 (the transport Title), free provision of services can be implemented in this sector only by the introduction of a common transport policy. The ECJ pointed out, however, that the Council has very little discretion with respect to the introduction of a common transport policy, because the combined effect of Articles 59, 60, 61, concerning the freedom to provide services, and 75(1)(a) and (b), on the implementation of a common transport policy determine the results to be obtained. The Council must adopt legislation establishing freedom to provide transport services in accordance with the principle of nondiscrimination based on the nationality of the person providing services. The Council's discretion goes only toward the appropriate means necessary to achieve the desired results.

c. Competition Rules

The competition rules apply to all economic activities, in-

238. European Parliament, [1985] E.C.R. at 1599, ¶ 62, [1986] 1 C.M.L.R. at 205 (asserting that "application of the principles governing freedom to provide services . . . must . . . be achieved, according to the Treaty, by introducing a common transport policy, and more particularly, by laying down common rules applicable to international transport.")
239. See EC Treaty, supra note 1, arts. 59-61 [1992] 1 C.M.L.R. at 616-17. Article 59 requires the abolition of restrictions on freedom to provide services within the Community. Id. art. 59, [1992] 1 C.M.L.R. at 616-17. Article 60 provides for equal treatment of national and non-national providers of services within the Community. Id. art. 60, [1992] 1 C.M.L.R. at 617. Article 61 states that freedom to provide transport services shall be governed by the rules on transport. Id. art. 61, [1992] 1 C.M.L.R. at 617.
240. See EC Treaty, supra note 1, art. 75(1)(a) and (b), [1992] 1 C.M.L.R. at 623-24 (stating that for purpose of implementing common transport policy, Council shall lay down "(a) common rules applicable to international transport to or from the territory of a Member State or passing across the territory of one or more Member States;" and "(b) the conditions under which non-resident carriers may operate transport services within a Member State.").
241. See European Parliament, [1985] E.C.R. at 1599, ¶ 64, [1986] 1 C.M.L.R. at 205 (holding that scope of obligation imposed on Council with respect to implementation of common transport policy is "clearly defined by the Treaty."). The ECJ affirmed that "[p]ursuant to Articles 59 and 60 the requirements of freedom to provide services include . . . the removal of any discrimination against the person providing services based on his nationality or the fact that he is established in a Member State other than that where the services are to be provided." Id. at 1599, ¶ 64, [1986] 1 C.M.L.R. at 205.
242. Id. at 1599, ¶ 64, [1986] 1 C.M.L.R. at 205.
243. Id. at 1600, ¶ 65, [1986] 1 C.M.L.R. at 205-06.
cluding maritime transport. The EC Treaty competition rules fall into two categories, rules that apply to undertakings and rules that apply to government aids. The shipping industry has to comply with both types of rules.

Article 85 regulates market agreements and Article 86 regulates market behavior which may distort competition and adversely affect trade between Member States. To further the implementation of Articles 85 and 86, the Council issued the first Regulation in the area, Regulation 17/62, laying down


247. See Greaves, supra note 2, at 125 (stating that maritime industry must respect both state aids rules and rules governing market behavior of undertakings).

248. See EC Treaty, supra note 1, art. 85, [1992] 1 C.M.L.R. at 626 (prohibiting all agreements between undertakings that may distort competition within common market).

249. See id. art. 86, [1992] 1 C.M.L.R. at 626-27 (ruling out any abuse by one or more undertakings of dominant position within common market). The ECJ has established the following definition of a dominant position:

The dominant position referred to in this Article relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers. United Brands v. EC Commission, Case 27/76, [1978] E.C.R. 207, 277, ¶ 65, [1978] 1 C.M.L.R. 429, 486-87. The ECJ has held that the first step in establishing the existence of a dominant position is to define the relevant product or service market. Continental Can v. EC Commission, Case 6/72, [1973] E.C.R. 215, 247, ¶ 32, [1973] 1 C.M.L.R. 199, 226 (emphasizing importance of correctly defining relevant market in light of characteristics of products in question). The legal test for defining the relevant product or service market is the interchangeability of the product or service concerned. Id. The interchangeability of the products or services will depend on their physical characteristics, price, and use. See Clough & Randolph, supra note 204, at 118 (defining relevant market). The interchangeability of products or services will ultimately depend on the "characteristics of the products in question by virtue of which those products are particularly apt to satisfy an inelastic need and are only to a limited extent interchangeable with other products." Continental Can, [1973] E.C.R. at 247, ¶ 32, [1973] 1 C.M.L.R. at 226.


detailed rules of procedure for the Commission to follow in enforcing the EC competition rules. Reg 17/62 declared void any agreement or behavior incompatible with the rules on competition, and empowered the Commission to impose fines for such infringements. Regulation 17/62 did not, however, apply to transport. To account for transport, the Council had

252. Id. Article 11 empowers the Commission to obtain all information necessary for the performance of its duties in enforcing EC competition rules. Id. art. 11, O.J. Eng. Spec. Ed. 1959-62, at 90. The Commission may, by decision, require the parties to the agreement concerned to supply the necessary information. Id. The Commission may impose fines for noncompliance with this requirement. Id. Under Article 14, the Commission also has the power to carry out all necessary investigations into undertakings concerned, including the power to enter the premises of relevant undertakings to gather information. Id. art. 14, O.J. Eng. Spec. Ed. 1959-62, at 91. Having determined the facts, the Commission may take a decision to issue a negative clearance, terminate an infringement, or grant exemptions. Clough & Randolph, supra note 204, at 240 (reviewing provisions of Regulation 17/62). See also Council Regulation 17/62, supra note 251, arts. 2, 3, and 6, O.J. Eng. Spec. Ed. 1959-62, at 88. Article 2 of Regulation 17/62 explains that "upon application by the undertakings . . . concerned, the Commission may certify that, on the basis of the facts in its possession, there are no grounds under Article 85(1) or Article 86 of the Treaty [concerning competition rules] for action on its part in respect of an agreement, decision or practice." Id. art. 2, O.J. Eng. Spec. Ed. 1959-62, at 88. Where the Commission finds that there is an infringement of Article 85 or Article 86 of the EC Treaty, the Commission may require the undertakings concerned to "bring such infringement to an end." Id. art. 3, O.J. Eng. Spec. Ed. 1959-62, at 88. Article 6 of Regulation 17/62 empowers the Commission to grant exemptions pursuant to Article 85(3) of the EC Treaty. Id. art. 3, O.J. Eng. Spec. Ed. 1959-62, at 88. See EC Treaty, supra note 1, art. 85(3), [1992] 1 C.M.L.R. at 626 (providing for exemptions from EC Treaty prohibition on agreements and practices infringing EC competition rules). If a prohibited agreement "contributes to improving the production or distribution of goods or to promoting technical or economic progress" and allows consumers "a fair share of the resulting benefit," the EC Treaty prohibition on practices distorting competition does not apply to the agreement. Id. In order to qualify for the exemption, the undertaking must also avoid imposing on the parties concerned "restrictions which are not indispensable to the attainment of the objectives" of the agreement and the provisions of the agreement must not eliminate competition altogether "in respect of a substantial part of the products in question." Id.

253. See Regulation 17/62, supra note 251, art. 1, O.J. Eng. Spec. Ed. 1959-62, at 88 (asserting that any agreements, decisions, and practices violating Article 85(1) and Article 86 of EC Treaty "shall be prohibited, no prior decision to that effect being required.")


to issue Regulation 4056/86 laying down detailed rules for the application of Articles 85 and 86 of the EC Treaty to Maritime Transport.

d. Transport Provisions

Article 3(f) of the EC Treaty requires the Community to adopt a common transport policy as a means toward establishing a common market. Title IV of Part Two of the EC Treaty sets forth specific transport provisions. Article 74 states that the objectives of the Treaty with respect to transport shall be pursued within the framework of a common transport policy. Article 75 requires the Council to lay down common rules applicable to international transport, as well as conditions under which non-resident carriers may operate transport services within a Member State and any other appropriate measures. Article 84(1), however, makes the provisions of Title IV applicable to transport by rail, road, and inland waterway, thus selecting maritime and air transport for special treatment. Article 84(2) further states that the Council may decide whether, to what extent, and by what procedure, appropriate provisions may be adopted for these two types of transport. Because of the exemption of maritime transport from the normal requirements of a common transport policy, the European Community was slow in implementing the appropriate measures for bringing maritime transport have as their object or effect the fixing of transport rates and conditions, the limitation or control of the supply of transport or the sharing of transport markets; nor shall it apply to the abuse of a dominant position, within the meaning of Article 86 of the Treaty, within the transport market. Regulation 141/62 further provided that the Council "shall adopt appropriate provisions in order to apply rules of competition to transport." See Greaves, supra note 2, at 126 (analyzing application of EC competition rules to transport by sea).


257. See Greaves, supra note 2, at 126 (analyzing application of EC competition rules to transport by sea).

258. EC Treaty, supra note 1, art. 3(f), [1992] 1 C.M.L.R. at 589 (requiring Community to adopt common policy in sphere of transport in accordance with principles of Article 2 laying down task of establishing common market).


262. Id. art. 84(1), [1992] 1 C.M.L.R. at 626.

263. EC Treaty, supra note 1, art. 84(2), [1992] 1 C.M.L.R. at 626.
II. THE EC MARITIME LEGISLATION

Despite the strategic importance of maritime transport\(^{265}\) and the regulations imposed by international conventions and organizations such as UNCTAD,\(^{266}\) the U.N. Liner Code,\(^{267}\) and OECD, Community activity with respect to adopting a common maritime policy was minimal in the period between 1958 and 1985.\(^{268}\) An effective EC maritime policy was necessary to ensure free and open access to cargoes for EC shipowners and to secure fair competition on a commercial basis in the trades to, from, and within the Community.\(^{269}\) In view of the necessity for EC action in the sea transport sector, in 1985, the Commission published a progress report\(^{270}\) ("1985 Commission Progress Report") on the Community common maritime transport policy.\(^{271}\) Emphasizing the dependence of the European Community on world trade and on the international maritime shipping market,\(^{272}\) the Commission made a number of proposals\(^{273}\) which

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264. See BREDIMA-SAVOPOULOU & TZOANNOS, supra note 3, at 113 (referring to EC measures on sea transport prior to 1985 as "far from constituting a common maritime policy.").

