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

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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

* J.D. Candidate, 1999, Fordham University. I dedicate this Comment to Marius, for his unconditional love and support in all my endeavors.

1. Treaty Establishing the European Community, Feb. 7, 1992, [1992] 1 C.M.L.R. 573 [hereinafter EC Treaty], *incorporating changes made by Treaty on European Union*, Feb. 7, 1992, O.J. C 224/1 (1992), [1992] 1 C.M.L.R. 719, 31 I.L.M. 247 [hereinafter TEU]. The TEU, *supra*, amended the Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter EEC Treaty], *as amended by Single European Act* [hereinafter SEA], O.J. L 169/1 (1987), [1987] 2 C.M.L.R. 741, *in TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES* (EC Off'l Pub. Off. 1987). As of the signing of the TEU, the term European Community ("EC" or "Community") replaces the term European Economic Community ("EEC"). TEU, *supra*, art. G, O.J. C 224/1, at 6 (1992), [1992] 1 C.M.L.R. at 728; P.S.R.F. MATHIJSEN, A GUIDE TO EUROPEAN UNION LAW 4 (1995). In addition to the EEC, there is the European Coal and Steel Community ("ECSC") and the European Atomic Energy Community ("Euratom"). *Id.* The TEU established the European Union, which functions as a new chapter in the task of uniting the people of Europe more closely. *Id.* at 3-4. The EEC, ECSC, and Euratom comprise the first of the three pillars that form the European Union, while the second and third pillars are, respectively, Common Foreign and Security Policy, and Co-operation in the areas of Justice and Home Affairs. *Id.* at 4. The twelve Member States that signed the TEU were Belgium, Denmark, Germany, Greece, Spain, France, Ireland, Italy, Luxembourg, the Netherlands, Portugal, and the United Kingdom. TEU, *supra*, pmb., O.J. C 224/1, at 1 (1992), [1992] 1 C.M.L.R. at 719. In 1995, Austria, Finland, and Sweden acceded to the European Union. Roger J. Goebel, *The European Union Grows: the Constitutional Impact of the Accession of Austria, Finland and Sweden*, 18 FORDHAM INT'L L.J. 1092, 1093 (1995).

2. See Rosa Greaves, *EC Maritime Transport Policy and Regulation*, 3 DUKE J. COMP. & INT'L L. 119, 119 (1992) (noting position of European Community as major economic power).

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 maritime⁵ transport.⁶ It is of primary importance for the European Community, therefore, to maintain a viable and competitive commercial fleet.⁷

The EC maritime industry⁸ has not been able, however, to avert the adverse effects of the prolonged crisis in international shipping⁹ and the steady growth of the fleets of developing countries.¹⁰ Compared with the fleets of the developing countries,

from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions, COM (96) 84 Final at 3-5 (March 1996) [hereinafter Commission Communication I] (assessing importance of transport by sea for Community economy).

5. See BLACK'S LAW DICTIONARY 968 (6th ed. 1990) (defining maritime as pertaining to navigable waters, such as sea, ocean, great lakes, navigable rivers, or to navigation or commerce on navigable waters).

6. See Commission Communication I, *supra* note 4, COM (96) 84 Final, at 3 (explaining role of maritime transport).

7. See Greaves, *supra* note 2, at 119-20 (discussing importance of maintaining viable and competitive Community fleet).

8. See BREDIMA-SAVOPOULOU & TZOANNOS, *supra* note 3, at 12 (identifying maritime industry as carriage of goods and passengers by "vessels over the surface of water."). See also COMMITTEE OF INQUIRY INTO SHIPPING, CHAIRMAN: THE RT. HON. THE VISCOUNT ROCHDALE, REPORT, 1970, Cmnd 4337, at 1 [hereinafter ROCHDALE REPORT] (defining EC maritime industry as transporting goods and persons in ships from "a dockside point across the sea for commercial return.").

9. See BLACK'S LAW DICTIONARY, *supra* note 5, at 1378 (defining shipping as putting, or receiving, on board ships or vessels intended for navigation).

10. See MULTINATIONALS FROM DEVELOPING COUNTRIES (Krishna Kumar & Maxwell G. McLeod eds., 1981) (identifying developing countries or nations as "all nonsocialist nations of Africa, Asia, and Latin America that are not the members of the Organization for Economic Cooperation and Development ("OECD")."). The Convention setting up the OECD was signed in Paris on December 14, 1960 by Austria, Belgium, Canada, Denmark, France, Germany, Greece, Iceland, Irish Republic, Italy, the Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, the United Kingdom, and the United States of America. See Convention on the Organization for Economic Cooperation and Development, Dec. 14, 1960, 888 U.N.T.S. 179 [hereinafter OECD Convention]. Japan became a member in 1964, Finland in 1969, Australia in 1971, New Zealand in 1973, Mexico in 1994, the Czech Republic in 1995, and Hungary, Poland, and the Republic of Korea in 1996. OECD, CODE OF LIBERALISATION OF CURRENT INVISIBLE OPERATIONS 2 (1997). The purpose of OECD is to promote policies designed:

- (a) to achieve the highest sustainable economic growth and employment and a rising standard of living in Member countries, while maintaining financial stability, and thus to contribute to the development of the world economy;
- (b) to contribute to sound economic expansion in member as well as non-member countries in the process of economic development; and
- (c) to contribute to the expansion of world trade on a multilateral, non-discriminatory basis in accordance with international obligations.

Id. art. 1, 888 U.N.T.S. at 183. See also ADEMUNI-ODEKE, PROTECTIONISM AND THE FUTURE OF INTERNATIONAL SHIPPING 3 (1984) [hereinafter PROTECTIONISM] (describing general

the Community commercial fleets have suffered a decrease in their competitiveness and strength on the world maritime market.¹¹ The EC fleets experienced a considerable decline both in terms of tonnage¹² and total size relative to other principal world fleets¹³ in the period between 1970 and 1987.¹⁴ A strong na-

shipping industry decline and growing fleets of developing countries); Commission of the European Communities, *Towards a New Maritime Strategy: Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions*, COM (96) 81 Final, at 1 (March 1996) [hereinafter *Commission Communication II*] (discussing shrinking EC shipping industry in contrast to growing shipping industries of developing countries, particularly in East Asia).

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 ENCYCLOPÆDIA BRITANNICA 843 (15th ed. 1994) [hereinafter *ENCYCLOPÆDIA 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.¹⁵ Shipping fleets are also status symbols.¹⁶ If the European Community wants to retain its prestige and status as a leading economic power, it must maintain a strong modern fleet.¹⁷

Free access to maritime services within Member States presents one of the factors contributing to the vitality and competitiveness of the Community fleet.¹⁸ Moreover, the removal of restrictions on the provision of services along cabotage¹⁹ routes within Member States will eliminate another barrier towards establishing the internal market²⁰ 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.²¹ 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.²² In 1986, the Council of Ministers²³ ("Council") adopted a package of four regulations²⁴ ("1986 Legislative Package"). The 1986 Legislative Package marked the first stage in the implementation of an EC common maritime transport policy.²⁵ Council Regulation 3577/92,²⁶ extending the principle of freedom to provide services to maritime cabotage, marked the second stage towards a common maritime policy.²⁷ For years the

21. See Council Regulation No. 3577/92, pmb., 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. BERMAN 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).

23. See EC Treaty, *supra* note 1, arts. 145-54, [1992] 1 C.M.L.R. at 679-82 (setting forth duties and composition of Council). The Council acts as a legislative body. BERMAN, *supra* note 22, at 51.

24. See Council Regulation No. 4055/86, O.J. L 378/1 (1986) [hereinafter Regulation 4055/86] (applying principle of freedom to provide services to maritime transport between member states and third countries); Council Regulation No. 4056/86, O.J. L 378/4 (1986) [hereinafter Regulation 4056/86] (detailing rules for application of Treaty Articles 85 and 86 on competition to maritime transport); Council Regulation No. 4057/86, O.J. L 378/14 (1986) [hereinafter Regulation 4057/86] (restricting unfair pricing practices in maritime transport); and Council Regulation No. 4058/86, O.J. L 378/21 (1986) [hereinafter Regulation 4058/86] (concerning coordinated action to safeguard free access to cargoes in ocean trades). The four regulations comprise the 1986 Legislative Package ("1986 Legislative Package"). Commission Communication II, *supra* note 10, COM (96) 81 Final, at 8 n.3.

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).

26. Regulation 3577/92, *supra* note 21, O.J. L 364/7 (1992).

27. See Commission Communication II, *supra* note 10, COM (96) 81 Final, at 8-11

Council deliberated Regulation 3577/92,²⁸ and even after its adoption, Regulation 3577/92 represented a delicate compromise between opposing positions taken by Member States.²⁹

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).

28. See Commission of the European Communities, Implementation of Regulation 3577/92 applying the principle of freedom to provide services to maritime transport within Member States - 1993-1994: Report from the Commission to the Council, COM (95) 383 Final, at 1 (September 1995) [hereinafter Commission Report I] (noting difficulty in reaching agreement between positions of Northern and Southern Member States). See also BREDIMA-SAVOPOULOU & TZOANNOS, *supra* note 3, at 157-59 (discussing deliberations of Council of Transport Ministers leading to 1986 Legislative Package, and Southern Member States' opposition to Northern Member States' insistence on immediate lifting of cabotage restrictions).

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 industry³⁰ concerned with the shipping of passengers and goods over navigable waters.³¹ Because of its close ties with international trade,³² shipping plays a major role in the economy and political relations of a state.³³ The Community's power to legislate in the sphere of maritime transport derives from Article 84(2) of the EC Treaty.³⁴ EC action in the maritime transport area must also observe the general EC Treaty rules of nondiscrimination on the basis of nationality,³⁵ freedom to provide services,³⁶ and competition.³⁷

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."); ADEMUNI-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."); CAFRUNY, *supra* note 13, at 2 (referring to shipping as constituting "operations of the global marketplace for the transportation of commodities.").

