

EC MARITIME TRANSPORT POLICY AND REGULATION

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I. INTRODUCTION

Since its inception in 1957, the European Community¹ (EC) has become a major economic power.² Despite its prominence in the international market—where air freight is increasingly common—the majority of EC trade is still carried out by sea. Recent figures show that fully 95 percent of external trade and 30 percent of intracommunity trade involve some form of maritime transport.³ For the EC to retain its status as a world economic power, it must maintain an efficient and competitive Community fleet to effectuate its trade. Without a strong and independent fleet, the EC will be subject to pressures from other world powers.

In recent years, however, the economic viability of Community fleets has decreased as compared to the fleets of nonmember nations.⁴

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1. The Treaty of Rome, signed in 1957, established the European Economic Community. TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY [EEC TREATY] art. 1. The parties to this Treaty were: Belgium, France, Italy, Luxembourg, The Netherlands, and West Germany. *Id.* In 1973 Denmark, Ireland, Norway, and the United Kingdom acceded, followed by Greece in 1980 and Portugal and Spain in 1986. *See* P.S.R.F. MATHISEN, A GUIDE TO EUROPEAN COMMUNITY LAW 9 (4th ed. 1985). In 1991 a draft Treaty between the European Community and the EFTA countries, that is, Austria, Finland, Iceland, Liechtenstein, Norway, Sweden, and Switzerland was proposed, which would establish an European Economic Area (EEA). *See* Opinion Regarding the Draft Agreement Between The European Community and The European Free Trade Association Relating to the Creation of The European Economic Area, December 14, 1991, 31 I.L.M. 442, 444-66 (discussing the compatibility of the draft agreement with the EC). The benefits of the single European market will be extended to the EEA.

2. *See* ANNA BREDIMA-SAVOPOULOU & JOHN TZOANNOS, THE COMMON SHIPPING POLICY OF THE EC 28-29 (1990).

3. ECONOMIC AND SOCIAL COMMITTEE OF THE EUROPEAN COMMUNITIES, EEC MARITIME TRANSPORT POLICY: PROGRESS TOWARDS A COMMON TRANSPORT POLICY: COMMUNICATION AND PROPOSALS BY THE COMMISSION TO THE COUNCIL i (1986) [hereinafter EEC MARITIME TRANSPORT].

4. *See* BREDIMA-SAVOPOULOU & TZOANNOS, *supra* note 2, at 7-8.

Developing countries have aggravated the problem by demanding that a portion of their export trade be carried by their own ships.⁵ Because shipping fleets are perceived as state symbols,⁶ a decline in Community fleets will certainly result in a loss of international prestige. More importantly, however, such a decline will result in a loss of a major source of foreign currency, further reduction of the European shipbuilding industry, and a reduction in the employment of Community seafarers.⁷

By 1988 the EC fleet constituted less than 16 percent of the world shipping capacity, almost half of its 1970 capacity.⁸ It was essential that the Community take action to improve its maritime competitiveness.⁹ As will be set out in the following sections, some actions have been taken to address the situation, but more legislation is needed.

The objectives of this article are as follows: (1) to define the legal framework for Community action in maritime matters; (2) to outline the current status of Community policy and legislation in this area; and (3) to survey pending legislative proposals which will complete the liberalization program for maritime services within the Community.

II. LEGAL FRAMEWORK FOR COMMUNITY MARITIME ACTION

Several provisions in the Treaty of Rome (EEC Treaty) directly concern maritime transport. The most important of these provisions, and the most general, deals with a fundamental tenet of Community law, namely the principle of nondiscrimination on the basis of nationality.¹⁰ This principle, when combined with other key provisions of the EEC Treaty, authorizes Community action in the area of

5. *Id.* at 8.

6. See generally E.P. ANDREYEV ET AL., *THE INTERNATIONAL LAW OF THE SEA* 8-14 (I.P. Blishchenko & S.A. Gureyev eds. & Dmitry Belyavsky trans., 1988) (discussing the evolution of the maritime trading system).