265. See Greaves, supra note 2, at 119 (emphasizing need for Community to maintain efficient and competitive fleet capable of carrying out EC trade if Community is to retain its status as world economic power); Commission Communication I, supra note 4, COM (96) 84 Final, at 3 (reporting that in 1996, 90% of EC external trade and 30% of intra-Community trade depended on maritime transport).

266. UNCTAD, supra note 76.


268. See BREDIMA-SAVOPOULOU & TZOANNOS, supra note 3, at 102-05 (assessing EC initiatives in sea transport area between 1958-1985); CLOUGH & RANDOLPH, supra note 204, at 41 (noting slow progress in implementing common transport policy prior to 1985); id. at 48 (noting insufficient EC action towards establishing common shipping policy prior to 1985).

269. See CLOUGH & RANDOLPH, supra note 204, at 50-52 (specifying objectives of EC common shipping policy); Regulation 4055/86, supra note 24, pmbl., O.J. L 378/1, at 1 (1986) (asserting need for application of freedom to provide services to maritime transport as necessary condition for securing adherence to commercial principles in external and Intra-Community shipping services); Regulation 4058/86, supra note 24, pmbl., O.J. L 378/21, at 21 (1986) (stating need to coordinate EC action to safeguard free access to cargoes by EC shipowners, particularly where "the competitive position of Member States' merchant fleets or Member States' trading interests are adversely affected by cargo reservation to shipping companies of third countries.").


271. Id.

272. Id. at 7. The Commission stated:

[in view of the Community's dependence on world trade and the depen-
became the basis of the 1986 Legislative Package. The Council adopted Regulation 3577/92 which complemented the 1986 Legislative Package.

A. The 1986 Legislative Package

The 1986 Legislative Package consisted of four acts marking the first stage in the development of an EC common maritime policy. The primary focus of the four legislative acts was the threat to Community shipping interests from protectionist practices and measures of non-Member States. The four acts of...
the 1986 Legislative Package are Regulation 4055/86, Regulation 4056/86, Regulation 4057/86, and Regulation 4058/86. The 1986 Legislative Package marked the first stage in the implementation of an EC common maritime policy.

1. Background to the 1986 Legislative Package

Because developments in the other transport sectors had been equally slow, the European Parliament brought action in 1983 against the Council for failure to act in accordance with its obligations under the EC Treaty transport provisions. The ECJ ruled that the Council was under an obligation to introduce a common policy for transport, particularly in the free movement of capital with third states [EC Treaty art. 73c] and most measures to be taken in creating the [European Monetary Union]. The Parliament may also take part in the legislative process by means of the cooperation procedure and the co-decision procedure. See EC Treaty, supra note 1, art. 175, [1986] 1 C.M.L.R. at 694 (laying down cooperation procedure); id. art. 189b, [1992] 1 C.M.L.R. at 694-95 (setting forth co-decision procedure). Under cooperation, the Council needs a unanimous vote to override the Parliament’s rejection of proposed legislation. In co-decision, Parliament may, by absolute majority, reject a measure that the Council has approved.

See European Parliament, [1985] E.C.R. at 1596, ¶ 48, [1986] 1 C.M.L.R. at 202 (asserting that under Article 175 “the Court must find that there has been an infringement of the Treaty if the Council or the Commission fails to act when under an obligation to do so.”).

286. See id. at 1596, ¶ 49, [1986] 1 C.M.L.R. at 202-03 (maintaining that “under the system laid down by the Treaty it is for the Council to determine,” as part of its obligation to introduce a common transport policy, “the aims of and means for implementing a common transport policy.”).
larly with a view to the liberalization of transport and the facilitation of international traffic. In 1985, soon after the ECJ’s decision in *European Parliament*, the Commission published a progress report setting forth measures towards a common maritime transport policy. In light of the importance of maritime transport for the EC economy and international trade relations, the Commission went on to make a number of proposals necessary to promote the Community’s trade and shipping interests. These proposals became the basis of the 1986 legislative package, which marked the first stage towards a common EC maritime transport policy.

2. Regulations of the 1986 Legislative Package

The focal point of the 1986 Legislative Package concerned the threat to Community shipping interests from protectionist practices and measures of non-Member States that made it dif-

288. Id. at 1603, ¶ 80, [1986] 1 C.M.L.R. at 208. The ECJ held that “in breach of the Treaty the Council has failed to ensure freedom to provide services in the sphere of international transport and to lay down the conditions under which non-resident carriers may operate transport services in a Member-State.” Id.


291. See id. at 1-7 (presenting Commission’s analysis of role of maritime transport in EC economy and for achievement of EC Treaty objectives).


293. See BREDIMA-SAVOPOULOU & TZOANNOS, supra note 3, at 113-21 (tracing enactment history of 1986 Legislative Package); CLOUGH & RANDOLPH, supra note 204, at 62 (discussing background to 1986 Legislative Package).

294. See Regulation 4055/86, supra note 24, art. 3-4, O.J. L 378/1, at 2 (1986) (requiring gradual phasing out of existing cargo-sharing arrangements and prohibiting any future cargo-sharing arrangements); Regulation 4057/86, supra note 24, art. 3, O.J.
difficult to maintain a free-competition economy system. The four regulations changed little with respect to intra-Community policies concerning nondiscrimination against ships flying non-national flags. Most significantly, the 1986 Legislative Package did not deal with cabotage restrictions.

a. Council Regulation 4055/86

Council Regulation 4055/86, one of the 1986 Legislative Package acts, establishes the freedom to provide maritime transport services between Member States and between Member States and third countries. The purpose of Regulation 4055/86 is to help EC shipowners defend against restrictions imposed by third countries on shippers established in a Member State or established in a non-Member State but controlled by an EC na-

L 378/14, at 15 (1986) (defining unfair pricing). Article 3 sets forth that unfair pricing is

the continuous charging on a particular shipping route to, from or with the Community of freight rates for selected or all commodities which are lower than the normal freight rates . . . when such lower freight rates are made possible by the fact that the shipowner concerned enjoys non-commercial advantages . . . granted by a State which is not a member of the Community.

Id.

299. See Greaves, supra note 2, at 130 (analyzing objectives and effect of 1986 Legislative Package); BREDIMA-SAVOPOULOU & TZOANNOS, supra note 3, at 115-121 (assessing 1986 Regulations and their impact on establishment of common market in maritime services).

296. See Meyers, supra note 13, at 133-34 (explaining that "when it is stated that a ship is 'flying' or 'sailing under' a particular flag, what is meant is that the ship has the nationality of the flag state.").

297. See CLOUGH & RANDOLPH, supra note 204, at 63 (summing up effect of 1986 Legislative Package on EC maritime policy); Greaves, supra note 2, at 130 (stating that external relations with nonmember shipowners formed focus of 1986 Legislative Package).

298. See CLOUGH & RANDOLPH, supra note 204, at 63 (referring to failure of Council to adopt measures regarding cabotage); BREDIMA-SAVOPOULOU & TZOANNOS, supra note 3, at 153 (pointing out that 1986 Legislative Package "left the stumbling block of cabotage" untouched).


300. See id. art. 1(1), O.J. L 378/1, at 2 (1986) (asserting application of "[f]reedom to provide maritime transport services between Member States and between Member States and third countries."). Services between Member States concern the "carriage of passengers or goods by sea between any port of a Member State and any port or offshore installation of another Member State." Id. art. 1(4)(a), O.J. L 378/1, at 2 (1986). Services between Member States and third-countries refer to the "carriage of passengers or goods by sea between the ports of a Member State and ports or offshore installations of a third country." Id. art. 1(4)(b), O.J. L 378/1, at 2 (1986).
tional and with ships registered in the Community. Regulation 4055/86 benefits EC nationals regardless of country of establish-
mament. In order to further free access to maritime services between Member States and third countries, Regulation 4055/86 prohibits future cargo sharing agreements with non-
Member States. Regulation 4055/86 also requires that existing agreements be adjusted or phased out.

Regulation 4055/86 did not extend the freedom to provide maritime services to services on cabotage routes. In this respect, the final version of Regulation 4055/86 adopted by the

301. See id. arts. 1(1), 1(2), O.J. L 378/1, at 2 (1986). Article 1(1) makes freedom to provide maritime services applicable to "nationals of Member States who are estab-
ished in a Member State other than that of the person for whom the services are inten-
ted." Id. Article 1(2) extends the freedom to provide maritime services to "nation-
als of the Member States established outside the Community and to shipping compa-
nies established outside the Community and controlled by nationals of a Member State,
if their vessels are registered in that Member State." Id.

302. Id.; see EC Treaty, supra note 1, art. 52, [1992] 1 C.M.L.R. at 613-14 (defining establish-
ment as taking up and pursuing activities as self-employed person or setting up and managing undertakings "under the conditions laid down for its own nationals by the law of the country where such establishment is effected."). Article 52 provides for the right of free establishment of "nationals of a Member State in the territory of an-
other Member State." EC Treaty, supra note 1, art. 52, [1992] 1 C.M.L.R. at 613-14. Under-
takings, for purposes of Article 52, are "companies or firms constituted under civil or commercial law . . . save for those which are nonprofitmaking." Id. arts. 52, 58,

303. See Regulation 4055/86, supra note 24, art. 5, O.J. L 378/1, at 2-3 (1986) (prohibiting "cargo-sharing arrangements in any future agreements with third coun-
tries."). Article 5 allows for an exception to the general prohibition of cargo-sharing arrangements where Community liner ships would "not otherwise have an effective oppor-
tunity to ply for trade to and from the third country concerned." Id.

304. Id. art. 3, O.J. L 378/1, at 3 (1986) (stating that cargo-sharing arrangements "contained in existing bilateral agreements concluded by Member States with third coun-
tries shall be phased out or adjusted."). Article 4 of Regulation 4055/86 governs the adjustment of existing cargo-sharing arrangements "not phased out in accordance with Article 3." Id. art. 4, O.J. L 378/1, at 2 (1986). Where "trades [are] governed by the United Nations Code of Conduct for Liner Conferences . . . [existing cargo-sharing agreements] shall comply" with the U.N. Liner Code and with the Community's obliga-
tions under Regulation 954/79. Id. art. 4(1)(a), O.J. L 378/1, at 2 (1986). Trade "not governed by the United Nations Code of Conduct for Liner Conferences shall be ad-
justed as soon as possible." Regulation 4055/86, supra note 24, art. 4(1)(b), O.J. L 378/
1, at 2 (1986).