33. See CAFRUNY, *supra* note 13, at 1 (stating that "[a]s 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).

36. See *id.* arts. 59-66, [1992] 1 C.M.L.R. at 616-18 (containing provisions governing freedom to provide services).

37. See *id.* arts. 85-94, [1992] 1 C.M.L.R. at 626-32 (setting forth EC competition rules).

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.³⁸ Shipping activities break down into different sub-sectors depending on the type of good or passenger transported.³⁹ The regularity of the services provided also distinguishes between different types of shipping activities.⁴⁰ The major elements of a government's maritime policy are protectionism,⁴¹ employment,⁴² international maritime affairs,⁴³ and competition policy.⁴⁴

1. Maritime Industry Defined

The maritime industry involves the carriage of goods and passengers over navigable water.⁴⁵ In terms of EC maritime policy, and the EC Treaty, the maritime industry concerns the busi-

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 & TZOANNOS, *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 cargoes in bulk, carriage of general cargo, which requires packaging, and carriage of cargo in containers. *Id.*; CAFRUNY, *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 & TZOANNOS, *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.⁴⁶ In the context of EC maritime policy then, the maritime industry excludes operations on inland waterways.⁴⁷

Shipping activities fall into various sub-sectors.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.⁴⁹ The types of activities according to this criterion include the transportation of cargoes in bulk, which can be liquid⁵⁰ or dry⁵¹ bulks.⁵² The transportation of general cargo⁵³ is another shipping activity.⁵⁴ Ships may also carry containers.⁵⁵ The transportation of passengers by sea represents another type of shipping activity.⁵⁶ Tourist services in the form of cruising services constitute another sub-sector.⁵⁷

A different classificatory criterion looks at the regularity of the service offered.⁵⁸ Liner⁵⁹ services are services which provide

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.").

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.

48. See BREDIMA-SAVOPOULOU & TZOANNOS, *supra* note 3, at 12 (defining shipping industry).

49. *Id.*

50. *Id.* Oil and oil products are examples of liquid cargo. *Id.*

51. *Id.* Examples of dry cargo are iron ore, grain, and coal. *Id.*

52. *Id.* See also BLACK'S LAW DICTIONARY, *supra* note 5, at 195 (defining bulk as "merchandise which is neither counted, weighed, nor measured.").

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

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).

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).

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).

57. BREDIMA-SAVOPOULOU & TZOANNOS, *supra* note 3, at 13.

58. *Id.*

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.⁶⁰ Tramp⁶¹ 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.⁶² Liner trades tend to operate through organized liner conferences,⁶³ whose purpose is to absorb the effect of short-term⁶⁴ fluctuations in market prices and secure stable service on established routes and goods.⁶⁵ Liner conferences thus escape the determination of freight rates⁶⁶ by free market mechanisms.⁶⁷ Tramp vessel services, in contrast, employ freight rates which are established in accordance with conditions of supply and demand.⁶⁸

2. Major Elements of Maritime Policy

The key issues of a government's maritime policy include

60. *Id.*; see BREDIMA-SAVOPOULOU & TZOANNOS, *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,⁶⁹ employment,⁷⁰ international maritime affairs,⁷¹ and competition policy.⁷² The most frequently employed forms of protectionism are flag⁷³ preference⁷⁴ and state aid and assistance.⁷⁵ The United Nations Conference on Trade and Development⁷⁶ ("UNCTAD") is a major factor shaping international

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).

71. See Joseph C. Sweeney, *From Columbus to Cooperation—Trade and Shipping Policies from 1492 to 1992*, 13 *FORDHAM INT'L L.J.* 481, 488-521 (1989/1990) (reviewing existing international maritime public and private organizations). There exists a long history of international regulation in maritime transportation. *Id.* Individual governments' positions with respect to international conventions and rules shape international maritime affairs. 1 D.P. O'CONNELL, *THE INTERNATIONAL LAW OF THE SEA* 31-33 (1982) (noting that although nations used to view unilateral actions as legitimate means of international maritime claim resolution, more recent approach favors international negotiations as preferred method).

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.

76. See G.A. Res. 1995, 19 U.N. GAOR, 19th Sess., Supp. No. 15, at 1, U.N. Doc. A/

maritime affairs.⁷⁷ With respect to competition policy in the maritime industry, the main issues concern a state's membership in the system of liner conferences.⁷⁸

a. Employment

The employment element of a government's maritime policy primarily concerns the legality of employing non-nationals on board national flag vessels.⁷⁹ Because of its ties with international trade,⁸⁰ the maritime industry often brings nationals of different countries to work together on a shipping transaction.⁸¹ 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.⁸²

Within the European Community, a 1973 decision⁸³ of the European Court of Justice⁸⁴ ("ECJ") made the policy of free

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.*

82. See SHIPPING, *supra* note 30, at 314 (describing relation between employment in maritime industry and protectionism). The U.S. Jones Act of 1920, reserving coastal trade to U.S.-manned vessels, is a good example of a government policy seeking to protect the jobs of national seafarers. Merchant Marine Act of 1920, 46 App. U.S.C. § 883 (1997). The Merchant Marine Act of 1920 is popularly known as the Jones Act of 1920. See Robert W. Gruendel, Note, *The Weakening Grip of United States Cabotage Law*, 4 FORDHAM INT'L L.J. 391, 393 (1981) (reviewing provisions of Jones Act).

83. Commission of the European Communities v. French Republic, French Merchant Seamen, Case 167/73, [1974] E.C.R. 359, [1974] 2 C.M.L.R. 216 [hereinafter French Merchant Seamen].

84. See BERMANN ET AL., *supra* note 22, at 50 (identifying European Court of Justice

movement of labor⁸⁵ and nondiscrimination on the basis of nationality⁸⁶ applicable to the maritime transport sector.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.⁸⁸ A major qualification to the free employment of seafarers on board EC ships takes into account passenger safety considerations.⁸⁹ Member States may require that a certain percentage of the crew members, and, in particular, those nominated on muster-rolls⁹⁰ to assist passengers in emergency situations, have communication skills sufficient for that purpose.⁹¹

("ECJ") as EC chief judicial body). The ECJ's function is to ensure that the EC institutions and Member States observe the rules and principles of law when applying or interpreting the EC Treaty. EC Treaty, *supra* note 1, art. 164, [1992] 1 C.M.L.R. at 684. The ECJ's power to give binding interpretations of Community law is exclusive. Carl Otto Lenz, *The Role and Mechanism of the Preliminary Ruling Procedure*, 18 *FORDHAM INT'L L.J.* 388, 392 (1994). The European Community's other legal body is the Court of First Instance upon which the Council has conferred jurisdiction to hear "all direct actions brought by natural or legal persons." GEORGE A. BERMAN ET AL., 1995 SUPPLEMENT TO CASES AND MATERIALS ON EUROPEAN COMMUNITY LAW 72 (1995).

85. See EC Treaty, *supra* note 1, art. 3(c), [1992] 1 C.M.L.R. at 588 (providing for the free movement of persons, as between Member States).

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

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

Id.

87. *French Merchant Seamen*, [1974] E.C.R. at 371, ¶¶ 32-33, [1974] 2 C.M.L.R. at 219 (holding application of free movement of workers to maritime transport obligatory for Member States).

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).

89. See Council Directive No. 94/58, O.J. L 319/28 (1994) [hereinafter Council Directive 94/58] (setting requirements for minimum level of training for seafarers).

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.")

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

(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.*

93. See BREDIMA-SAVOPOULOU & TZOANNOS, *supra* note 3, at 59-52 (detailing Member States policy with respect to employment of seamen from third countries). See also Commission Communication II, *supra* note 10, COM (97) 296 Final, at 19 annex A-4 (1996) (summarizing data on non-national seafarers on board EC flagged vessels, by country, for 1983, 1992, and 1994).

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

trade of either one or both.⁹⁷ The European colonial powers⁹⁸ 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.⁹⁹ The prevailing economic theory of the sixteenth and seventeenth centuries, mercantilism,¹⁰⁰ asserted that a nation's strength and prosperity depended on the amassing of reserves of gold and silver.¹⁰¹ 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.¹⁰² Consequently, even without cabotage restrictions reserving the trade to national ships, the shipping services of the metropolitan country inevitably gained a dominant position.¹⁰³ 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 SESAM 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.¹⁰⁴

Because shipping is vital in international trade,¹⁰⁵ a developed maritime industry plays a major role in the economic and political integration of the developing countries into the world economy.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.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.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.¹⁰⁹ The signing of the United Nations Convention on the Code of Conduct for Liner Conferences¹¹⁰ ("U.N. Liner Code") in 1974

GOLD, *supra* note 13, at 274 (noting connection between colonial trade and development of world trade and prosperity).

104. 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).

105. 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]rom 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.*

106. *Id.*; see PROTECTIONISM, *supra* note 10, at 7-15 (discussing development and problems of protectionism in international shipping).

107. See SHIPPING, *supra* note 30, at 2-11 (focussing 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.").

108. See SHIPPING, *supra* note 30, at 153-246 (analyzing prevailing conditions of world trade and shipping in period following World War II).

109. See Sweeney, *supra* note 71, at 484 n.10 (explaining purpose of UNCTAD).

110. UNCTAD, Convention on a Code of Conduct for Liner Conferences, U.N. Doc. TD/CODE/11/REV.1 (1974), 13 I.L.M. 917 [hereinafter U.N. Liner Code]. The U.N. Liner Code was signed at Geneva on April 6, 1974 in response to further pressure by the developing countries, which wanted to strengthen their negotiating positions in the liner conferences. SHIPPING, *supra* note 30, at 17 (1988). The U.N. Liner Code 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

further affected the relations among the world's maritime industries.¹¹¹ The cargo-sharing provisions¹¹² of the U.N. Liner Code make the U.N. Liner Code discriminatory and protectionist in nature.¹¹³

The U.N. Liner Code received much support from the developing countries,¹¹⁴ but a mixed reception from the developed maritime nations.¹¹⁵ Among the EC Member States, France, Belgium, and Germany voted in its favor,¹¹⁶ while the United Kingdom and Denmark opposed the U.N. Liner Code.¹¹⁷ The divergence of opinion concerning joining the U.N. Liner Code presented the European Community with a problem.¹¹⁸ 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.¹¹⁹ The EC Treaty requires, however, that the Community approach matters concerning transport within a Common Transport Policy.¹²⁰ Adopting a common position on the

country, and 20% is left open to third country carriers. *Id.* The United States firmly opposes both the U.N. Liner Code and the European Community's commitment to the U.N. Liner Code. See BREDIMA-SAVOPOULOU & TZOANNOS, *supra* note 3, at 243 (relating U.S. position on U.N. Liner Code); Council Regulation No. 954/79, O.J. L 121/1 (1979) [hereinafter Regulation 954/79] (committing Member States to provisions of U.N. Liner Code).

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.* 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.*

117. *Id.*; see Bridget Hogan, *West German Ratification of the Liner Code May Fuel Talks*, LLOYD'S LIST, April 11, 1983, at 1 (describing EC Member States' response and attitude to U.N. Liner Code).