7. See BREDIMA-SAVOPOULOU & TZOANNOS, *supra* note 2, at 52, 54-55 (discussing the drop in labor and shipbuilding due to the drop in EC fleet); see also Amended Proposal for a Council Regulation (EEC) Establishing a Community Ship Register and Providing for the Flying of the Community Flag by Sea-going Vessels, pmbl., 1992 O.J. (C 19) 10, 10 (discussing loss of employment and decline in earnings of member states as a result of a decline in fleet flying Community flags).

8. A Future for the Community Shipping Industry: Measures to Improve the Operating Conditions of Community Shipping, COM(89)266 final at 1.

9. See BREDIMA-SAVOPOULOU & TZOANNOS, *supra* note 2, at 17.

10. "Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited." EEC TREATY art. 7.

maritime transport. The other relevant portions of the EEC Treaty are the transport provisions themselves,¹¹ the provisions relating to the freedom to provide services,¹² and the competition rules.¹³ After the following discussion of the general principle of nondiscrimination, each of these provisions will be considered.

A. The Principle of Nondiscrimination

The principle of nondiscrimination on the basis of nationality is a fundamental concept in the development of European Community law. If a single European Community is to be created, it is crucial that member states treat nationals of other member states as if they were nationals of that state. This policy is critical to safeguarding the unity of the EC.

The European Court of Justice (ECJ) has decided that the principle of nondiscrimination applies to the creation and application of a common transport policy,¹⁴ as well as to the provisions regarding the freedom to provide services and the competition rules. In the area of maritime transport, however, the most influential decision invoking the theory of nondiscrimination involved the legal controversy over the meaning of Article 84(2) of the EEC Treaty. That controversy is embodied in what is commonly known as the Code Maritime Case. In that case, the member states argued that Article 84(2) implied that the general provisions of the EEC Treaty did not apply to sea transport unless the European Council (Council) took a unanimous decision to the contrary.¹⁵ These arguments were rejected by the ECJ, which stated that "whilst under Article 84(2) . . . sea and air transport, so long as the Council has not decided otherwise, is excluded from the rules of Title IV . . . relating to the common transport policy, it remains, on the same basis as the other modes of transport, subject to the general rules of the Treaty."¹⁶ The general rules to which the ECJ refers are those concerning nondiscrimination.

The Code Maritime Case held that Section 3(2) of the 1926 French Merchant Seamen Code, in its unamended state, was inconsis-

11. *Id.* arts. 74-84.

12. *Id.* arts. 59-66.

13. *Id.* arts. 85-94.

14. See generally *infra* notes 25-38 and accompanying text (discussing transport provisions).

15. Case 167/73, *Commission of the European Communities v. French Republic*, 1974 E.C.R. 359, 365-66, 1974 C.M.L.R. 216, 227 [hereinafter *Commission v. French Republic*]; EEC MARITIME TRANSPORT, *supra* note 3, at 25.

16. *Commission v. French Republic*, 1974 E.C.R. at 371, 1974 C.M.L.R. at 219.

tent with French treaty obligations under Article 48 of the EEC Treaty, which requires nondiscriminatory treatment of workers.¹⁷ The French Code provided that a certain proportion of the crew of a French ship, as specified by order of the Minister, must be of French nationality.¹⁸ After France continued to ignore requests from the European Commission (Commission) that France uphold its treaty obligations under Article 48 of the EEC Treaty,¹⁹ the Commission initiated proceedings against France under Article 169.²⁰ Article 48 provides for the freedom of movement for workers and prohibits any discrimination based on nationality between workers of the member states as regards employment, remuneration, or other conditions of work and employment.²¹ The French government argued that it had no obligation under the Treaty to act in a nondiscriminatory fashion since Article 48 did not apply to workers in the maritime transport sector, so long as the Council had not so decided under Article 84(2).²²

The ECJ analyzed the relevant provisions and concluded that Article 84(1) and (2) allow the application of the general rules of the EEC Treaty to sea and air transportation. That is, sea transport provisions exist on the same basis as other modes of transport and are thus subject to the general rules of the EEC Treaty until the Council decides otherwise.²³ In other words, the ECJ applied Articles 48 through 51, which relate to the nondiscrimination against and the free movement of workers, to maritime transport. The ECJ, however, made a distinction between provisions regarding the free movement of workers and those related to the freedom to provide services. The ECJ relied on Article 61(1), which establishes that the “[f]reedom to provide services in the field of transport shall be governed by the provisions of the Title relating to transport.”²⁴ Because maritime transport services are not included in the general protections of Articles 59 to 66, specific action is required by the Council before the

17. *Id.* at 374, 1974 C.M.L.R. at 226.