305. See Regulation 4055/86, supra note 24, art. 1(4)(a), O.J. L 378/1 at 2 (1986) (limiting intra-Community shipping services that fall within ambit of Regulation 4055/
86 to "the carriage of passengers or goods by sea between any port of a Member State and any port . . . of another Member State.") (emphasis added); CLOUGH & RANDOLPH, supra note 204, at 63 (noting failure of Council to adopt measures regarding cabotage services as part of freedom to provide services under Regulation 4055/86).
Council differed from the Commission's proposals leading to the 1986 Legislative Package.\textsuperscript{306} Annex II-2 of the 1985 Commission Progress Report\textsuperscript{307} contained a draft Council Regulation applying the principle of freedom to provide maritime transport services to the coastal trades of a Member State.\textsuperscript{308} Due to the large divergence of opinion expressed at the Council deliberations in the course of adopting Regulation 4055/86,\textsuperscript{309} the Member States could not reach agreement on the sensitive issue of cabotage in time for the adoption of the four-piece Legislative Package of 1986.\textsuperscript{310} Because of the national defense implications of cabotage,\textsuperscript{311} and because coastal services cover not only the ordinary carriage of goods and passengers but also the profitable cruise business,\textsuperscript{312} cabotage soon became a major issue of contention.\textsuperscript{313} Two approaches emerged during the deliberations.

\textsuperscript{306} See 1985 Commission Progress Report, \textit{supra} note 216, COM (85) 90 Final, Annex II-2, at 2-3 (containing proposal for abolishing restrictions in provision of maritime services by persons "established in a State of the Community other than that of the person for whom the services are intended" including "the carriage of passengers or goods by sea between ports in any one Member State (cabotage).")

\textsuperscript{307} Id.

\textsuperscript{308} See \textit{id.} art. 3, at 3 (extending free provision of maritime services to cabotage trade).

\textsuperscript{309} See \textit{BREDIMA-SAVOPOULOU & TZOANNOS, supra} note 3, at 152-68 (detailing Council deliberations during 1985-86 leading to adoption of 1986 Legislative Package).

\textsuperscript{310} See \textit{id.} at 152-54 (discussing positions Member States adopted in respect of cabotage liberalization). France proposed the creation of a Community-wide cabotage whereby existing cabotage restrictions would be lifted for shipowners who are nationals of Member States. \textit{Id.} at 169. France's proposal did not gain enough support to be accepted but caused the Council deliberations on cabotage restrictions to reach a deadlock. \textit{Id.} at 152. In an attempt to break the deadlock, Germany proposed lifting cabotage restrictions in trade between a list of certain specified EC ports. \textit{Id.} The list of proposed specified ports included all ports in the Baltic, the North Sea, the British Isles, and the Channel, as well as the continental ports in Spain, Portugal, Italy, and Greece. \textit{Id.} at 169. When Germany's proposal did not succeed in helping the Member States reach an agreement on cabotage, the Council decided to leave the liberalization of cabotage services out of the scope of Regulation 4055/86. \textit{Id.} at 153.

\textsuperscript{311} See PROTECTIONISM, \textit{supra} note 10, at 113 (referring to strategic importance of cabotage routes for maintaining regular national communications with remote and usually underdeveloped regions of a country); \textit{BREDIMA-SAVOPOULOU & TZOANNOS, supra} note 3, at 158 (relating Greece's opposition to lifting cabotage restrictions because of strategic position of Greek islands close to Turkey).

\textsuperscript{312} See Regulation 3577/92, \textit{supra} note 21, art. 6, O.J. L 364/7, at 9 (1992) (granting special exemption from application of Regulation 3577/92 to cruise services, as type of cabotage transport services).

\textsuperscript{313} See \textit{BREDIMA-SAVOPOULOU & TZOANNOS, supra} note 3, at 151-68 (detailing reasons for exclusion of cabotage liberalization from Regulation 4055/86).
tions. The Southern European States, France, Italy, Greece, Spain and Portugal, insisted on maintaining cabotage. The countries of Northern Europe, the United Kingdom, the Netherlands, Belgium, Ireland, Germany, and Denmark insisted on total and immediate opening up of cabotage services to carriers flying a non-national flag.

Moreover, even within the group of the Southern Member States, reasons against the liberalization of cabotage services differed from country to country. Greece, for example, defended cabotage restrictions on grounds of national security, especially in view of the location of its islands in close proximity to Turkey. France, on the other hand, proposed the creation of an EC maritime space with no restrictions applying to ships flying Community flags. The French proposal envisaged in essence a Community-wide coastal zone modeled on the U.S. system created by the Jones Act of 1920. The rest of the Member States rejected the French proposal as incompatible with the EC commitment to a liberal and anti-protectionist approach to maritime transport. Spain, Italy, and Portugal insisted on Community harmonization of regulations concerning seafarers' social benefits and terms of employment as a pre-condition to the removal of cabotage restrictions. In the end, Member States' opposing opinions with respect to free access to coasting trade

314. Id. at 158 (mentioning clear division between Mediterranean and Northern Member States on issue of cabotage). The United Kingdom even threatened on several occasions during the negotiations to impose cabotage restrictions around its coast, or to proceed to the ECJ for a final decision of the controversy. Id.
315. Id. at 158-59.
316. Id. at 158.
317. See BREDIMA-SAVOPOULOU & TZOANNOS, supra note 3, at 158-59 (presenting views on cabotage of individual Southern Member States).
318. Id.
319. Id. at 159 (discussing French proposals for EC policy on cabotage restrictions).
321. See BREDIMA-SAVOPOULOU & TZOANNOS, supra note 3, at 159 (discussing French position on cabotage). France proposed removing national restrictions between Member States in favor of EC flags, not only for coastal services, but equally for all intra-Community routes. Id. The other Member States rejected the French proposal because it contradicted the Community’s general commitment to liberalism in the world maritime market and the principles of the OECD Code. See OECD CODE, supra note 190, Annex A, at 59 n.1. (setting forth maintenance of free circulation of shipping in international trade as underlying principle of OECD Code).
322. BREDIMA-SAVOPOULOU & TZOANNOS, supra note 3, at 159.
resulted in Regulation 4055/86 excluding the issue of cabotage.\textsuperscript{323}

b. Council Regulation 4056/86

The 1986 Legislative Package also contained Council Regulation 4056/86\textsuperscript{324} which set down rules for the application of EC competition norms to maritime transport.\textsuperscript{325} Regulation 4056/86 was the first Community act applying the rules of competition to the transport sector.\textsuperscript{326} It sought to find a balance between the requirements of Council Regulation 954/79\textsuperscript{327} on Member States’ ratification of the U.N. Liner Code\textsuperscript{328} and undue distortion of the common maritime market.\textsuperscript{329} In recognition of the stabilizing role of conferences in ensuring reliable services to shippers, Regulation 4056/86 provided for block exemptions\textsuperscript{330} of liner conferences.\textsuperscript{331} At the same time, Regulation 4056/86

\textsuperscript{323} See Greaves, supra note 2, at 137 (noting that due to conflict between Northern European Member States and Southern European Member States, cabotage issues were withdrawn from 1986 Legislative Package).

\textsuperscript{324} Regulation 4056/86, supra note 24, O.J. L 378/4 (1986).

\textsuperscript{325} See id. pmbl., O.J. L 378/4, at 4 (1986) (explaining that Regulation 4056/86 “should define the scope of the provisions of Articles 85 and 86 of the Treaty” to maritime transport).

\textsuperscript{326} Greaves, supra note 2, at 125. Regulation 141/62 made Regulation 17/62, the first EC measure laying down rules of procedure for the Commission to follow in enforcing EC competition laws, inapplicable to transport. Regulation 4056/86, pmbl., O.J. L 378/4, at 4 (1986).

\textsuperscript{327} Council Regulation 954/79, supra note 110, O.J. L 121/1 (1979) (concerning Member States’ ratification of, or accession to, U.N. Liner Code).

\textsuperscript{328} U.N. Liner Code, supra note 110.

\textsuperscript{329} See Regulation 4056/86, supra note 24, pmbl., O.J. L 378/4, at 4 (1986) (stating that Regulation 954/79 “will result in the application of the [U.N. Liner] Code . . . to a considerable number of conferences serving the Community . . . [and] . . . Regulation [4056/86] should supplement the [U.N. Liner] Code or make it more precise” and “take account of the necessity . . . to provide for implementing rules that enable the Commission to ensure that competition is not unduly distorted within the common market.”).

\textsuperscript{330} See Greaves, supra note 2, at 145 n.52 (explaining that block exemption is term commonly used for categorical exemptions in competition area). Block exemptions are exemptions which can be granted automatically to an agreement if the agreement falls within the terms of the relevant regulation. Id. at 126.

\textsuperscript{331} See Regulation 4056/86, supra note 24, pmbl., O.J. L 378/4, at 4 (1986) (allowing block exemptions). The preamble asserts that:

provision should be made for block exemption of liner conferences; whereas
liner conferences have a stabilizing effect, assuring shippers of reliable services; whereas they contribute generally to providing adequate efficient scheduled maritime transport services and give fair consideration to the interests of users; whereas such results cannot be obtained without cooperation that ship-
empowered the Commission to carry out necessary investigations into suspected infringements of the Community competition rules by undertakings in the shipping industry.\(^{332}\) The Regulation also lays down procedural rules supporting the Commission's investigative powers.\(^{333}\) Finally, the Regulation applies only to international maritime transport services.\(^{334}\)

_Ping companies promote within conferences in relation to rates and, where appropriate, availability of capacity or allocation of cargo for shipment, and income._

_Id._ Article 3 of Regulation 4056/86 provides that "[a]greements . . . of all or part of the members of one or more liner conferences are hereby exempted from the prohibition of Article 85(1) of the Treaty . . . when they have as their objective the fixing of rates and conditions of carriage" of goods. _Id._ art. 3, O.J. L 378/4, at 6 (1986). Article 4 of Regulation 4056/86, however, makes the exemption of Article 3 subject to the condition that the agreements "shall not, within the common market, cause detriment to certain ports, transport users or carriers by applying for the carriage of the same goods . . . rates and conditions of carriage which differ according to the country of origin or destination or port of loading or discharge, unless such rates or conditions [sic] can be economically justified." _Id._ art. 4, O.J. L 378/4, at 6 (1986). Regulation 4056/86 also provides that agreements "between transport users, on the one hand, and conferences, on the other hand . . . concerning the rates, conditions and quality of liner services . . . are hereby exempted from the prohibition laid down in Article 85(1) of the Treaty." _Id._ art. 6, O.J. L 378/4, at 7 (1986).