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-

Member States shall pursue EC Treaty objectives concerning transport within framework of common transport policy).

121. See Regulation 954/79, *supra* note 110, pmb., O.J. L 121/1, at 1 (1979) (emphasizing necessity for common position in relation to U.N. Liner Code).

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

123. See BREDIMA-SAVOPOULOU & TZOANNOS, *supra* note 3, at 79-81 (discussing EC measures relating to UNCTAD and 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.¹³⁰ Open conferences keep liner trades open to new members,¹³¹ while closed conferences resist admission of new members.¹³² Closed conferences, furthermore, often preclude outside shipping lines that are not members of a conference from access to the relevant liner trade.¹³³ Within the frameworks of UNCTAD and the Organization for Economic Co-operation and Development¹³⁴ ("OECD"), all EC Member States except Greece¹³⁵ 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.¹³⁶ All EC Member States, apart from Ireland and Greece, have respectively ratified the U.N. Liner Code.¹³⁷ EC Member States, in general, favor the closed conference system,¹³⁸ 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.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.¹⁴⁰

d. Protectionist Activities

Protectionism in shipping takes different forms,¹⁴¹ the most widely-spread of which are various manifestations of flag preference and state aid and assistance.¹⁴² The major categories of flag preference are cargo reservation¹⁴³ and cabotage restric-

of closed conferences in system of liner conferences in which Member States participate); CAFRUNY, *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. BREDIMA-SAVOPOULOU & TZOANNOS, *supra* note 3, at 15; *see* CAFRUNY, *supra* note 13, at 53-54 (tracing development of liner conferences to nineteenth century trades with colonies); 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); 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. *See* BREDIMA-SAVOPOULOU & TZOANNOS, *supra* note 3, at 15 (analyzing EC liner trades).

139. *See* BREDIMA-SAVOPOULOU & TZOANNOS, *supra* note 3, at 15 (explaining meaning of closed conferences).

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

141. *See* PROTECTIONISM, *supra* note 10, at 11 (overviewing existence and role of protectionism in international shipping).

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

143. *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. *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. 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. *Id.*

tions.¹⁴⁴ Financial aid¹⁴⁵ and fiscal relief¹⁴⁶ to the national maritime industry are the usual forms of state aid and assistance.¹⁴⁷

i. Cabotage

Cabotage or coasting trade,¹⁴⁸ refers to the trade or navigation in coastal waters between two points within a country.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.¹⁵⁰ The term in essence denotes the discriminatory practice of keeping foreign flags out of coastal waters¹⁵¹ and

144. See COLOMBOS, *supra* note 13, at 383 (defining cabotage as practice of excluding foreign vessels from coastal trade).

145. See PROTECTIONISM, *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, *supra* note 5, at 1428.

146. See PROTECTIONISM, *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, *supra* note 5, at 816.

147. PROTECTIONISM, *supra* note 10, at 147.

148. See BLACK'S LAW DICTIONARY, *supra* note 5, at 282 (defining coasting trade as commerce and trade along coast); L. Oppenheim, *The Meaning of Coasting-Trade in Commercial Treaties*, 24 L.Q. REV. 328, 329 (1908) (equating cabotage with coasting trade).

149. See BLACK'S LAW DICTIONARY, *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, *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, *supra* note 5, at 1091.

150. See WEBSTER'S DICTIONARY, *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 *caboter*, "to sail along the coast", which originated from the Spanish *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, *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.

151. See PROTECTIONISM, *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)

thus often constitutes an element of a government's maritime policy as a category of flag preference.¹⁵² The idea behind cabotage restrictions is to promote the development of national merchant fleets.¹⁵³ The U.S. Jones Act of 1920¹⁵⁴ is a well-known case in point,¹⁵⁵ requiring U.S.-built, U.S.-owned, and U.S.-manned vessels to carry out all coastal trade.¹⁵⁶

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,

(describing cabotage as practice, since ancient times, of reserving coastal trade for domestic ships).

152. See PROTECTIONISM, *supra* note 10, at 147 (characterizing cabotage restrictions as category of flag preference); CAFRUNY, *supra* note 13, at 59 (1987) (defining cabotage as wide-spread flag-preference practice of reserving coastal shipping for national fleet).

153. PROTECTIONISM, *supra* note 10, at 75.

154. Merchant Marine Act of 1920, 46 App. U.S.C. § 883 (1997) (providing for forfeiture of any cargo transported between United States ports by vessels not built, owned, or manned by United States citizens). See Gruendel, *supra* note 82, at 391-94 (discussing cabotage restrictions in United States and applicable statutory provisions). "The Jones Act" is also a name often given to Chapter 18 of the Merchant Marine Act of 1920, 46 App. U.S.C. § 688 (1997) (concerning liability for injuries to seamen). 46 App. U.S.C. § 688.

155. See GOLD, *supra* note 13, at 192 (characterizing Jones Act of 1920 as protectionist U.S. measure striving to improve competitive position of U.S. shipping in international maritime transport).

156. See 46 App. U.S.C. § 883. Section 883 states :

No merchandise . . . shall be transported by water, or by land and water, on penalty of forfeiture of the merchandise (or a monetary amount up to the value thereof as determined by the Secretary of the Treasury, or the actual cost of the transportation, whichever is greater, to be recovered from any consignee, seller, owner, importer, consignee, agent, or other person or persons so transporting or causing said merchandise to be transported), between points in the United States, including Districts, Territories, and possessions thereof embraced within the coast-wise laws, either directly or via a foreign port, or for any part of the transportation, in any other vessel than a vessel built in and documented under the laws of the United States and owned by persons who are citizens of the United States.

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

157. See BREDIMA-SAVOPOULOU & TZOANNOS, *supra* note 3, at 42-43 (reviewing existence of cabotage restrictions in EC Member States).

158. *Id.*; see 5 ENCYCLOPÆDIA BRITANNICA, *supra* note 12, at 736 (explaining that Faroe Islands are autonomous dependency of Denmark situated between Great Britain and Iceland).

159. *Id.*

160. See 1 ENCYCLOPÆDIA BRITANNICA, *supra* note 12, at 197 (defining Aegean Sea as sea situated in area between Greek mainland and Asia Minor).

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).

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 Iviza).

163. See *id.* at 513 (defining Corsica as French island in Mediterranean Sea).

164. See *id.* at 2110 (explaining that Sicily is Italian island in Mediterranean Sea, west of Italian peninsula).

165. See Sweeney, *supra* note 71, at 522 (noting importance of cabotage for guaranteeing year round access to mainland for island dwellers in Mediterranean and North Sea areas); BREDIMA-SAVOPOULOU & TZOANNOS, *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.

166. See BREDIMA-SAVOPOULOU & TZOANNOS, *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.¹⁶⁷

ii. Other Protectionist Activities

Cargo reservation is another major form of flag preference protectionism.¹⁶⁸ Specific state practices coming under the heading of cargo reservation include cargo sharing¹⁶⁹ and cargo preference.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.¹⁷¹ The U.N. Liner Conference provides an example of a multilateral cargo sharing agreement.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.¹⁷³

Cargo preference refers to the practice of enacting laws

167. See BREDIMA-SAVOPOULOU & TZOANNOS, *supra* note 3, at 42 (discussing arguments by EC Member States for maintaining cabotage restrictions).

168. See PROTECTIONISM, *supra* note 10, at 71 (describing cargo reservation as category of flag preference).

169. See CAFRUNY, *supra* note 13, at 26 (defining cargo sharing as practice of dividing cargoes among fleets of trade-generating nations).

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).

171. See PROTECTIONISM, *supra* note 10, at 71 (discussing cargo sharing); CAFRUNY, *supra* note 13, at 26 (defining cargo sharing).

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).

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:

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:

(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;

(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.

Id.

mandating that national flag vessels carry a certain proportion of export and import cargo in various trades.¹⁷⁴ Cargo preference, as a protectionist state policy, is most advanced in the Latin American region.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.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.¹⁷⁷ Financial aid often comes in the shape of maritime subsidies.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.¹⁷⁹ Without governmental financial aid the services in question would come

174. See CAFRUNY, *supra* note 13, at 59 (noting that cargo preference refers to practice of reserving cargoes for domestic vessels); PROTECTIONISM, *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, *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. CAFRUNY, *supra* note 13, at 59. See also SINGH, *supra* note 30, at 77 (justifying cargo preference practice on grounds of government possession and control over cargoes which are subject of cargo preference).

175. See CAFRUNY, *supra* note 13, at 159-62 (reviewing cargo preference practices in world shipping); Hearn, *supra* note 143, at 489-91 (examining cargo preference laws in Latin American countries); 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).

176. See CAFRUNY, *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. *Id.* The Dominican Republic reserved 40% of the seagoing trade to her national flag ships, and Peru reserved 30%. *Id.* Brazil mandated that 100% of government-related goods travel on Brazilian ships. *Id.* See also Hearn, *supra* note 143, at 489-91 (describing cargo preference practices in each Latin American country).

177. See PROTECTIONISM, *supra* note 10, at 147 (describing major forms of state aid to shipping).

178. *Id.*; see CAFRUNY, *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. PROTECTIONISM, *supra* note 10, at 147.

179. See PROTECTIONISM, *supra* note 10, at 148 (defining maritime subsidies); 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).

to the public at a much higher price.¹⁸⁰ The operational maritime subsidy in the United States provides a typical example of a state subsidy to the shipping industry.¹⁸¹ 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.¹⁸²

Governments may also extend special protection to the national maritime industry by adjustments in government fiscal policy.¹⁸³ Tax depreciation allowances to the shipping industry are a major form of fiscal relief.¹⁸⁴ Depreciation refers to a reduction in the value of fixed assets.¹⁸⁵ 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. GOLD, *supra* note 13, at 192. See also SIR OSBORNE MANCE, *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 CAFRUNY, *supra* note 13, at 66 (tracing beginnings of U.S. "elaborate system of subsidies to shipping" in 1920s and 1930s); GOLD, *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 CAFRUNY, *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. BITTKER & 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,¹⁸⁶ which ultimately results in promotion of national shipping.¹⁸⁷

EC Member States have expressed a clear preference for a liberal¹⁸⁸ approach to maritime transport.¹⁸⁹ 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.¹⁹⁰ Despite this general commitment, EC Member States have pursued some measure of protectionist

which determines the property's salvage value. *Id.* 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. *Id.* 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. *Id.* 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 23-24.

186. See BREDIMA-SAVOPOULOU & TZOANNOS, *supra* note 3, at 38 (looking at role of fiscal concessions in maritime industries).