18. *Id.* at 361, 1974 C.M.L.R. at 217.

19. *Id.* at 362, 1974 C.M.L.R. at 218.

20. Article 169 sets out the procedure under which the Commission, as guardian of the EEC Treaty, may initiate proceedings against a member state that is not fulfilling its treaty obligations. *See* EEC TREATY art. 169.

21. *Id.* art. 48(2).

22. *Commission v. French Republic*, 1974 E.C.R. at 367-68, 1974 C.M.L.R. at 227.

23. *Id.* at 371, 2 C.M.L.R. at 229.

24. EEC TREATY art. 61(1).

principle of nondiscrimination can apply to the service aspects of the maritime industry.

B. Transport Provisions

Article 3 of the EEC Treaty requires the Community to create a common transport policy (CTP) to help establish a common market, or a single European market.²⁵ Specific provisions are found in Title IV of Part Two of the Treaty.²⁶

Article 74 states that the objectives of the EEC Treaty with respect to transportation shall be achieved within the framework of a CTP.²⁷ In order to implement Article 74, Article 75(1) requires the Council to lay down "common rules" applying to international transport, as well as "conditions under which non-resident carriers may operate transport services within a Member State" and "any other appropriate provisions."²⁸ Maritime and air transportation, however, are specifically selected for separate treatment. Article 84(2) provides that upon a unanimous vote the Council may decide whether, to what extent, and by what procedure appropriate provisions may be laid down for these two modes of transport.²⁹

There are two reasons why the EEC Treaty viewed maritime transport as different from other types of transportation and exempted it from normal application within the CTP. First, there exists a long history of international regulation in maritime transportation,³⁰ including a number of international conventions to which most member states belonged prior to the creation of the EC.³¹ The EC, as a relatively new arrival on the international scene, was unwilling to disrupt established international norms.³² Second, unlike other modes

25. *Id.* art. 3(e) (the Community is required to establish a common market according to Article 2).

26. *Id.* arts. 74-84.

27. *Id.* art. 74.

28. *Id.* art. 75(1).

29. *Id.* art. 84(2).

30. *See generally* 1 D.P. O'CONNELL, *THE INTERNATIONAL LAW OF THE SEA* 20-28 (1982) (discussing the history of international maritime law).

31. *See, e.g.*, Convention on a Code of Conduct for Liner Conferences, *opened for signature* Apr. 6, 1974, 1987 Gr. Brit. T.S. No. 45 (United Nations Code).

32. *See generally* Communication and Proposals by the Commission to the Council on Progress Towards a Common Transport Policy: Maritime Transport, COM(85)90 final at 11 [hereinafter *Progress Towards a Common Transport Policy: Maritime Transport*] (noting that the Community has only been involved in shipping policy since the late 1970s and that Community policy favors an international shipping context).

of transportation, maritime transport is inherently international.³³ The EC cannot act unilaterally regarding its maritime policies; it must negotiate with nonmember states to create workable measures.³⁴ By exempting maritime transport from the obligations of the CTP, the EC could avoid conflicts between Community and international law.

Nevertheless, the importance of transportation to the EC must not be underestimated. At one point the European Parliament (Parliament) brought an action against the Council for failing to introduce a CTP.³⁵ The Parliament based its legal argument on Articles 3(e), 61, 74, 75, and 84 of the EEC Treaty and established standing to sue under Article 175.³⁶ However, even though some measures, such as Directive 79/115, have been adopted by the Council,³⁷ there has been an almost total absence of subsequent Community action in relation to sea and air transport.³⁸

C. Freedom to Provide Services

The articles concerned with the freedom to provide services are found under Title III in Part Two of the EEC Treaty.³⁹ This freedom is based on the principle of nondiscrimination on the basis of nationality.⁴⁰ Like the transport provisions, this freedom provides a legal foundation for the EC to act in the field of maritime transportation.