332. _Id._ art. 3, O.J. L 378/4, at 6 (1986) (empowering Commission to "undertake all necessary investigations into undertakings and associations of undertakings."). The Commission's investigating powers include the right to "examine the books and other business records; to take copies of or extracts from the books and business records; to ask for oral explanations on the spot; [and] to enter any premises, land and vehicles of undertakings." _Id._ Article 18 further requires officials of the "competent authority of the Member State in whose territory the investigation is to be made . . . [to] assist the officials of the Commission in carrying out their duties." _Id._

333. _See id._ art. 10, O.J. L 378/4, at 9 (1986) (stating that Commission shall initiate procedures to terminate any infringement of provisions of Articles 85(1) and 86 of EC Treaty while acting on its own initiative or on complaint by Member States, or natural or legal persons claiming legitimate interest); art. 16, O.J. L 378/4, at 10 (1986) (authorizing Commission to "obtain all necessary information from the Governments and competent authorities of the Member States and from undertakings and associations of undertakings."). When sending a request for information to "an undertaking or association of undertakings, the Commission shall at the same time forward a copy of the request to the competent authority of the Member state in whose territory the seat of the undertaking . . . is situated." _Id._ Article 16 also requires the Commission to state, in its request, the legal basis and the purpose of the request, as well as the applicable penalties. _Id._ See also id. art. 18, O.J. L 378/4, at 11 (1986) (detailing steps Commission may take in carrying out its investigation); art. 19, O.J. L 378/4, at 11 (1986) (providing for fines Commission may impose on undertakings which "intentionally or negligently . . . supply incorrect or misleading information" or "produce the required books or other business records in incomplete form during investigations."). The Commission may also impose fines on undertakings which infringe Article 85(1) or Article 86 of the EC Treaty. _Id._ at 12.

334. _See id._ art. 1(2), O.J. L 378/4, at 6 (1986) (making Regulation 4056/86 appli-
c. Council Regulation 4057/86

The third Council Regulation in the 1986 Legislative Package deals with unfair pricing practices of third countries.\[^{335}\] The purpose of Regulation 4057/86\[^{336}\] is to lay down the procedure to be followed in response to unfair pricing practices by third country shipowners engaged in international cargo liner shipping.\[^{337}\] Regulation 4057/86 thus covers only liner shipping.\[^{338}\]

It sets out complaint procedures for those acting on behalf of the Community shipping industry who consider themselves injured or threatened by unfair pricing practices.\[^{339}\]

cable "only to international maritime transport services from or to one or more Community ports.")

\[^{335}\] See Regulation 4057/86, supra note 24, art. 1, O.J. L 378/14, at 15 (1986) (stating objective of Regulation 4057/86). Article 1 asserts that the objective of Regulation 4057/86 is to lay down procedure to

be followed in order to respond to unfair pricing practices by certain third country shipowners engaged in international cargo liner shipping, which cause serious disruption of the freight pattern on a particular route to, from or within the Community and cause or threaten to cause major injury to Community shipowners operating on that route.

\[^{336}\] Id.

\[^{337}\] Id. O.J. L 378/14 (1986).


\[^{339}\] Id.

The complaint must contain sufficient evidence of the existence of the unfair practice in question and the resulting injury. \[^{339}\] If there is sufficient evidence to justify initiating a proceeding, the Commission shall commence an investigation at Community level, acting in cooperation with the Member States. \[^{339}\] The investigation should cover both unfair pricing practices and the resulting injury. \[^{339}\] In the course of its investigation the Commission "shall seek all the information it deems necessary" from the Member States and where necessary "shall . . . carry out investigations in third countries, provided that the firms concerned give their consent and the government of the country in question has been officially notified and raises no objections." \[^{339}\] Id. art. 7(2), O.J. L 378/14, at 16-17 (1986). The Commission may hear the interested parties. \[^{339}\] Id. art. 7(5), O.J. L 378/14, at 17 (1986). "Furthermore, the Commission shall, on request, give the parties directly concerned an opportunity to meet" and present their views. \[^{339}\] Id. art. 7(6), O.J. L 378/14, at 17 (1986). If the investigation reveals that "protective measures are unnecessary, then, where no objection is raised within the Advisory Committee, . . . the proceeding shall be terminated." \[^{339}\] Id. art. 9, O.J. L 378/14, at 18 (1986). The Advisory Committee will consist of representatives of each Member State, with a representative of the Commission as Chairman. \[^{339}\] Id. art. 6, O.J. L 378/14, at 16 (1986). Finally,

[w]here investigation shows that there is an unfair pricing practice, that injury is caused by it and that the interests of the Community make Community in-
d. Council Regulation 4058/86

The last act in the 1986 Legislative Package concerns coordinated action to safeguard free access to cargoes in ocean trades. Regulation 4058/86, which is an anti-protectionist measure, strives to ensure a freely competitive environment in the international maritime market, particularly in the dry and liquid bulk trades. Because third countries are increasingly restricting access to bulk cargoes, the Community should be able to provide for coordinated action by Member States to counter the adverse effects of these restrictive practices on the EC merchant fleets. Regulation 4058/86 respectively lays down the mechanism of coordinated action against third countries. The coordinated action by Member States may range...
from diplomatic representation to the third countries concerned,\textsuperscript{347} to counter-measures\textsuperscript{348} directed at the shipping company or companies of the third countries concerned.\textsuperscript{349}

3. Aftermath

Although the 1986 Legislative Package did not address all aspects of an EC common shipping policy, it marked an important first stage on the way to a common maritime market.\textsuperscript{350} The Community had yet to address the sensitive issue of cabotage before establishing a single EC shipping market.\textsuperscript{351} The split between the Northern Member States, supporting immediate liberalization of cabotage, and the Southern Member States, opposing the lifting of cabotage restrictions, stood in the way to free intra-Community maritime services.\textsuperscript{352} Striving to bring the maritime market up in line with the introduction of the Single European Market in 1992,\textsuperscript{353} in 1989 the Commission submitted to

request Commission for coordinated action). The Commission shall make the appropriate recommendations or proposals to the Council, and the Council may decide on the appropriate coordinated action. \textit{Id.} If the Council "has not adopted the proposal on coordinated action within a period of two months, Member States may apply national measures unilaterally or as a group." \textit{Id.} art. 6, O.J. L 378/21, at 22 (1986). In case of urgency Member States may take unilateral national measures even within the two-month period before the Council has made a decision. \textit{Id.}

\textsuperscript{347} Id. art. 4(1)(a), O.J. L 378/21, at 22 (1986).

\textsuperscript{348} See \textit{id.} art. 4(1)(b), O.J. L 378/21, at 22 (1986) (describing counter-measures as consisting, separately or in combination, of "the imposition of an obligation to obtain a permit to load, carry or discharge cargoes" or "the imposition of a quota, . . . . taxes or duties.").

\textsuperscript{349} Id.

\textsuperscript{350} See \textit{COUCH \& RANDOLPH, supra} note 204, at 53-54 (referring to 1986 Legislative Package as first stage toward EC common maritime policy); Xuereb, \textit{supra} note 216, at 136 (describing 1986 Legislative Package as "a major breakthrough in maritime policy.").


\textsuperscript{352} See \textit{Cabotage: Progress Made but Problems Still Remain, supra} note 351 (noting continuing opposing positions of Northern and Southern Member States on liberalization of cabotage).


B. The 1992 Council Regulation 3577

The Single European Act of 1987\footnote{356. SEA, supra note 1. Article 13 of the SEA defined the internal market as "an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured." Id. art. 13, O.J. L 169/1, at 7(1987), [1987] 2 C.M.L.R. at 747.} ("SEA") set the internal market program in motion as a vehicle toward greater economic and political integration of the European Community.\footnote{357. See Goebel, supra note 1, at 1101 (describing impact of SEA on Community).} The SEA envisioned a European Community without internal frontiers and the adoption of 279 new legislative measures designed to achieve the full integration of the goods, services, and capital markets by the end of 1992.\footnote{358. See Goebel, supra note 1, at 1101 (discussing changes in intra-Community relations and EC institutions that SEA introduced).} The general Community movement toward closer economic integration and greater political union\footnote{359. See id. (referring to SEA as first stage on road to greater political and constitutional union).} served as a major impetus towards a more comprehensive common EC maritime policy.\footnote{360. See BREDIMA-SAVOPOULOU & TZOANNOS, supra note 3, at 205 (stating that process toward achievement of internal market in 1992 would inevitably trigger new developments in maritime field).} The purpose of Regulation 3577/92 is to remove restrictions on the provision of maritime transport services on cabotage routes.\footnote{361. See Regulation 3577/92, supra note 21, pmbl, O.J. L 364/7, at 7 (1992) (defining application of principle of freedom to provide services to maritime cabotage as purpose of Regulation 3577/92).} Regulation 3577/92 marked the second stage on the way to an EC common maritime policy.\footnote{362. See Greaves, supra note 2, at 128-38 (referring to pending EC legislation on issue of cabotage as next stage in development of EC maritime policy).} In the aftermath of Regulation 3577/92, as of June 1997, the Northern European Member States had completely opened up both mainland\footnote{363. See Regulation 3577/92, supra note 21, art. 2(1)(a), O.J. L 364/7, at 8 (1992).} and island\footnote{364. supra note 21 (stating that process toward achievement of internal market in 1992 would inevitably trigger new developments in maritime field).} cabotage, while the
Southern European Member States had lifted restrictions on mainland cabotage only.\textsuperscript{365}

1. Background

The SEA set December 31, 1992, as the target date to achieve the internal market.\textsuperscript{366} The SEA also facilitated Community decision-making by permitting the Council to act by a qualified majority vote.\textsuperscript{367} Article 16(5) of the SEA\textsuperscript{368} also changed (specifying meaning of mainland cabotage as "the carriage of passengers or goods by sea between ports on the mainland of one and the same Member State without calls at islands.").