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

188. 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).

189. 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).

190. 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.¹⁹¹ Cargo reservation in international trade exists in France, Portugal, and Spain.¹⁹² Council Regulation 954/79, which committed the EC Member States to the U.N. Liner Code, institutionalized cargo sharing in the liner trades.¹⁹³ With respect to state aid, shipping companies in France, Germany, Italy, Portugal, Spain, and the United Kingdom receive operating subsidies from their governments.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.¹⁹⁵ Accelerated depreciation allowances¹⁹⁶ exist for shipowning enterprises in all EC Member States except Greece.¹⁹⁷

B. *Legal Framework for EC Maritime Policy*

The major objectives of the Community are to promote a

191. See BREDIMA-SAVOPOULOU & TZOANNOS, *supra* note 3, at 37 (reviewing protectionist activities by Member States).

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.*

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).

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); CAFRUNY, *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.

195. BREDIMA-SAVOPOULOU & TZOANNOS, *supra* note 3, at 37.

196. See BITTKER & 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).

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); CAFRUNY, *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).

harmonious development of economic activities, sustainable economic growth, economic and social cohesion, and solidarity among Member States by establishing a common market.¹⁹⁸ For these purposes, Article 3(f) provides that the activities of the Community shall include a common policy in the sphere of transport.¹⁹⁹ Community action in the sphere of transport, including maritime transport, must observe the fundamental Community principles²⁰⁰ of nondiscrimination on the basis of nationality,²⁰¹ the freedom to provide services,²⁰² and EC competition rules.²⁰³

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.

Id.

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.

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

201. See EC Treaty, *supra* note 1, art. 6, [1992] 1 C.M.L.R. at 591 (stating that "[w]ithin 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.").

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.

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.²⁰⁴ More than other transport modes, shipping tends therefore to be subject to international agreements, regulations, and trends.²⁰⁵ The UNCTAD and the U.N. Liner Conference have become important channels of regulating international maritime trade.²⁰⁶ The principles of the OECD Code of Liberalisation of Current Invisible Operations²⁰⁷ ("OECD Code"), which covers maritime transport, have further guided EC Member States' activities in international shipping.²⁰⁸ The OECD Code provides for complete free-

distortion of competition within the common market, and in particular those which:

- (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
- (b) limit or control production, markets, technical development, or investment;
- (c) share markets or sources of supply . . .

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

Id. art. 85, [1992] 1 C.M.L.R. at 626-27.

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.

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

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.

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).

206. See SHIPPING, *supra* note 30, at 3 (looking at international organizations and agreements influencing international shipping relations).

207. OECD CODE, *supra* note 190.

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.²⁰⁹ 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.²¹⁰ The United States²¹¹ too was pursuing a protectionist policy, reserving a significant proportion of U.S.-generated cargo for U.S. flag vessels.²¹² The advent of the container shipping²¹³ 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 343 (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.²¹⁴ 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.²¹⁵ 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.²¹⁶

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-SAVOPOULOU & 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.²¹⁷ The relevant general EC Treaty provisions concerning maritime transport include the principle of nondiscrimination on the basis of nationality,²¹⁸ the freedom to provide services,²¹⁹ and competition rules.²²⁰ The specific acts dealing with maritime transport derive from Article 84(2) of Title IV on transport.²²¹

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.²²² The principle of nondiscrimination represents a fundamental postulate of the EC concept and structure.²²³ 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.²²⁴ As a fundamental conceptual principle, nondiscrimination on the basis of nationality underlies each and every Com-

217. See BREDIMA-SAVOPOULOU & TZOANNOS, *supra* note 3, at 76 (describing legal basis of EC measures on shipping); Greaves, *supra* note 2, at 12-21 (analyzing legal framework for EC maritime action); CLOUGH & RANDOLPH, *supra* note 204, at 37 (presenting EC Treaty sources of rules governing EC transport policy).

218. See EC Treaty, *supra* note 1, art. 6, [1992] 1 C.M.L.R. at 591 (prohibiting any discrimination on grounds of nationality). Article 48 of the EC Treaty specifically applies the principle of nondiscrimination based on nationality to the free movement of workers. See *id.* art. 48, [1992] 1 C.M.L.R. at 612 (providing that free 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.").

219. *Id.* arts. 59-66, [1992] 1 C.M.L.R. at 616-18 (setting forth rules governing freedom to provide services).

220. *Id.* arts. 85-94, [1992] 1 C.M.L.R. at 626-32 (containing EC competition rules).

221. See EC Treaty, *supra* note 1, art. 84(2), [1992] 1 C.M.L.R. at 626 (stating that Council may "decide whether, to what extent and by what procedure appropriate provisions may be laid down for sea . . . transport.").

222. *Id.* art. 6, [1992] 1 C.M.L.R. at 591.

223. See Greaves, *supra* note 2, at 121 (examining fundamental principles and tenets of EC law).

224. See *id.* at 121 (describing role of principle of nondiscrimination in structure and functioning of Community).

munity act.²²⁵

The ECJ has explicitly ruled that the principle of nondiscrimination applies to the field of a common transport policy.²²⁶ With respect to maritime transport, in particular, the most influential case involving the principle of non-discrimination was the *French Merchant Seamen* case.²²⁷ 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.²²⁸ 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.²²⁹ 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.²³⁰ 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).

226. *See French Merchant Seamen*, [1974] E.C.R. 359, [1974] 2 C.M.L.R. 216 (holding that free movement of workers and abolition of any discrimination based on nationality apply to common transport policy and all modes of transport, including transport by sea). The common transport policy is among the activities in which the Community must engage according to Article 3 of the EC Treaty in order to establish a common market and progressively approximate the economic policies of the Member States. *European Parliament v. EC Council*, Case 13/83, [1985] E.C.R. 1513, 1584, ¶ 2, [1986] 1 C.M.L.R. 138, 192-93. *See EC Treaty, supra* note 1, art. 3 (f), [1992] 1 C.M.L.R. at 588 (requiring European Community to create common policy in sphere of transport as part of measures establishing common market and economic and monetary union). The common transport policy is the subject of Title IV of Part Two of the Treaty, the part concerned with the "foundations of the Community." *European Parliament*, [1985] E.C.R. at 1584, ¶ 2, [1986] 1 C.M.L.R. at 192. The first Article under the Title on transport, Article 74, lays down that the objectives of the EC Treaty concerning the transport sector "shall be pursued by Member States within the framework of a common transport policy." *EC Treaty, supra* note 1, art. 74, [1992] 1 C.M.L.R. at 623. Article 75(1) provides that for the purpose of implementing Article 74 the Council must lay down appropriate measures. *Id.* art. 75(1), [1992] 1 C.M.L.R. at 623-24.

227. *French Merchant Seamen*, [1974] E.C.R. at 371, ¶¶ 32, 33, [1974] 2 C.M.L.R. at 229 (making principle of nondiscrimination on grounds of nationality applicable to maritime transport).

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.²³¹ The ECJ's decisions thus applied the principles of nondiscrimination and free movement of workers, Articles 48 through 51, to maritime transport.²³²

b. Freedom to Provide Services

Title III in Part Two of the EC Treaty contains the articles relating to the freedom to provide services.²³³ The principle of nondiscrimination on the basis of nationality lies at the foundation of the freedom to provide services.²³⁴ Article 61, however, states that Title IV relating to transport shall govern the provision of services in the transport sector.²³⁵ In *European Parliament v. EC Council*²³⁶ ("*European Parliament*"), the ECJ ruled that because Article 61(1) makes the freedom to provide transport serv-

231. *French Merchant Seamen*, [1974] E.C.R. at 373, ¶ 46, [1974] 2 C.M.L.R. at 231. The *French Merchant Seamen* Case held that by maintaining unamended Section 3(2) of its 1926 Code du Travail Maritime (Merchant Seamen Code), France failed to fulfill its obligations under article 48 of the EC Treaty, which requires nondiscriminatory treatment of workers. *Id.* at 374, ¶ 48, [1974] 2 C.M.L.R. at 231. The French Code required that at least seventy-five percent of the crew of a French ship be of French nationality. *Id.* at 367, ¶ 3, [1974] E.C.R. at 226. Article 48 of the EC Treaty provides for the free movement of workers of the Member States and prohibits any discrimination based on nationality with respect to workers' employment, remuneration, or other conditions of work. EC Treaty, *supra* note 1, art. 48(2), [1992] 1 C.M.L.R. at 612. The French government argued that Article 48 did not apply to workers in the maritime transport sector, not unless the Council has ruled otherwise under Article 84(2). *French Merchant Seamen*, [1974] E.C.R. at 368, ¶ 8, [1974] 2 C.M.L.R. at 227. France, thus, insisted that it had not failed to fulfill its Treaty obligations with respect to the principle of nondiscrimination. *Id.*

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.

236. *European Parliament*, [1985] E.C.R. at 1599, ¶ 62, [1986] 1 C.M.L.R. at 205 (holding that freedom to provide services in transport is governed by Treaty provisions on transport).

ices subject to the rules of Articles 74-84 (the transport Title),²³⁷ free provision of services can be implemented in this sector only by the introduction of a common transport policy.²³⁸ 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,²³⁹ and 75(1)(a) and (b), on the implementation of a common transport policy,²⁴⁰ determine the results to be obtained.²⁴¹ 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.²⁴² The Council's discretion goes only toward the appropriate means necessary to achieve the desired results.²⁴³

c. Competition Rules

The competition rules apply to all economic activities, in-

237. See EC Treaty, *supra* note 1, arts. 74-84, [1992] 1 C.M.L.R. at 623-26 (constituting chapter on transport and laying down rules for achievement of common transport policy).

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.²⁴⁴ The EC Treaty competition rules fall into two categories, rules that apply to undertakings²⁴⁵ and rules that apply to government aids.²⁴⁶ The shipping industry has to comply with both types of rules.²⁴⁷

Article 85 regulates market agreements²⁴⁸ and Article 86 regulates market behavior²⁴⁹ which may distort competition and adversely affect trade between Member States.²⁵⁰ To further the implementation of Articles 85 and 86, the Council issued the first Regulation in the area, Regulation 17/62,²⁵¹ laying down

244. See EC Treaty, *supra* note 1, arts. 85-94, [1992] 1 C.M.L.R. at 626-32 (setting forth rules on competition); *French Merchant Seamen*, [1974] E.C.R. at 371, ¶ 32, [1974] 2 C.M.L.R. at 229 (making the general Treaty principles applicable to maritime transport). By extending the general Treaty principles to maritime transport, the ECJ's holding in the *French Merchant Seamen* case impliedly made the rules of competition applicable to the maritime transport sector. BREDIMA-SAVOPOULOU & TZOANNOS, *supra* note 3, at 101.