364. See id. art. 2(1)(c), O.J. L 364/7, at 8 (1992) (designating island cabotage as "the carriage of passengers or goods by sea between ports ... on the mainland and on one or more of the islands of one and the same Member State, or [between] ports ... on the islands of one and the same Member State.").


366. See SEA, supra note 1, art. 13, O.J. L 169/1, at 7 (1987), [1987] 2 C.M.L.R. at 747 (asserting that "[t]he Community shall adopt measures with the aim of progressively establishing the internal market over a period expiring on 31 December 1992.").

367. See Goebel, supra note 1, at 1102 (pointing out that by permitting Council to act by qualified majority vote, SEA facilitated adoption of legislation to achieve internal market). The basic rule with regard to voting in the Council is that the Council acts by a majority of its members, except when the EC Treaty provides otherwise. Mathijsen, supra note 1, at 52 (reviewing voting procedure in Council); EC Treaty, supra note 1, art. 148(1), [1992] 1 C.M.L.R. at 680 (asserting that "[s]ave as otherwise provided in this Treaty, the Council shall act by a majority of its members."). Because most EC Treaty provisions do provide otherwise, the general rule with respect to the Council's voting procedure is to act by qualified majority or by unanimity. Mathijsen, supra note 1, at 52-53. For purposes of the qualified majority voting procedure the votes of the members of the Council are weighted. EC Treaty, supra note 1, art. 148(2), [1992] 1 C.M.L.R. at 680. Article 148(2) requires that where the Council acts by a qualified majority vote, "the votes of the members shall be weighted as follows."

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the voting procedure under Article 84(2) of the EC Treaty concerning Council action on sea and air transport. The amended Treaty provision permitted the Council to act by qualified majority instead of the previously required unanimity. The Council could now adopt legislative decisions with fifty-four votes out of a total of seventy-six. The internal market objective, coupled with the new voting rules, eventually resulted in Council Regulation 3577/92 applying the principle of freedom to provide services to maritime transport within Member States.

an act when the Council is acting on a proposal from the Commission. EC Treaty, supra note 1, art. 148(2), [1992] 1 C.M.L.R. at 681. If the Council is not acting on a proposal from the Commission, there is the additional requirement that eight Member States must vote in favor of the measure. Id.; MATHIJSEN, supra note 1, at 53. After the accession of Austria, Finland and Sweden on January 1, 1995, Article 148(2) was respectively amended, so that now a qualified majority vote requires 62 out of a total of 87 votes, and if the Council is not adopting a proposal from the Commission, the 62 votes must come from at least ten members. See Act Concerning the Conditions of Accession of the Kingdom of Norway, the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the Adjustments to the Treaties on Which the European Union is Founded, art. 15, O.J. C 241/21, at 24 (1994) [hereinafter 1994 Act of Accession] (amending EC Treaty, supra note 1, art. 148(2)); Council Decision of 1 January 1995, art. 8, O.J. L 1/1, at 3 (1995) (adjusting instruments concerning accession of new Member States to European Union); 1994 Act of Accession, supra, art. 2, O.J. C 241/21, at 21 (1994) (delegating power to Council, acting unanimously, to adjust these instruments if any applicant state did not ratify Act of Accession). Because the referendum in Norway proved negative, Norway ultimately declined to join the EU. Goebel, supra note 1, at 1093, 1123 (discussing 1995 enlargement). Following the SEA, qualified majority voting became the usual mode of adopting most legislation to attain the internal market, protect consumers or the environment, harmonize visa policies, education, and health measures. Id. at 1121. Unanimity typically is required when the Council, acting on a proposal from the Commission, wants to adopt an act which constitutes an amendment to that proposal. EC Treaty, supra note 1, art. 189a(1), [1992] 1 C.M.L.R. at 694.

368. SEA, supra note 1, art. 16(5), O.J. L 169/1, at 7, [1987] 2 C.M.L.R. at 748 (stating that "[i]n Article 84(2) of the [EC] Treaty, the term 'unanimously' shall be replaced by 'by a qualified majority.'").

369. Id.; EC Treaty, supra note 1, art. 84(2), [1992] 1 C.M.L.R. at 626 (permitting Council, acting by qualified majority, to decide whether, to what extent, and by what procedure to adopt measures for sea and air transport).


371. See EC Treaty,, art. 148(2), supra note 1, art. 148(2), [1992] 1 C.M.L.R. at 681 (setting forth number of votes necessary for measures requiring qualified majority vote).


373. See id. pmbl., O.J. L 354/7, at 7 (1992) (asserting that abolition of restrictions on provision of maritime transport services within Member States is necessary for establishment of internal market); BREDIMA-SAVOPOULOU & TZOANNOS, supra note 3, at 205

The purpose of Regulation 3577/92 is to abolish restrictions on the provision of maritime transport services on cabotage routes, thereby eliminating another barrier towards the achievement of the internal market. Free access to cabotage routes will also ensure adequate and regular transport to, from, and between islands. The freedom to provide cabotage services applies to Community shipowners operating vessels registered in, and flying the flag of any Member State, provided that these ships comply with all conditions for carrying out cabotage in the State of registry, or flag State. Thus, if a vessel is capable of carrying out adequate cabotage services in the flag State, it is deemed fit for that purpose in any Member State.

Within the meaning of Regulation 3577/92, cabotage covers services normally provided for remuneration and includes mainland cabotage, off-shore supply services, and island cabotage. The preamble to Regulation 3577/92 posits that the implementation of the freedom with respect to cabotage services should be gradual and not necessarily carried out in a uniform fashion for all services concerned. Specifically, the implemen-
tation of Regulation 3577/92 for maritime services carried out in the Mediterranean and along the coast of Spain, Portugal, and France was temporarily suspended until January 1, 1995 for cruise services,\textsuperscript{384} until January 1, 1997 for transport of strategic goods,\textsuperscript{385} and until January 1, 1999 for regular passenger and ferry services.\textsuperscript{386} Island cabotage in the Mediterranean and to the French islands along the Atlantic coast was also exempted until January 1, 1999.\textsuperscript{387} Greece was given a special right not to implement the Regulation until January 1, 2004.\textsuperscript{388}

In order to secure reliable and regular transport to, from and between islands, Article 4 of the Regulation allows Member States to conclude public service contracts\textsuperscript{389} or impose public service obligations\textsuperscript{390} as a condition for the provision of cabotage services to or between islands.\textsuperscript{391} The fundamental Community principle of non-discrimination on the basis of nationality underlies the Member States' right to conclude public service contracts or impose public service obligations.\textsuperscript{392} All Community shipowners receive equal treatment with respect to public con-

\textsuperscript{384} Id. art. 6(1), O.J. L 364/7, at 9 (1992).
\textsuperscript{385} Regulation 3577/92, supra note 21, O.J. L 364/7, at 9 (1992). Article 6(1) designates oil, oil products, and drinking water as strategic goods. Id.
\textsuperscript{386} Id.
\textsuperscript{387} Id. art. 6(2), O.J. L 364/7, at 9 (1992). Article 6(2) also grants an exemption until January 1, 1999, to cabotage services to the Canary, Azores, and Madeira archipelagoes, and to the North African seaports of Ceuta and Melilla. Id.
\textsuperscript{388} Id. art. 6(3), O.J. L 364/7, at 9 (1992). Article 6(3) states that "[f]or reasons of socio-economic cohesion, the . . . [exemption from the implementation of Regulation 3577/92] shall be extended for Greece until 1 January 2004 for regular passenger and ferry services." Id.
\textsuperscript{389} See id. art. 2(3), O.J. L 364/7, at 8 (1992) (defining public service contract as "a contract concluded between the competent authorities of a Member State and a Community shipowner in order to provide the public with adequate transport services."). Such contracts may include fixed standards of continuity, regularity, capacity and quality of services, or transport services at specified rates and subject to specified conditions for certain categories of passengers or routes. Id.
\textsuperscript{390} See id. art. 2(4), O.J. L 364/7, at 8 (1992) (explaining public service obligations to mean obligations which Community shipowner would not assume "if he were considering his own commercial interest.").
\textsuperscript{391} Id. art. 4, O.J. L 364/7, at 8 (1992).
\textsuperscript{392} Id. Article 4 states that "[w]henever a Member State concludes public service contracts or imposes public service obligations, it shall do so on a non-discriminatory basis in respect of all Community shipowners." Id.
tracts and public service obligations.³⁹³

Regulation 3577/92 also grants Community shipowners the right of temporary establishment in the Member State where a shipowner from another Member State provides maritime cabotage services.³⁹⁴ The Treaty principle of freedom to provide services³⁹⁵ is thus explicitly made applicable to the maritime cabotage sector.³⁹⁶ Host Member States shall afford providers of coastal services from other Community countries the same conditions as those imposed on their own nationals.³⁹⁷

3. Aftermath

Regulation 3577/92, marking the second stage in the development of an EC common maritime policy, removed yet another barrier to free maritime trade by opening up the Member States' coastal services to Community shipowners irrespective of their country of origin.³⁹⁸ Despite the temporary derogations concerning island cabotage in the Mediterranean and along the Atlantic coast of Spain, Portugal, and France, Regulation 3577/92 started the process of considerably liberalizing the maritime transport to carry goods and passengers to, within, and from the Community.³⁹⁹ Moreover, the ECJ has narrowly interpreted the

³⁹³. Id.
³⁹⁴. Id. art. 8, O.J. L 364/7, at 9 (1992).
³⁹⁵. See EC Treaty, supra note 1, arts. 52, 60, [1992] 1 C.M.L.R. at 613-14, 617 (dealing with right of establishment permanently or temporarily for provision of services); European Parliament v. EC Council, Case 13/83, [1985] E.C.R. at 1599, ¶ 62, [1986] 1 C.M.L.R. at 204-05 (holding Title III articles on freedom to provide services inapplicable to transport services in absence of legislation introducing common transport policy and implementing Title III rules in transport sector).
³⁹⁶. See Regulation 3577/92, supra note 21, art. 8, O.J. L 364/7, at 9 (1992) (asserting that "a person providing a maritime transport service may, in order to do so, temporarily pursue his activity in the Member States where the service is provided, under the same conditions as are imposed by that State on its own nationals.").
³⁹⁷. Id.
³⁹⁸. See id. pmbl., O.J. L 364/7, at 7 (1992) (making Community shipowners beneficiaries of freedom to provide services on cabotage routes); id. art. 2(2), O.J. L 364/7, at 8 (1992) (defining Community shipowners as nationals of "a Member State established in a Member State . . . ; or nationals of a Member State established outside the Community or shipping companies established outside the Community and controlled by nationals of a Member State, if their ships are registered and fly the flag of a Member State.").
³⁹⁹. See Commission Report I, supra note 28, COM (95) 383 Final, at 2-7 (discussing legislative developments in Member States pursuant to Regulation 3577/92, and overall effect of liberalized cabotage by sector and by Member State, for 1993-94 period); Commission Report II, supra note 29, COM (97) 296 Final, at 4-26 (discussing
exemptions from the requirements of the Regulation.  

a. Re Port Dues

In Re Port Dues, France claimed that because Article 6 of Regulation 3577/92 excluded French cabotage from the freedom to provide services until January 1, 1999, it had the right to set fare rules concerning cabotage routes different from the rules covering intra-Community transport. Under the French Code governing maritime ports a charge was levied on each passenger disembarking, embarking or trans-shipping in the ports of France. In the case of transport between two national ports, passengers had to pay only on boarding for departure. In the case of vessels traveling to or from another Member State, passengers had to pay twice, both on embarkation and disembarkation. In addition, passengers arriving from, or leaving for another Member State paid rates higher than those traveling on purely domestic routes. The Commission respectively

new legislative developments in individual Member States in the 1995-96 period, socio-economic effect of liberalized cabotage for period concerned, and anticipated impact on liberalization of island cabotage).


402. See Opinion of Advocate General Lenz, Re Port Dues, [1994] E.C.R. at I-5153-54, ¶ 21-23, [1995] 2 C.M.L.R. at 492-93 (presenting French argument). France argued that the freedom to provide services consisted of the requirement to abolish “all discrimination against a person providing a service on the grounds of his nationality or the fact that he is established in a Member State other than that in which the service must be provided.” Id. at I-5153, ¶ 21, [1995] 2 C.M.L.R. at 493. Because the French fare rules treated all shipowners equally, irrespective of the country of registry, France insisted that it did not violate the freedom to provide services. Id. at I-5153, ¶ 22, [1995] 2 C.M.L.R. at 493. France further asserted that the principle of freedom to provide services in the maritime transport sector “did not mean that intra-Community transport and internal transport cannot be governed by different rules.” Id. at I-5154, ¶ 23, [1995] 2 C.M.L.R. at 493.


405. Id. at I-5165, ¶ 5, [1995] 2 C.M.L.R. at 500.

406. Id.

407. See id. at I-5164, ¶ 3, [1995] 2 C.M.L.R. at 499 (detailing charges on various routes to and from French ports). For example, the charge for passengers bound for a continental French port or Corsica was 8.28 FF, for passengers arriving from or travel-
charged France with violating Council Regulation 4055/86 applying the freedom to provide maritime transport services between Member States. The Commission maintained that by collecting different fees, depending on the country of destination or origin of the trip, the French authorities distinguished between transport services within France and transport services to or from another Member State, treating national transport services more favorably. According to the Commission, France was thus creating an impediment to the free provision of services in intra-Community maritime trade.

The French Government maintained that because the rules governing the charges levied applied equally to all operators, whether or not French nationals, there was no discrimination between French operators and operators from other Member States in intra-Community service to or from a French port. France contended that the fact that operators on intra-Community routes had to pay higher charges than operators servicing a port of the British Isles or the Channel Islands — 17.52 FF, and for passengers arriving or traveling for any other European port — 21.01 FF. The French Government argued that Regulation 4055/86, supra note 24, O.J. L 378/1 (1986), did not fully implement the freedom to provide services in maritime transport, "inasmuch as it concerns only maritime transport between Member States and between Member States and third countries and not . . . maritime cabotage." The French government insisted that there was a lack of discrimination between French operators and operators from other Member States in intra-Community transport to or from a French port, where the same fare rules applied to both.
cabotage routes, for the use of the same port, was simply a consequence of France's exemption from the freedom to provide services along its coast until 1999.413

The ECJ rejected the French argument that the rules concerning the freedom to provide services be assessed separately for each of the two types of routes.414 The ECJ held that the provision of maritime services between Member States cannot be subject to rules stricter than the rules governing provision of analogous services at a domestic level.415 The ECJ further stated that Regulation 3577/92 concerned only the access to maritime cabotage by providers of services from other Member States and did not lay down rules governing intra-Community maritime transport.416 France's temporary exemption from the requirements of the Regulation was therefore irrelevant.417 The ECJ concluded that the French rules operated as a scheme of charges treating providers of services from other Member States less favorably than national operators and that France thus failed to fulfill its obligations under Regulation 4055/86.418

b. Member State Implementation

As of June 1997, cabotage restrictions were in force in France, Greece, Italy, Portugal, and Spain,419 in accordance with the derogations granted under Article 6(1) of the Regulation.420

413. Id. at I-5166-67, ¶ 7, 8, [1995] 2 C.M.L.R. at 500-01.
414. See Re Port Dues, [1994] E.C.R. at I-5169, ¶ 17, [1995] 2 C.M.L.R. at 502 (emphasizing need to assess both types of services under equal requirements). The ECJ held that the achievement of the single market precluded the application of any national legislation which "has the effect of making the provision of services between Member States more difficult than the provision of services purely within one Member State." Id.
416. See id. at I-5169, ¶ 19, [1995] 2 C.M.L.R. at 502 (asserting that Member State's temporary exemption from implementing Regulation 3577/92 "is without relevance" with respect to uniform application of Community rules both to provision of services between Member States and within single Member State).
417. Id. The ECJ held, "[t]o accept that the Member States might on . . . [the] ground [of temporary derogation from the requirements of Regulation 3577/92] be justified in charging intra-Community maritime transport more heavily than internal transport would be tantamount to rendering the extension of the freedom to provide services to intra-Community maritime transport provided for in Regulation 4055/86 to a substantial extent nugatory." Id. at I-5169-70, ¶ 20, [1995] 2 C.M.L.R. at 502.
420. See Regulation 3577/92, supra note 21, art. 6(1), O.J. L 364/7, at 9 (1992)
Germany restricted access to cabotage services to EU registered or owned vessels.\textsuperscript{421} No restrictions applied in any of the remaining Member States because some Member States traditionally follow an open coast-line policy,\textsuperscript{422} some Member States enacted legislation for implementing Regulation 3577/92,\textsuperscript{423} and, finally, because maritime cabotage is not relevant in certain Member States.\textsuperscript{424} Thus, both mainland and island cabotage have been completely liberalized in Northern Europe, while in Southern Europe there has been only partial liberalization of mainland cabotage.\textsuperscript{425}

A study carried out on behalf of the Commission before the end of 1996 revealed that island cabotage is still a very sensitive issue in Southern Europe.\textsuperscript{426} The major anxieties concern cabotage related employment in the Mediterranean.\textsuperscript{427} Article 3(2) of Regulation 3577/92 provides that for vessels carrying out is-


\textsuperscript{422} See id. at 28-32. Member States traditionally following an open cabotage policy are the United Kingdom, Ireland, Denmark, the Netherlands, and Belgium. Id.

\textsuperscript{423} Id. at 29, 32. Finland issued an amending Act 1362/94 of 22 December 1994 which abolished restrictions concerning cabotage for EU vessels. Id. at 29. Sweden liberalized cabotage services to EU vessels by Decree of 1 July 1995 amending Decree 235/1974 on authorization to carry out domestic maritime transport operations. Id. at 5.

\textsuperscript{424} See id. at 5 (stating that no specific legislation was needed in Luxembourg and Austria because of irrelevance of cabotage in those Member States); see Commission Report I, supra note 28, COM (95) 383 Final, at 2 (listing relevant legislative acts adopted by Member States during 1993-94 period).

\textsuperscript{425} See Commission Report II, supra note 29, COM (97) 296 Final, at 20-24 (looking at overall effect of Regulation 3577/92 on maritime transport services in mainland and island cabotage within Community). The liberalized segment of the market in the Mediterranean countries was restricted to mainland cargo cabotage with vessels over 650 gt, which represents 18 million tons of a total Southern cabotage market of 135 million tons. Id. at 12. Mainland cruises were liberalized after January 1995, but this was "a theoretical without practical consequences since all cruise programmes include at least one island destination." Id. at 12. Restriction on island cabotage and mainland passenger operations will remain in force until January 1999. Id.; see Regulation 3577/92, supra note 21, art. 6, O.J. L 364/7, at 9 (1986) (exempting island cabotage in Mediterranean and regular passenger and ferry services until January 1, 1999). Island cabotage in Greece, with respect to regular passenger and ferry services, shall be liberalized by January 1, 2004. Id.


\textsuperscript{427} Id.
land cabotage all matters relating to manning shall be the responsibility of the host State. Article 3(3), however, specifies that, from January 1, 1999, flag State conditions shall govern manning of cargo vessels over 650 gross tons engaged in island cabotage services involving a voyage to or from another State. The Commission study established that the unions of seafarers in the Southern Member States fear that changing the manning requirements from host State to flag State would cause great loss of local employment. To complicate matters further, island cabotage services provide an important source of employment in the South European region. Seventy percent of the jobs in island traffic in the Mediterranean region consists of passenger trades in the form of regular ferry services or island cruise services. Accordingly, the Commission acknowledged that the most contentious point with respect to the post-1999 opening up of island cabotage services in the Southern Member States concerns the carriage of passengers.

In the Northern Member States, where coastal services have been free and open both in the cargo and passenger sectors, the Commission found that the practical consequences in each sector have been very different. In the United Kingdom, for example, where the cabotage routes have traditionally been completely open, U.K. registered ships hold a market share of

428. See Regulation 3577/92, supra note 21, art. 3(2), O.J. L 364/7, at 8 (1992) (setting forth manning conditions for vessels engaged in island cabotage). Host State means the State in which the vessel is performing maritime transport. Id.

429. See id. art. 3(3), O.J. L 364/7, at 8 (1992) (defining flag State as "the State in which the vessel is registered.").

430. Id.

431. See Commission Report II, supra note 29, COM (97) 296 Final, at 20 (discussing cabotage related employment in South European Member States). The problem seems particularly acute in island regions, such as Sicily and Sardinia, where the unemployment rate is very high as compared with the national average. Id. Hence, it would be very difficult for any seafarers resident in the islands to find alternative employment there, if made redundant. Id.