245. See EC Treaty, *supra* note 1, arts. 85-90, [1992] 1 C.M.L.R. at 626-29 (laying down competition rules governing activities of undertakings).

246. See *id.* arts. 92-94, [1992] 1 C.M.L.R. at 630-32 (setting forth provisions concerning "[a]ids granted by States.>").

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 [86] 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.

250. EC Treaty, *supra* note 1, arts. 85, 86, [1992] 1 C.M.L.R. at 626-27.

251. Council Regulation No. 17/62, 11 J.O. 204 (1962), O.J. Eng. Spec. Ed. 1959-

detailed rules of procedure for the Commission to follow in enforcing the EC competition rules.²⁵² Regulation 17/62 declared void any agreement or behavior incompatible with the rules on competition,²⁵³ and empowered the Commission to impose fines for such infringements.²⁵⁴ Regulation 17/62 did not, however, apply to transport.²⁵⁵ To account for transport, the Council had

62, at 87 [hereinafter Regulation 17/62] (setting forth first Council regulation implementing Articles 85 and 86 of EC Treaty).

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 “[u]pon 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.”)

254. *Id.* arts. 15, 16, O.J. Eng. Spec. Ed. 1959-62, at 91-92 (laying down detailed fine schedules Commission may impose on undertakings in infringement of EC competition rules).

255. *See* Council Regulation No. 141/62, 124 J.O. 2751 (1962), O.J. Eng. Spec. Ed. 1959-62, at 291 [hereinafter Regulation 141/62] (exempting transport from application of Regulation 17/62). Article 1 of Regulation 141/62 states that “Regulation No 17 shall not apply to agreements, decisions or . . . practices in the transport sector which

to issue Regulation 4056/86²⁵⁶ laying down detailed rules for the application of Articles 85 and 86 of the EC Treaty to Maritime Transport.²⁵⁷

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.²⁵⁸ Title IV of Part Two of the EC Treaty sets forth specific transport provisions.²⁵⁹ Article 74 states that the objectives of the Treaty with respect to transport shall be pursued within the framework of a common transport policy.²⁶⁰ 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.²⁶¹ 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.²⁶² 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.²⁶³ 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 trans-

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." *Id.* art. 1, O.J. Eng. Spec. Ed. 1959-62, at 291. Regulation 141/62 further provided that the Council "shall adopt appropriate provisions in order to apply rules of competition to transport." *Id.* art. 2, O.J. Eng. Spec. Ed. 1959-62, at 291.

256. Regulation 4056/86, *supra* note 24, O.J. L 378/4 (1986) (setting forth rules for application of EC competition provisions to sea transport sector).

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).

259. *Id.* arts. 74-84, [1992] 1 C.M.L.R. at 623-26 (covering EC rules in respect of transport).

260. *Id.* art. 74, [1992] 1 C.M.L.R. at 623.

261. *Id.* art. 75(1), [1992] 1 C.M.L.R. at 623-24.

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.

port in line with the other modes of transport.²⁶⁴

II. *THE EC MARITIME LEGISLATION*

Despite the strategic importance of maritime transport²⁶⁵ 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 report²⁷⁰ ("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 proposals²⁷³ which

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.

267. U.N. Liner Code, *supra* note 110.

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.").

270. 1985 Commission Progress Report, *supra* note 216, COM(85)90 Final.

271. *Id.*

272. *Id.* at 7. The Commission stated:

[i]n view of the Community's dependence on world trade and the depen-

became the basis of the 1986 Legislative Package.²⁷⁴ In 1992, the Council adopted Regulation 3577/92²⁷⁵ which complemented the 1986 Legislative Package.²⁷⁶

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.²⁷⁷ The primary focus of the four legislative acts was the threat to Community shipping interests from protectionist practices and measures of non-Member States.²⁷⁸ The four acts of

dence of its shipping interests on international shipping markets . . . the maintenance of a multilateral and commercially orientated Community shipping policy is still in the best interest of the Community's shipping industry, as well as of its user industries, and is still the best way of achieving the objectives of the Treaty.

Id.

273. *Id.* at 14-15. The thrust of the Commission's proposals was to provide an overall concept for an EC shipping policy based on a philosophy of free trade, fair competition, and promotion of the international competitive position of EC shipping.

Id.

274. See BREDIMA-SAVOPOULOU, *supra* note 3, at 113-27, 151 (analyzing main points of Commission's proposals in 1985 Commission Progress Report and role of Commission's proposals in enactment of 1986 Legislative Package); CLOUGH & RANDOLPH, *supra* note 204, at 52-54 (stating that 1986 Legislative Package embodied principles contained in Commission's proposals in 1985 Commission Progress Report).

275. Regulation 3577/92, *supra* note 21, O.J. L 364/7 (1992).

276. See *id.* 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); CLOUGH & RANDOLPH, *supra* note 204, at 130 (describing focus of 1986 Legislative Package to be relations with third-country shipowners). The 1986 Legislative Package did not address the issue of cabotage. *Id.*

277. See CLOUGH & RANDOLPH, *supra* note 204, at 54-55 (describing 1986 Legislative Package as first stage in development of EC shipping policy).

278. Regulation 4055/86, *supra* note 24, pmbl., O.J. L 378/1, at 1 (1986) (stressing need "for effectively pursuing, in relation to third countries, a policy aiming at safeguarding the continuing application of commercial principles in shipping."); Regulation 4056/86, *supra* note 24, pmbl., O.J. L 378/4, at 4 (1986) (stating need to adopt Council regulation applying rules of competition to maritime transport); Regulation 4057/86, *supra* note 24, pmbl., O.J. L 378/14, at 14 (1986) (providing that because "the competitive participation of Community shipowners in international liner shipping is adversely affected by certain unfair practices of shipping lines of third countries" it is "necessary to lay down the procedures for those acting on behalf of the Community shipping industry who consider themselves injured . . . by unfair pricing practices to lodge a complaint."); Regulation 4058/86, *supra* note 24, pmbl., O.J. L 378/21, at 21 (1986) (observing that increasing number of countries resort to protecting their merchant fleets and distort fair and free competition in shipping trade with EC Member States, and articulating need to safeguard free access to cargoes in maritime trade).

the 1986 Legislative Package are Regulation 4055/86,²⁷⁹ Regulation 4056/86,²⁸⁰ Regulation 4057/86,²⁸¹ and Regulation 4058/86.²⁸² The 1986 Legislative Package marked the first stage in the implementation of an EC common maritime policy.²⁸³

1. Background to the 1986 Legislative Package

Because developments in the other transport sectors had been equally slow, the European Parliament²⁸⁴ ("Parliament") brought action in 1983 against the Council for failure to act²⁸⁵ in accordance with its obligations under the EC Treaty transport provisions.²⁸⁶ The ECJ ruled that the Council was under an obligation to introduce a common policy for transport,²⁸⁷ particu-

279. Regulation 4055/86, *supra* note 24, O.J. L 378/1 (1986).

280. Regulation 4056/86, *supra* note 24, O.J. L 378/4 (1986).

281. Regulation 4057/86, *supra* note 24, O.J. L 378/14 (1986).

282. Regulation 4058/86, *supra* note 24, O.J. L 378/21 (1986).

283. *See* COUGH & RANDOLPH, *supra* note 204, at 53-54 (analyzing 1986 Legislative Package as first stage toward EC common maritime policy).

284. *See* EC Treaty, *supra* note 1, arts. 137-44, [1992] 1 C.M.L.R. at 676-79 (describing duties, role, and composition of European Parliament). The European Parliament ("Parliament") consists of representatives of the peoples of the EC Member States. *Id.* art. 137, [1992] 1 C.M.L.R. at 676. The people of Member States directly elect Members of Parliament, whose duty is to represent the people rather than a Member State government. BERMANN ET AL., *supra* note 22, at 65. In most areas of the law, the Council must consult with the Parliament before passing legislation. *Id.* at 80. Exceptions to the rule that legislation requires the consultation of Parliament include "directives on the free movement of capital with third states [EC Treaty art. 73c] and most measures to be taken . . . in creating the [European Monetary Union]." *Id.* 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. 189c, [1992] 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. *Id.* art. 189c, [1992] 1 C.M.L.R. at 694. In co-decision, Parliament may, by absolute majority, reject a measure that the Council has approved. *Id.* art. 189b, [1992] 1 C.M.L.R. at 694-95.

285. *See* EC Treaty, *supra* note 1, art. 175, [1992] 1 C.M.L.R. at 688 (providing that "[s]hould the European Parliament, the Council or the Commission, in infringement of this Treaty, fail to act, the Member States and the other institutions of the Community may bring an action before the Court of Justice to have the infringement established.").

286. *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.").

287. *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.²⁸⁸ In 1985, soon after the ECJ's decision in *European Parliament*,²⁸⁹ the Commission published a progress report setting forth measures towards a common maritime transport policy.²⁹⁰ In light of the importance of maritime transport for the EC economy and international trade relations,²⁹¹ the Commission went on to make a number of proposals necessary to promote the Community's trade and shipping interests.²⁹² These proposals became the basis of the 1986 legislative package, which marked the first stage towards a common EC maritime transport policy.²⁹³

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 measures²⁹⁴ 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.*

289. *European Parliament*, [1985] E.C.R. 1513, [1986] 1 C.M.L.R. 138 (holding Council responsible for laying down measures to achieve common transport policy).

290. 1985 Commission Progress Report, *supra* note 216, COM(85) 90 Final.

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).

292. *See id.* Annexes (containing six proposals for draft Council regulations and directives on maritime transport). The six legislative proposals included Draft Council Regulation concerning coordinated action to safeguard free access to cargoes in ocean trades ("Annex II-1"), Draft Council Regulation applying the principle of freedom to provide services to maritime transport ("Annex II-2"), Draft Council Decision amending Council Decision No. 77/587/EEC of 13/9/77 setting up a consultation procedure on relations between Member States and third countries in shipping matters and on action relating to such matters in international organizations ("Annex II-3"), Draft Council Directive concerning a common interpretation of the concept of "national shipping line" ("Annex II-4"), Amendments to the proposal for a Council Regulation laying down detailed rules for the application of Articles 85 and 86 of the EC Treaty to maritime transport ("Annex II-5"); Draft Council Regulation on unfair pricing practices in maritime transport ("Annex II-6"). *Id.* *See* BREDIMA-SAVOPOULOU & TZOANNOS, *supra* note 3, at 121-27 (describing Commission's legislative proposals). The 1986 Legislative Package left out the Commission's proposals contained in Annex II-3 and Annex II-4, implementing the other four proposals. *Id.* at 151.