432. See id. at 21 (summarizing estimated total number of jobs associated with South European cabotage activities in 1995). Out of a total of 51,422 seafarers in cabotage trades, 43,570 are engaged in the island sector. Id.

433. Id. at 22. Regular passenger/ferry services comprise 58.4% of all seafarers job opportunities in the Mediterranean region, while cruise services account for 11.6%. Id.

434. See id. at 24 (summing up trends observed up to present moment and analyzing possible future developments).


436. See BREDIMA-SAVOPOULO & TZIOANNOS, supra note 3, at 42-43 (mentioning
thirty to fifty percent in the various cargo sub-categories.\textsuperscript{437} By contrast, passenger cabotage services are entirely carried out under the national flag.\textsuperscript{438} Likewise, in the other Northern Member States, nationally owned, crewed, and registered vessels carry out all passenger island cabotage trade.\textsuperscript{439}

The Commission ascertained that the Northern States’ experience shows that domestic regular passenger services tend to remain in the hands of national carriers, even if the market is open and free for many years.\textsuperscript{440} In the Commission's opinion, the most likely explanation for the dominance of domestic carriers in free cabotage trades in Northern Europe is that it is not financially attractive for a newcomer to set up a regular passenger service to Nordic islands in parallel to the existing services of the traditional national carriers.\textsuperscript{441} The Commission furthermore found that domestic passenger ferries in the Northern States hardly make use of the possibility under their national laws to employ foreign staff.\textsuperscript{442}

The Commission study indicates that conditions in the Southern European islands differ from those in the North.\textsuperscript{443} In the Southern European islands, the demand for coastline transport reaches its peak in the summer when passenger services can

\textsuperscript{437} See Commission Report I, supra note 28, COM (95) 383 Final, at 2 (noting free cabotage in United Kingdom even prior to Regulation 3577/92).

\textsuperscript{438} Id.

\textsuperscript{439} See id. (stating that domestic flag ships carry out 100% of passenger island cabotage in Denmark, Germany, Finland, Sweden, and Netherlands). Cabotage passenger trades are important in Denmark and to a lesser extent also in Germany, Finland, and the Netherlands. See id. at 7 tbl.2 (summarizing cabotage passenger trades in Member States in 1995). Thus, 21.5 million passengers moved in cabotage trades in Denmark in 1995, while in Germany the figure for the same period was 5.5 million. Id. By comparison, in 1995, 4 million passengers traveled on cabotage routes in Finland, 3.3 million passengers moved in cabotage trades in the Netherlands, and in Sweden the respective figure was 1.1 million. Id.

\textsuperscript{440} Id. at 24.

\textsuperscript{441} See id. (explaining that regular passenger services to Nordic islands carry modest profit margins).

\textsuperscript{442} Id. Probably the preference for speakers of the local languages would explain the preference for national seamen on board domestic ferries. Id.

\textsuperscript{443} See Commission Report II, supra note 29, COM (97) 296 Final, at 24 (comparing regular passenger services market in Northern and Southern Europe).
be very profitable.\footnote{444}{See id. (noting seasonal fluctuations in demand for regular passenger services to and from islands in Southern Europe).} The Commission concluded that non-national providers of services would therefore find it commercially attractive to set up businesses in parallel to those offered by national carriers.\footnote{445}{Id. Seafarers unions and ferry operators in Southern Europe expressed concern with respect to the potential increased competition from outside following the liberalization of island cabotage services in the Mediterranean region. \textit{Id}.}

The Commission study also revealed that a change from host State to flag State manning rules\footnote{446}{See Regulation 3577/92, \textit{supra} note 21, art. 3(2)-(3), O.J. L 364/7, at 8 (1986) (providing for shift of responsibility in regards of manning conditions from host State to flag State after January 1, 1999).} is the main source of concern to Southern European operators.\footnote{447}{See Commission Report II, \textit{supra} note 29, COM (97) 296 Final, at 24 (discussing response by Southern seafarers to forthcoming liberalization of island cabotage market).} Their major concern is that Northern European carriers would be allowed to set up regular passenger services in the Mediterranean while making partial use of cheap third country labor under their flag State manning provisions.\footnote{448}{Id. The situation seems less sensitive with respect to island cargo trades. \textit{See id}. at 24-25 (explaining that only 30% of all seamen employed in Southern island cabotage work in cargo trades sector).} Finally, the Commission concluded that the special character of the regular passenger services market and the potential socio-economic implications of the forthcoming liberalization would justify the adoption of certain special provisions to counteract a possible disruption of the competition conditions.\footnote{449}{Id. at 25-26 (expressing Commission's belief that amending Article 3 of Regulation 3577/92 would allow for maintaining competition conditions on passenger services market after full implementation of Regulation 3577/92). The Commission proposed amending Article 3 of Regulation 3577/92 so that the flag State manning conditions apply in principle to all cabotage passenger services while permitting the host State to require that, in the case of passenger services, the host State rules concerning the proportion of EU nationals in the crew shall apply. \textit{Id}.}
In adopting a two-stage common maritime policy, with a gradual liberalization of cabotage, the European Community acted in the Community's best interests in view of the prevailing internal and international conditions of the maritime market. Because maritime transport is closely connected with international trade, shipping is a truly international industry.\footnote{See supra note 204 and accompanying text (discussing international nature of shipping industry).} Due to its international character, maritime transport tends to be subject to international agreements, regulations and trends, more than other types of transport.\footnote{See supra notes 71, 205-06 and accompanying text (referring to long history of international agreements and treaties regulating maritime transport).} The EC long-term commercial and strategic interests dictate the maintenance of a strong, competitive and growing merchant fleet.\footnote{See supra notes 4, 7, 16, 265 and accompanying text (emphasizing importance of maritime transport and competitive fleet for EC economy).} A successful common maritime policy will enable the European Community to respond to existing internal and external exigencies, without compromising the major objective of establishing a common maritime market founded on the rules of open trade and fair competition.\footnote{See supra note 216 and accompanying text (discussing need for EC common maritime policy).} By establishing greater coordination between Member States, an effective EC maritime policy will also improve the Community's ability to provide shipping services and to secure access to the world shipping market.\footnote{See supra notes 204, 269-73 and accompanying text (analyzing objectives of EC common maritime policy).} Finally, an effective maritime policy is necessary to enable the Community to promote fair trade and competition in the world maritime industry while finding the proper balance between the interests of developing countries and the preservation of a distortion-free competitive world shipping market.\footnote{See supra notes 269-73, 278 and accompanying text (discussing aims and pur-}
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Package456 and Regulation 3577/92457 the European Community acted in the Community's best interests in view of the international and internal conditions on the maritime market, and the need for EC common maritime policy.

A. The 1986 Legislative Package Focused on the Most Urgent Issues Concerning the Forging of a Common Maritime Policy

No real progress would have been made toward achieving the goal of a common maritime market if in adopting the 1986 Legislative Package the Council had focused entirely on the removal of barriers to intra-Community shipping services, or had insisted on adopting the 1985 Commission proposal program in its entirety.458 Protectionist practices by non-Member States were making it difficult to maintain free competition in an open market.459 In addition, the continuing recession in the shipping industry coupled with the decline of EC vessels' share of the world fleet,460 necessitated the adoption of a coherent and trade-oriented maritime policy.461 Against this background the Council correctly set the free and nondiscriminatory access to the world maritime market for EC shipowners on the basis of open trade and fair competition as an immediate priority.

456. See supra note 278 and accompanying text (presenting legislative acts comprising 1986 Legislative Package).
457. See Regulation 3577/92, supra note 21, O.J. L 364/7 (1992) (applying principle of freedom to provide services to sea transport within Member States).
458. See supra notes 272, 292 and accompanying text (discussing Commission proposals contained in 1985 Commission Progress Report, COM (85) 90 Final). The original proposal package by the Commission contained draft regulations on all aspects of intra-Community maritime transport as well as services to and from third countries. See supra note 292 (detailing draft Council Regulations that Commission proposed).
459. See Regulation 4055/86, supra note 24, pmbl., O.J. L 378/1, at 1 (1986) (discussing growing danger to EC interests posed by protectionist practices by third countries).
460. See supra notes 10-13 and accompanying text (detailing general shipping recession in 1970s and 1980s, and decline of EC maritime industry in comparison with maritime industries of developing countries during same period).
461. See 1985 Commission Progress Report, supra note 216, COM (85) 90 Final, at 1-10 (assessing world maritime market and Community's position on world maritime market, along with appropriate goals towards coherent Community maritime policy). See also Council Regulation 4057/86, supra note 24, pmbl., O.J. L 378/14, at 14 (1986) (discussing need for Community countermeasures to prevent unfair pricing practices by third countries); supra note 278 and accompanying text (analyzing preamble to Regulation 4057/86).
1. The 1986 Legislative Package Came in Response to International Pressures Adversely Affecting Community Shipping Interests

Historically, international trade developed out of the transport services between a metropolitan country and a colony for the purpose of expanding the commercial exchange between colony and metropolis. Consequently, the maritime services of the metropolitan country inevitably gained a dominant position. The political liberation of the former colonies did not change the dominant position of the metropolitan countries on the maritime market. Because of the close ties between shipping and international trade, a developed maritime industry is of vital importance for the economic and political integration of the developing countries into the world economy. As a result, developing countries consistently adopted a policy of subsidizing and protecting their newly created national fleets in the post-World War II period. The signing of the U.N. Liner Code in 1974 played a major role in the redistribution of available cargoes in international shipping. The cargo-sharing provisions of the U.N. Liner Code make it essentially discriminatory and protectionist in nature. Under these conditions, it was important for the Community to adopt a common position in relation to the U.N. Liner Code. By committing the EC

462. See supra notes 96-103 and accompanying text (relating history of international trade and development of international trade out of shipping services between metropolitan countries and their colonies).
463. Id.
464. See supra note 104 and accompanying text (discussing developing countries' weak position on maritime market in 1950s and 1960s).
465. See supra notes 105-07 and accompanying text (noting importance of national fleets for economic strength of developing countries).
466. See supra notes 106, 108 and accompanying text (analyzing emergence of protectionist maritime policies by developing countries).
472. See supra notes 118, 121 and accompanying text (focusing on Community's
Member States to the U.N. Liner Code, on the one hand, and setting down rules to govern the Member States's relation with third countries pursuant to the Community's obligations under the U.N. Liner Code, on the other, the EC sought to find the middle ground between the stabilizing effect of liner conferences and its commitment to a policy of free and fair competition. In this way, by finding the proper balance between participating in the international maritime cooperation process while at the same time promoting open market and free competition policies, the European Community acted in the Community's best interests. Addressing the issues relating to maritime trade between Member States and third countries properly constituted a priority interest in view of the world maritime conditions prevailing in the mid-eighties. Regulating the relations with third countries was necessary to secure the Community maritime industry vital free access to the world shipping market.