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.²⁹⁵ The four regulations changed little with respect to intra-Community policies concerning nondiscrimination against ships flying²⁹⁶ non-national flags.²⁹⁷ Most significantly, the 1986 Legislative Package did not deal with cabotage restrictions.²⁹⁸

a. Council Regulation 4055/86

Council Regulation 4055/86,²⁹⁹ 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.³⁰⁰ 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.

295. 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).

299. Regulation 4055/86, *supra* note 24, O.J. L 378/1 (1986).

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 off-shore 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 off-shore 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.³⁰¹ Regulation 4055/86 benefits EC nationals regardless of country of establishment.³⁰² 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.³⁰³ Regulation 4055/86 also requires that existing agreements be adjusted or phased out.³⁰⁴

Regulation 4055/86 did not extend the freedom to provide maritime services to services on cabotage routes.³⁰⁵ 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 established in a Member State other than that of the person for whom the services are intended." *Id.* Article 1(2) extends the freedom to provide maritime services to "nationals of the Member States established outside the Community and to shipping companies 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 establishment 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 another Member State." EC Treaty, *supra* note 1, art. 52, [1992] 1 C.M.L.R. at 613-14. Undertakings, 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, [1992] 1 C.M.L.R. at 613-14, 616.

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 countries."). Article 5 allows for an exception to the general prohibition of cargo-sharing arrangements where Community liner ships would "not otherwise have an effective opportunity 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 countries 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 obligations 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 adjusted 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.³⁰⁶ Annex II-2 of the 1985 Commission Progress Report³⁰⁷ contained a draft Council Regulation applying the principle of freedom to provide maritime transport services to the coastal trades of a Member State.³⁰⁸ Due to the large divergence of opinion expressed at the Council deliberations in the course of adopting Regulation 4055/86,³⁰⁹ 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 1986.³¹⁰ Because of the national defense implications of cabotage,³¹¹ and because coastal services cover not only the ordinary carriage of goods and passengers but also the profitable cruise business,³¹² cabotage soon became a major issue of contention.³¹³ Two approaches emerged during the delibera-

306. See 1985 Commission Progress Report, *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).").

307. *Id.*

308. See *id.* art. 3, at 3 (extending free provision of maritime services to cabotage trade).

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

310. See *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. *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. *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. *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. *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. *Id.* at 153.

311. See PROTECTIONISM, *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); 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).

312. See Regulation 3577/92, *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).

313. See BREDIMA-SAVOPOULOU & TZOANNOS, *supra* note 3, at 151-68 (detailing reasons for exclusion of cabotage liberalization from Regulation 4055/86).

tions.³¹⁴ The Southern European States, France, Italy, Greece, Spain and Portugal, insisted on maintaining cabotage.³¹⁵ 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.³¹⁶

Moreover, even within the group of the Southern Member States, reasons against the liberalization of cabotage services differed from country to country.³¹⁷ 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.³¹⁸ France, on the other hand, proposed the creation of an EC maritime space with no restrictions applying to ships flying Community flags.³¹⁹ The French proposal envisaged in essence a Community-wide coastal zone modeled on the U.S. system created by the Jones Act of 1920.³²⁰ 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.³²¹ 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.³²² 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).

320. *Id.*; see 46 App. U.S.C. § 883, *supra* note 157, (reserving coastal trade for U.S.-built, U.S.-owned and U.S.-manned vessels).

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.³²³

b. Council Regulation 4056/86

The 1986 Legislative Package also contained Council Regulation 4056/86³²⁴ which set down rules for the application of EC competition norms to maritime transport.³²⁵ Regulation 4056/86 was the first Community act applying the rules of competition to the transport sector.³²⁶ It sought to find a balance between the requirements of Council Regulation 954/79³²⁷ on Member States' ratification of the U.N. Liner Code³²⁸ and undue distortion of the common maritime market.³²⁹ In recognition of the stabilizing role of conferences in ensuring reliable services to shippers, Regulation 4056/86 provided for block exemptions³³⁰ of liner conferences.³³¹ At the same time, Regulation 4056/86

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).

324. Regulation 4056/86, *supra* note 24, O.J. L 378/4 (1986).

325. See *id.* p.mbl., 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).

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, p.mbl., O.J. L 378/4, at 4 (1986).

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).

328. U.N. Liner Code, *supra* note 110.

329. See Regulation 4056/86, *supra* note 24, p.mbl., 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.").

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.

331. See Regulation 4056/86, *supra* note 24, p.mbl., 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. 18, O.J. L 378/4, at 11 (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 4057/86³³⁶ 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.

Id.

336. *Id.* O.J. L 378/14 (1986).

337. *Id.* art. 1, O.J. L 378/14, at 15 (1986) (describing purpose of Regulation 4057/86).

338. *Id.*

339. *Id.* art. 5, O.J. L 378/14, at 16 (1986) (allowing any injured party to lodge written complaint). An injured party may submit a complaint directly to the Commission or to a Member State, which should forward the complaint to the Commission. *Id.* The complaint must contain sufficient evidence of the existence of the unfair practice in question and the resulting injury. *Id.* 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. *Id.* art. 7(1), O.J. L 378/14, at 16 (1986). The investigation should cover both unfair pricing practices and the resulting injury. *Id.* 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." *Id.* art. 7(2), O.J. L 378/14, at 16-17 (1986). The Commission may hear the interested parties. *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. *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." *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. *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.³⁴⁰ Regulation 4058/86,³⁴¹ which is an anti-protectionist measure,³⁴² strives to ensure a freely competitive environment in the international maritime market, particularly in the dry and liquid bulk trades.³⁴³ Because third countries are increasingly restricting access to bulk cargoes,³⁴⁴ 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.³⁴⁵ Regulation 4058/86 respectively lays down the mechanism of coordinated action against third countries.³⁴⁶ The coordinated action by Member States may range

tervention necessary, the Commission shall propose to the Council, after the consultations [within the Advisory Committee] provided for in Article 6, that it introduce a redressive duty. The Council, acting by a qualified majority, shall take a Decision within two months.

Id. art. 11, O.J. L 378/14, at 19 (1986). Redressive duties "shall be imposed on the foreign shipowners" resorting to unfair pricing and "[p]ermission to load or discharge cargo in a Community port may be made conditional upon the provision of security for the amount of the duties." *Id.* art. 13, O.J. L 378/14, at 19 (1986).

340. Regulation 4058/86, *supra* note 24, O.J. L 378/21 (1986).

341. *Id.*

342. *See id.* pmb., O.J. L 378/21, at 21 (1986) (asserting need to enable Community to take coordinated action by Member States "if 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.").

343. *See id.* pmb., O.J. L 378/21, at 21 (1986) (explaining that there is increasing tendency on part of third countries to restrict access to bulk cargoes, which poses serious threat to "the freely competitive environment . . . in the bulk trades."). Regulation 4058/86 seeks to affirm the Member States' commitment to a freely competitive environment "as being an essential feature of the dry and liquid bulk trades." *Id.* Regulation 4058/86 further expresses the Member States' conviction that the introduction of cargo-sharing arrangements in the bulk trades "will have a serious effect on the trading interests of all countries by substantially increasing transportation costs." *Id.* The purpose of Regulation 4058/86, therefore, is to provide for a procedure enabling the Member States to take coordinated action against third countries restricting free access by shipping companies of Member States to the transport of bulk cargoes and any other cargo in tramp services, or of passengers. *Id.* art. 1, O.J. L 378/21, at 21 (1986). Regulation 4058/86 also provides for Member States' coordinated action to counter action by third countries restricting access by Community ships to liner trades, where the liner trades operate outside the U.N. Liner Code, or if within the U.N. Liner Code, the restrictive action by third countries is not in accordance with the provisions of the U.N. Liner Code. *Id.*

344. *Id.*

345. *Id.*

346. *See id.* art. 3, O.J. L 378/21, at 22 (1986) (setting forth that Member State may

from diplomatic representation to the third countries concerned,³⁴⁷ to counter-measures³⁴⁸ directed at the shipping company or companies of the third countries concerned.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.³⁵⁰ The Community had yet to address the sensitive issue of cabotage before establishing a single EC shipping market.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.³⁵² Striving to bring the maritime market up in line with the introduction of the Single European Market in 1992,³⁵³ 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. *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." *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. *Id.*

347. *Id.* art. 4(1)(a), O.J. L 378/21, at 22 (1986).

348. *See 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.").

349. *Id.*

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

351. *See* Greaves, *supra* note 2, at 133 (analyzing EC maritime policy in post-1986 Legislative Package period); *Cabotage: Progress Made but Problems Still Remain*, EUROPE INFORMATION SERVICE, Mar. 1, 1991, available in LEXIS, News Library, Transport Europe File [hereinafter *Cabotage: Progress Made but Problems Still Remain*] (explaining that cabotage proved problematic issue and pointing need to introduce cabotage measures in order to improve competitiveness of EC fleet).

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

353. *See Cabotage: Italians Present Council with Compromise Pater*, EUROPE INFORMATION SERVICE, Mar. 1, 1991, available in LEXIS, News Library, Transport Europe File [hereinafter *Italians Present Council*] (reporting that Commission "envisage[d] bringing in the first stage of a liberalized maritime cabotage market at the end of 1993, a year after the introduction of the Single Market.").

the Council a proposal complementing the 1986 Legislative Package.³⁵⁴ The 1989 Commission proposal became the basis of Regulation 3577/92.³⁵⁵

B. *The 1992 Council Regulation 3577*

The Single European Act of 1987³⁵⁶ ("SEA") set the internal market program in motion as a vehicle toward greater economic and political integration of the European Community.³⁵⁷ 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 1992.³⁵⁸ The general Community movement toward closer economic integration and greater political union³⁵⁹ served as a major impetus towards a more comprehensive common EC maritime policy.³⁶⁰ The purpose of Regulation 3577/92 is to remove restrictions on the provision of maritime transport services on cabotage routes.³⁶¹ Regulation 3577/92 marked the second stage on the way to an EC common maritime policy.³⁶² In the aftermath of Regulation 3577/92, as of June 1997, the Northern European Member States had completely opened up both mainland³⁶³ and island³⁶⁴ cabotage, while the

354. See Commission Proposal for a Council Regulation Applying the Principle of Freedom to Provide Services to Maritime Transport within Member States, J.O. C 263/17 (1989), amended by O.J. C 73/17 (1991) (applying principle of freedom to provide services to cabotage).

355. See Regulation 3577/92, *supra* note 24, pmb., O.J. L 364/7, at 7 (1992) (acknowledging amended proposal of Commission as foundation for purpose and policy of Regulation 3577/92).

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.

357. See Goebel, *supra* note 1, at 1101 (describing impact of SEA on Community).

358. See Goebel, *supra* note 1, at 1101 (discussing changes in intra-Community relations and EC institutions that SEA introduced).

359. See *id.* (referring to SEA as first stage on road to greater political and constitutional union).

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).

361. See Regulation 3577/92, *supra* note 21, pmb., 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).

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).

363. See Regulation 3577/92, *supra* note 21, art. 2(1)(a), O.J. L 364/7, at 8 (1992)

Southern European Member States had lifted restrictions on mainland cabotage only.³⁶⁵

1. Background

The SEA set December 31, 1992, as the target date to achieve the internal market.³⁶⁶ The SEA also facilitated Community decision-making by permitting the Council to act by a qualified majority vote.³⁶⁷ Article 16(5) of the SEA³⁶⁸ 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.").

365. *See* Commission Report II, *supra* note 29, COM (97) 296 Final, at 20-24 (reviewing effect of Regulation 3577/92 on maritime services on cabotage routes within Member States).

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:"

Belgium	5
Denmark	3
Germany	10
Greece	5
Spain	8
France	10
Ireland	3
Italy	10
Luxembourg	2
Netherlands	5
Portugal	5
United Kingdom	10

Id. These numbers are set in an attempt to take into account each state's population and economic power. Goebel, *supra* note 1, at 1122 (analyzing qualified majority voting system). Out of a total of 76, at least 54 votes in favor are required for the adoption of

the voting procedure under Article 84(2) of the EC Treaty concerning Council action on sea and air transport.³⁶⁹ The amended Treaty provision permitted the Council to act by qualified majority instead of the previously required unanimity.³⁷⁰ The Council could now adopt legislative decisions with fifty-four votes out of a total of seventy-six.³⁷¹ The internal market objective, coupled with the new voting rules, eventually resulted in Council Regulation 3577/92³⁷² applying the principle of freedom to provide services to maritime transport within Member States.³⁷³

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).

370. SEA, *supra* note 1, art. 16(5), O.J. L 169/1, at 7, [1987] 2 C.M.L.R. at 748; EC Treaty, *supra* note 1, art. 84(2), [1992] 1 C.M.L.R. at 626.

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).

372. Regulation 3577/92, *supra* note 21, O.J. L 354/7 (1992).

373. *See id.* p.mbl., 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

2. Provisions of Council Regulation 3577/92

The purpose of Regulation 3577/92 is to abolish restrictions on the provision of maritime transport services on cabotage routes,³⁷⁴ thereby eliminating another barrier towards the achievement of the internal market.³⁷⁵ Free access to cabotage routes will also ensure adequate and regular transport to, from, and between islands.³⁷⁶ The freedom to provide cabotage services applies to Community shipowners operating vessels registered in, and flying the flag of any Member State,³⁷⁷ provided that these ships comply with all conditions for carrying out cabotage in the State of registry, or flag State.³⁷⁸ 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.³⁷⁹

Within the meaning of Regulation 3577/92, cabotage covers services normally provided for remuneration³⁸⁰ and includes mainland cabotage, off-shore supply services,³⁸¹ and island cabotage.³⁸² 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.³⁸³ Specifically, the implemen-

(discussing expected effect of qualified voting procedure and of goal of achieving internal market by end of 1992 on EC maritime policy).

374. See *id.* pmbi, O.J. L 364/7, at 7 (1992) (describing purpose of Regulation 3577/92 to be application of principle of freedom to provide services to maritime cabotage).

375. See *id.* (stating that abolition of restrictions on provision of maritime cabotage services is necessary for establishment of internal market).

376. *Id.*

377. *Id.* (stating that "the beneficiaries of [the] freedom [to provide services within Member States] should be Community shipowners operating vessels registered in and flying the flag of a Member State whether or not it has a coastline."). Regulation 3577/92 uses "maritime transport within Member States" and "maritime cabotage" as interchangeable expressions. *Id.*

378. Regulation 3577/92, *supra* note 21, art. 1(1), O.J. L 364/7, at 7 (1992). The application of the provision of Article 1(1) was temporarily suspended until December 1996. *Id.* art. 1(2), O.J. L 364/7, at 7 (1992).

379. *Id.*

380. See Regulation 3577/92, *supra* note 21, art. 2(1), O.J. L 364/7, at 7 (1992) (defining maritime transport services within Member State).

381. *Id.* art. 2(1)(b), O.J. L 364/7, at 8 (1992) (referring to off-shore supply services as "the carriage of passengers or goods by sea between any port in a Member State and installations on the continental shelf of that Member State.").

382. *Id.* art. 2(1)(c), O.J. L 364/7, at 8 (1992) (defining services within scope of Regulation 3577/92).

383. *Id.* pmbi, O.J. L 364/7, at 7 (1992) (asserting that "the implementation of . . .

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,³⁸⁴ until January 1, 1997 for transport of strategic goods,³⁸⁵ and until January 1, 1999 for regular passenger and ferry services.³⁸⁶ Island cabotage in the Mediterranean and to the French islands along the Atlantic coast was also exempted until January 1, 1999.³⁸⁷ Greece was given a special right not to implement the Regulation until January 1, 2004.³⁸⁸

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 contracts³⁸⁹ or impose public service obligations³⁹⁰ as a condition for the provision of cabotage services to or between islands.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.³⁹² All Community shipowners receive equal treatment with respect to public con-

[the] freedom [to provide services within Member States] should be gradual and not necessarily provided for in a uniform way for all services concerned, taking into account the nature of certain specific services and the extent of the effort that certain economies in the Community showing differences in development will have to sustain.”)

384. *Id.* art. 6(1), O.J. L 364/7, at 9 (1992).

385. Regulation 3577/92, *supra* note 21, art.6(1), O.J. L 364/7, at 9 (1992). Article 6(1) designates oil, oil products, and drinking water as strategic goods. *Id.*

386. *Id.*

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 archipelagos, and to the North African seaports of Ceuta and Melilla. *Id.*

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.*

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.*

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.”).

391. *Id.* art. 4, O.J. L 364/7, at 8 (1992).

392. *Id.* Article 4 states that “[w]henver 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.* p.mbl., 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.⁴⁰⁰

a. *Re Port Dues*

In *Re Port Dues*,⁴⁰¹ 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.⁴⁰² Under the French Code governing maritime ports⁴⁰³ a charge was levied on each passenger disembarking, embarking or trans-shipping in the ports of France.⁴⁰⁴ In the case of transport between two national ports, passengers had to pay only on boarding for departure.⁴⁰⁵ In the case of vessels traveling to or from another Member State, passengers had to pay twice, both on embarkation and disembarkation.⁴⁰⁶ In addition, passengers arriving from, or leaving for another Member State paid rates higher than those traveling on purely domestic routes.⁴⁰⁷ 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).

400. *See Re Port Dues*: EC Commission v. France, Case 381/93, [1994] E.C.R. I-5145, [1995] 2 C.M.L.R. 485 (holding that temporary exemption from implementation of Regulation 3577/92 does not permit Member State enjoying exemption to apply rules differentiating between intra-Community maritime transport and internal maritime transport).

401. *Re Port Dues*, [1994] E.C.R. I-5145, [1995] 2 C.M.L.R. 485.

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.

403. Decree No. 92-1089 of 1 October 1992, J.O., 7 October 1992.

404. *Re Port Dues*, [1994] E.C.R. at I-5161, ¶ 2, [1995] 2 C.M.L.R. at 499.

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 4055/86⁴⁰⁸ applying the freedom to provide maritime transport services between Member States.⁴⁰⁹ 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.⁴¹⁰ According to the Commission, France was thus creating an impediment to the free provision of services in intra-Community maritime trade.⁴¹¹

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.⁴¹² France contended that the fact that operators on intra-Community routes had to pay higher charges than operators servicing

ing to 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. *Id.*

408. Regulation 4055/86, *supra* note 24, O.J. L 378/1 (1986).

409. *See Re Port Dues*, [1994] E.C.R. at I-5166, ¶ 6, [1995] 2 C.M.L.R. at 500 (explaining Commission's position that "even if the French rules do not discriminate on the basis of the nationality of the provider of the transport services in question," they violate Regulation 4055/86 "owing to the fact that they distinguish between transport services within France and those performed to or from another Member State."). *See also* Regulation 4055/86, *supra* note 24, art. 1(1), O.J. L 378/1, at 2 (1986) (applying principle of freedom to provide services to maritime transport between Member States).

410. *Id.* at I-5165, ¶ 5, [1995] 2 C.M.L.R. at 500. The Commission found the French system of charges discriminatory. *Id.*

411. *Id.* at I-5166, ¶ 6, [1995] 2 C.M.L.R. at 500.

412. *Id.* at I-5166, ¶ 8, [1995] 2 C.M.L.R. at 501. France argued that Regulation 4055/86 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." *Id.* at I-5166, ¶ 7, [1995] 2 C.M.L.R. at 500. France further stressed that Article 6(1) of Regulation 3577/92 granted France exemption from implementing the freedom to provide services to cabotage transport. *Id.* According to the French government, therefore, "the observance by France of the rules concerning the freedom to provide services must be assessed separately for each of these two types of services." *Id.* at I-5166-67, ¶ 8, [1995] 2 C.M.L.R. at 500-01. France insisted that there was no discrimination as 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. *Id.* at I-5167, ¶ 8, [1995] 2 C.M.L.R. at 501. As for cabotage services, there was no discrimination either, because "all operators from the other Member States are placed in the same situation with regard to the applicable French legislation." *Id.*

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.*

415. *Id.* at I-5169, ¶ 18, [1995] 2 C.M.L.R. at 502.

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.

418. *Re Port Dues*, [1994] E.C.R. at I-5170-71, ¶ 24, [1995] 2 C.M.L.R. at 503.

419. *See Commission Report II*, *supra* note 29, COM (97) 296 Final, Annex I, at 28-34 tbl.A.1 (overviewing cabotage restrictions in Member States).