2. By Leaving the Issue of Cabotage out of the 1986 Legislative Package, the European Community Secured the Adoption of Important Policy Decisions with Respect to Maritime Trade with Third Countries

Deliberations in the Council leading to the adoption of the


473. See Regulation 954/79, supra note 110, O.J. L 121/1 (1979) (committing Member States to U.N. Liner Code); supra notes 121-26 and accompanying text (discussing provisions of Regulation 954/79).

474. See Council Regulation 4055/86, supra note 24, O.J. L 378/1 (1986) (applying principle of freedom to provide services to maritime transport between Member States and third countries and laying down rules for gradual phasing out of existing cargo-sharing agreements); supra notes 300-01, 303-05 and accompanying text (detailing provisions of Regulation 4055/86).


476. See Regulation 4057/86, supra note 24, O.J. L 378/14 (1986) (aimed at restricting unfair pricing practices in international shipping); Regulation 4058, supra note 24, O.J. L 378/21 (1986) (providing for Member States' coordinated action to secure free access to cargoes in ocean trades); supra notes 335-39 and accompanying text (analyzing Regulation 4057/86); supra notes 342-48 and accompanying text (detailing provisions of Regulation 4058/86).

477. See supra notes 272-73 (discussing EC dependence on world trade and on need to focus on international aspects of EC maritime policy).
The 1986 Legislative Package revealed great divergence of opinion among the then twelve Member States concerning the opening up of cabotage services. Many Member States have long traditions as maritime nations which influence their attitudes toward shipping. Member States therefore have traditionally attributed varying degrees of importance to the reservation of coastal services for their own national maritime operators. The deliberations in Council made it clear that the opposing positions of the Northern and Southern Member States on the liberalization of cabotage routes would make a compromise difficult to reach, at least not before further careful examination of the conflicting views and the socio-economic realities behind them. The conflict between the Northern and Southern Member States on cabotage could indefinitely delay the adoption of the remaining proposals contained in the 1995 Commission Progress Report, which laid down the foundations of a common external maritime policy.

By splitting the proposals put forward by the Commission into external and internal sub-parts, and adopting the regulations concerning trading relations with third countries, the Council acted most expeditiously under the circumstances. This move made possible the adoption of the 1986 Legislative Package which marked the first phase of a common maritime policy. With the prospect of successfully fostering a competitive EC fleet in a non-protectionist open world market, the Community could now better concentrate on the problem of removing

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478. See supra notes 309-11, 313-19, 321 and accompanying text (discussing in detail legislative history of 1986 Legislative Package and presenting opinions expressed by Member States during Council deliberations leading to 1986 Legislative Package).
479. See Commission Communication II, supra note 10, COM (96) 81 Final, Annex B, at 8 (referring to long history of maritime traditions in most Member States).
480. See supra notes 157, 165-67, 317 and accompanying text (reviewing policies with respect to cabotage restrictions Member States traditionally follow).
481. See supra notes 309-11, 313-23 and accompanying text (detailing proceedings of Council's meetings in 1985).
482. See supra notes 310, 314, 323 and accompanying text (discussing conflict between Northern and Southern Member States and inability of Council to break deadlock in deliberations on issue of cabotage).
483. See supra notes 278, 294-297 and accompanying text (examining focus of 1986 Legislative Package).
484. Id.
internal barriers to a fully open common shipping policy.486

B. In Introducing a Gradual Liberalization of Cabotage Services, Regulation 3577/92 Found the Best Common Ground for a Compromise Between the Positions of Northern and Southern Member States

Regulation 3577/92487 was the outcome of years of discussion and it represents a delicate compromise between the positions of Northern and Southern Member States.488 Member States have imposed cabotage restrictions in response to various historical and geographical conditions.489 For example, the existence of an extremely long coastline in Italy, or of a complex archipelago structure with scattered islands, in the case of Greece, explain the importance of restricting coastal trades to ships flying the national flag in these countries.490 On the other hand, the contours and geographical properties of the Belgian coast may be the reason behind Belgium’s traditionally open coastal trade and lack of cabotage restrictions.491 A staunch opponent to liberalization initially, Greece was also concerned about its national defense because a number of its islands are situated in immediate proximity to Turkey, with which relations have not always been good.492

In view of the conflicting approaches by the Northern and Southern Member States to lifting the restrictions on the Com-

486. See supra notes 353-54 and accompanying text (discussing background to adoption of Regulation 3577/92, which applied freedom to provide services to cabotage); Regulation 3577/92, supra note 21, O.J. L 364/7 (1992).


488. See Commission Report I, supra note 28, COM (95) 383 Final, at 1 (mentioning difficulty in reaching agreement on maritime cabotage); supra notes 28-29, 310-11, 313-17, 323 and accompanying text (discussing conflicting positions of Northern and Southern Member States regarding liberalization of cabotage).

489. See supra notes 157, 165-67, 311, 317 and accompanying text (examining purpose and motivation for cabotage restrictions).

490. See supra note 311 and accompanying text (discussing Member States’ reasons for opposing liberalization of cabotage).

491. See supra notes 165, 317 and accompanying text (presenting connection between country’s geography and policy on cabotage). Most of Belgium’s transport between its ports is done by land. BREDIMA-SAVOPOULOU & TZOANNOS, supra note 3, at 158.

492. See supra notes 166, 311 and accompanying text (discussing Greece’s response to proposal for opening up cabotage trades).
munity's coastal trade, particularly concerning island cabotage, the optimal approach to the problem was the adoption of a gradual phasing out of the existing restrictions, taking into account the local socio-economic conditions in each Member State. In that sense then the provisions of Article 6 of Regulation 3577/92, setting down a timetable for cabotage liberalization by sector and by region until 2004, offered an acceptable compromise between the positions of the Northern and Southern Member States. By giving the Mediterranean countries until January 1, 1999 and in the case of Greece, until 2004 to open up completely their regular coastal passenger and ferry services, Regulation 3577/92 reflected the differing socio-economic conditions and importance of maritime cabotage in the Northern and Southern Member States. At the same time Regulation 3577/92 outlined a definite program for the Southern countries to follow toward a genuine single maritime market. Furthermore, the ECJ has narrowly interpreted the temporary exemptions from the implementation of Regulation 3577/92.

The Community has moreover adopted a flexible approach

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493. See supra notes 314-23 and accompanying text (reviewing opposing positions of Northern and Southern Member States on issue of cabotage).
494. See supra notes 383-88 and accompanying text (describing provisions of Regulation 3577/92, which allows for gradual lifting of restrictions on cabotage routes).
495. See Regulation 3577/92, supra note 21, art. 6, O.J. L 364/92, at 9 (1992) (providing for temporary exemptions from implementation of Regulation 3577/92). Article 6(1) of Regulation 3577/92 states:
   - By way of derogation, the following maritime transport services carried out in the Mediterranean and along the coast of Spain, Portugal and France shall be temporarily exempted from the implementation of this Regulation:
     - cruise services, until 1 January 1995,
     - transport of strategic goods (oil, oil products and drinking water), until 1 January 1997...
     - regular passenger and ferry services, until 1 January 1999.
Id.; see supra notes 387-88 and accompanying text (discussing Article 6 of Regulation 3577/92).
496. See Regulation 3577/92, supra note 21, art. 6, O.J. L 364/92, at 9 (1992) (setting forth temporary derogations from requirements of Regulation 3577/92); supra notes 387-88, 495 and accompanying text (detailing provisions of Article 6 of Regulation 3577/92).
497. See supra note 388 and accompanying text (discussing Article 6(3) of Regulation 3577/92 granting Greece special exemption from implementation of Regulation 3577/92).
499. See Re Port Dues, [1994] E.C.R. at I-5169-70, ¶ 20, [1995] 2 C.M.L.R. at 502 (ruling that temporary exemption from requirements of Regulation 3577/92 does not permit Member State to apply national rules in contravention of principle of free provi-
to the ongoing implementation of Regulation 3577/92, based on constant consultation and cooperation among all Member States and Community institutions. For example, having studied the effects of the implementation of the Regulation until the early 1996, the Commission reported that the most sensitive issue remained the liberalization of regular passenger and ferry services in island cabotage. The primary source of anxiety is the change from host-State to flag-State manning conditions on the vessels providing cabotage services after January 1, 1999, according to the provisions of Article 3 of Regulation 3577/92. The Southern seafarers fear that competition conditions will be distorted by opening up the passenger services in the region to Northern shipowners employing cheap third-world labor. Analyzing the situation, the Commission concluded that the need for further unification of the Member States around a common maritime policy and the full implementation of Regulation 3577/92 dictated taking notice of the concerns of
the Mediterranean seafarers.\footnote{See supra note 449 and accompanying text (presenting Commission's response to findings of Commission study).} The Commission has correspondingly proposed an amendment to Article 3 of Regulation 3577/92.\footnote{See id. (discussing Commission's proposal for amending Article 3 of Regulation 3577/92).} The Commission's analysis of the prevailing conditions in the EC maritime market and the proposed amendment to Regulation 3577/92 serve as a fine example of the flexible approach of the Community toward removing all barriers to the free provision of maritime services in the Community.

CONCLUSION

As part of the attainment of the internal market, the European Community has forged a common maritime policy. Maritime trade between Member States and between Member States and third countries has been fully liberalized. Liberalization of cabotage trade, including the troublesome sector of domestic passenger services, commenced in 1993 and will be completed within the next decade. In its external policy in maritime transport, the EC has sought to secure free access and fair competition throughout the world maritime market. The EC maritime policy has aimed at fostering a competitive Community fleet. At the same time it has sought to provide measures to counter unfair competition and protectionist policies. Notably, the European Community has managed to steer middle ground in its relations with non-Member States by balancing Community shipping interests against the needs of developing countries in an atmosphere of continued cooperation and consultation.