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.⁴²¹ No restrictions applied in any of the remaining Member States because some Member States traditionally follow an open coast-line policy,⁴²² some Member States enacted legislation for implementing Regulation 3577/92,⁴²³ and, finally, because maritime cabotage is not relevant in certain Member States.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.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.⁴²⁶ The major anxieties concern cabotage related employment in the Mediterranean.⁴²⁷ Article 3(2) of Regulation 3577/92 provides that for vessels carrying out is-

(temporarily exempting maritime transport services in Mediterranean and along coast of Spain, Portugal, and France from implementing Regulation 3577/92).

421. See Commission Report II, *supra* note 29, COM (97) 296 Final, Annex I, at 30 tbl.A.1.

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.*

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.

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).

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 133 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.*

426. See Commission Report II, *supra* note 29, COM (97) 296 Final, at 20 (analyzing effects of liberalization of island cabotage and its anticipated socio-economic impact).

427. *Id.*

land cabotage all matters relating to manning shall be the responsibility of the host State.⁴²⁸ Article 3(3), however, specifies that, from January 1, 1999, flag State⁴²⁹ conditions shall govern manning of cargo vessels over 650 gross tons engaged in island cabotage services involving a voyage to or from another State.⁴³⁰ 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.⁴³¹ To complicate matters further, island cabotage services provide an important source of employment in the South European region.⁴³² 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.⁴³³ 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.⁴³⁴

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.⁴³⁵ In the United Kingdom, for example, where the cabotage routes have traditionally been completely open,⁴³⁶ 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).

435. See Commission Report II, *supra* note 29, COM (97) 296 Final, at 23 (discussing consequences of open coast line policy in Northern Member States).

436. See BREDIMA-SAVOPOULOU & TZOANNOS, *supra* note 3, at 42-43 (mentioning

thirty to fifty percent in the various cargo sub-categories.⁴³⁷ By contrast, passenger cabotage services are entirely carried out under the national flag.⁴³⁸ Likewise, in the other Northern Member States, nationally owned, crewed, and registered vessels carry out all passenger island cabotage trade.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.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.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.⁴⁴²

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

long-standing open coast line policy of United Kingdom); Commission Report I, *supra* note 28, COM (95) 383 Final, at 2 (noting free cabotage in United Kingdom even prior to Regulation 3577/92).

437. See Commission Report II, *supra* note 29, COM (97) 296 Final, at 23 (discussing extent to which national carriers carry out substantial cabotage market). In liquid bulk, for example, U.K. registered ships hold a market share of 30%, while in dry bulk, the share is approximately 50%. *Id.*

438. *Id.*

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.*

440. *Id.* at 24.

441. See *id.* (explaining that regular passenger services to Nordic islands carry modest profit margins).

442. *Id.* Probably the preference for speakers of the local languages would explain the preference for national seamen on board domestic ferries. *Id.*

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.⁴⁴⁴ 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.⁴⁴⁵

The Commission study also revealed that a change from host State to flag State manning rules⁴⁴⁶ is the main source of concern to Southern European operators.⁴⁴⁷ 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.⁴⁴⁸ 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.⁴⁴⁹

444. *See id.* (noting seasonal fluctuations in demand for regular passenger services to and from islands in Southern Europe).

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. *Id.*

446. *See* Regulation 3577/92, *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).

447. *See* Commission Report II, *supra* note 29, COM (97) 296 Final, at 24 (discussing response by Southern seafarers to forthcoming liberalization of island cabotage market).

448. *Id.* The situation seems less sensitive with respect to island cargo trades. *See id.* at 24-25 (explaining that only 30% of all seamen employed in Southern island cabotage work in cargo trades sector).

449. *See 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. *Id.*

III. *IN 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*

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.⁴⁵⁰ Due to its international character, maritime transport tends to be subject to international agreements, regulations and trends, more than other types of transport.⁴⁵¹ The EC long-term commercial and strategic interests dictate the maintenance of a strong, competitive and growing merchant fleet.⁴⁵² 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.⁴⁵³ 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.⁴⁵⁴ 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.⁴⁵⁵ By adopting the 1986 Legislative

450. *See supra* note 204 and accompanying text (discussing international nature of shipping industry).

451. *See supra* notes 71, 205-06 and accompanying text (referring to long history of international agreements and treaties regulating maritime transport).

452. *See supra* notes 4, 7, 16, 265 and accompanying text (emphasizing importance of maritime transport and competitive fleet for EC economy).

453. *See supra* note 216 and accompanying text (discussing need for EC common maritime policy).

454. *See supra* notes 204, 269-73 and accompanying text (analyzing objectives of EC common maritime policy).

455. *See supra* notes 269-73, 278 and accompanying text (discussing aims and pur-

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.

pose of EC maritime policy in relation to existing conditions on world maritime market).

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, p.mbl., 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, p.mbl., 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.⁴⁶² Consequently, the maritime services of the metropolitan country inevitably gained a dominant position.⁴⁶³ The political liberation of the former colonies did not change the dominant position of the metropolitan countries on the maritime market.⁴⁶⁴ 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.⁴⁶⁵ 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.⁴⁶⁶ The signing of the U.N. Liner Code⁴⁶⁷ in 1974⁴⁶⁸ played a major role in the redistribution of available cargoes in international shipping.⁴⁶⁹ The cargo-sharing provisions⁴⁷⁰ of the U.N. Liner Code make it essentially discriminatory and protectionist in nature.⁴⁷¹ Under these conditions, it was important for the Community to adopt a common position in relation to the U.N. Liner Code.⁴⁷² 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).

467. U.N. Liner Code, *supra* note 110.

468. See *supra* note 110 and accompanying text (discussing signing of U.N. Liner Code).

469. See *supra* notes 110, 112, 172-73 and accompanying text (examining cargo-sharing provisions of U.N. Liner Code).

470. See *supra* notes 110, 112, 172-73 and accompanying text (discussing often quoted "40-40-20" formula of U.N. Liner Codes's cargo-sharing provisions).

471. See *supra* notes 111, 113 and accompanying text (noting opposition to U.N. Liner Code by developed maritime countries because of U.N. Liner Code's protectionist nature).

472. See *supra* notes 118, 121 and accompanying text (focusing on Community's

Member States to the U.N. Liner Code,⁴⁷³ 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,⁴⁷⁴ 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.⁴⁷⁵ 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,⁴⁷⁶ 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.⁴⁷⁷

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

response to U.N. Liner Code and U.N. Liner Code's consequences for EC maritime policy).

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).

475. See Council Regulation 4056/86, *supra* note 24, O.J. L 378/4 (1986) (granting block exemptions to liner conferences); *supra* notes 325, 329-34 and accompanying text (explaining block exemptions and examining purpose and language of Regulation 4056/86).

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).

1986 Legislative Package revealed great divergence of opinion among the then twelve Member States concerning the opening up of cabotage services.⁴⁷⁸ Many Member States have long traditions as maritime nations which influence their attitudes toward shipping.⁴⁷⁹ Member States therefore have traditionally attributed varying degrees of importance to the reservation of coastal services for their own national maritime operators.⁴⁸⁰ 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.⁴⁸¹ 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.⁴⁸²

By splitting the proposals put forward by the Commission into external and internal sub-parts,⁴⁸³ and adopting the regulations concerning trading relations with third countries,⁴⁸⁴ the Council acted most expediently under the circumstances. This move made possible the adoption of the 1986 Legislative Package which marked the first phase of a common maritime policy.⁴⁸⁵ 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

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.*

485. See *supra* notes 25, 350 and accompanying text (assessing impact of 1986 package).

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).

487. 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,⁴⁹³ 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.⁴⁹⁴ 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 2004,⁴⁹⁵ offered an acceptable compromise between the positions of the Northern and Southern Member States. By giving the Mediterranean countries until January 1, 1999,⁴⁹⁶ and in the case of Greece, until 2004,⁴⁹⁷ to open up completely their regular coastal passenger and ferry services,⁴⁹⁸ 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 3577/92.⁴⁹⁹

The Community has moreover adopted a flexible approach

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).

498. Regulation 3577/92, *supra* note 21, art. 6(1), O.J. L 364/92, at 9 (1992).

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.⁵⁰⁰ 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.⁵⁰¹ The primary source of anxiety is the change from host-State⁵⁰² to flag-State⁵⁰³ manning conditions on the vessels providing cabotage services after January 1, 1999, according to the provisions of Article 3 of Regulation 3577/92.⁵⁰⁴ 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.⁵⁰⁵ 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

sion of services in intra-Community maritime transport); *supra* notes 400-17 (detailing ECJ's holding in *Re Port Dues*, [1994] E.C.R. I-5145, [1995] 2 C.M.L.R. 485).

500. See Regulation 3577/92, *supra* note 21, art. 10, O.J. L. 364/7, at 9 (1992) (providing that every two years Commission shall present to Council report on implementation of Regulation 3577/92, and that "the Commission shall put forward any necessary proposals."). In accordance with these provisions, the Commission has submitted two reports, the second one of which also included an in depth examination of the economic and social impact of the liberalization of island cabotage, as required by Article 3(3) of Regulation 3577/92. See *supra* notes 419-49 and accompanying text (focusing on two Commission reports to Council on implementation of Regulation 3577/92).

501. See *supra* notes 426-33 and accompanying text (discussing Commission's findings on implementation of Regulation 3577/92 and on socio-economic impact of liberalization of island cabotage).

502. See *id.* (examining major concerns with respect to forthcoming liberalization of island cabotage); *supra* note 428 and accompanying text (defining host-State).

503. See *supra* note 429 and accompanying text (defining flag-State).

504. See Regulation 3577/92, *supra* note 21, art. 3(3), O.J. L. 364/7, at 8 (1992) (stating that from January 1, 1999, for vessels carrying out island cabotage "when the voyage concerned follows or precedes a voyage to or from another State, all matters relating to manning shall be the responsibility of the" flag state); *supra* note 446 and accompanying text (examining Article 3(2)-(3) of Regulation 3577/92).

505. See *supra* note 445 and accompanying text (discussing Southern seafarers' major concern regarding forthcoming island cabotage liberalization); Commission Report II, *supra* note 29, COM (97) 296 Final, at 24 (reporting that South European seafarers considered "it . . . unfair if North European carriers were allowed to set up regular passenger services in Southern Europe making partial use of cheap third country labor, as is allowed . . . under their flag State manning provisions.").

the Mediterranean seafarers.⁵⁰⁶ The Commission has correspondingly proposed an amendment to Article 3 of Regulation 3577/92.⁵⁰⁷ 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.

506. See *supra* note 449 and accompanying text (presenting Commission's response to findings of Commission study).

507. See *id.* (discussing Commission's proposal for amending Article 3 of Regulation 3577/92).