Article 61 expressly states that the provision of services in the field of transport shall be governed by the transport provisions of the EEC Treaty.⁴¹ In *Parliament v. Council* it was argued (unsuccessful-

33. O'CONNELL, *supra* note 30, at 29.

34. Although nations have, in the past, viewed unilateral actions as legitimate means of international maritime claim resolution, recent international judicial decisions have supported the need for international negotiation as the preferred method. *Id.* at 31-33.

35. Case 13/83, *Parliament v. Council*, 1985 E.C.R. 1513, 1583, 1 C.M.L.R. 138, 141 (1986) [hereinafter *Parliament v. Council*]. The Council was held to have breached its duty to establish a CTP, but was not directed to implement any specific actions under the EEC Treaty. *Id.* at 1601, 1 C.M.L.R. at 206.

36. Article 175(1) allows member states and Community institutions to bring an action before the ECJ when the Council or the Commission fails to act. EEC TREATY art. 175(1).

37. Council Directive 79/115 of 21 Dec. 1978 Concerning Pilotage of Vessels by Deep-sea Pilots in the North Sea and English Channel, 1979 O.J. (L 33) 32 (ensuring sufficient numbers of deep-sea pilots in critical areas to ensure safety at sea and the prevention of pollution).

38. See BREDIMA-SAVOPOULOU & TZOANNOS, *supra* note 2, at 113 (noting the passage of few Community regulations from 1958-1985). Recent developments indicate a continuing hesitancy to act. See *id.* at 255.

39. EEC TREATY arts. 59-66.

40. See *id.* arts. 52, 60.

41. *Id.* art. 61(1).

ly) that Article 61 requires the provision of services in respect of transport to be liberalized within the framework of a CTP within an appropriate period. This was proposed even though the Article 61 requirement was not in itself a sufficient ground for indefinitely suspending the effect of the provisions relating to services when the Council had for years failed to introduce such a policy.⁴² The ECJ, however, declared that Article 61(1) clearly provides that because the freedom to provide services in the field of transport is to be governed by the transport provisions (Articles 74–84), the principles of Articles 59 and 60 can be implemented in this sector only by introducing a CTP.⁴³ Thus, Articles 59 and 60 are not directly applicable in the transport sector. The ECJ did note that, in this area, the Council has very limited discretion because the result to be achieved is already determined by the combined effect of Articles 59, 60, 61, and 75(1)(a) and (b), and that the discretion is relevant only to the means to be employed to obtain the results.⁴⁴

D. Competition Rules

The competition rules apply to all economic activities, including maritime services. There are essentially two sets of rules: Articles 85 to 90, which apply to undertakings, and Articles 92 to 94 which relate to aids granted by governments of the member states.⁴⁵ Both the state aids rules and the rules governing market behavior of undertakings must be respected by the maritime industry. These rules are now fully operative, and effective sanctions—such as fines or recovery of unlawful aids—may be imposed by the Commission.

Article 85 regulates market agreements and Article 86 regulates market behavior likely to restrict or distort competition and affect trade between member states.⁴⁶ Any agreement or behavior which is incompatible with the rules is void and/or subject to fines.⁴⁷ Certain agreements may be exempted by the Commission upon

42. *Parliament v. Council*, 1985 E.C.R. at 1598–99, 1 C.M.L.R. at 204–05.

43. *Id.* at 1599, 1 C.M.L.R. at 205.

44. *Id.* at 1599–1600, 1 C.M.L.R. at 205–06.

45. EEC TREATY arts. 85–90, 92–94.

46. *Id.* arts. 85–86.

47. *Id.* art. 85(2); Council Regulation No. 17 First Regulation Implementing Articles 85 and 86 of the Treaty, arts. 2, 15–16, 1959–1966 O.J. SPEC. ED., 87–88, 91–92 [hereinafter Regulation 17].

notification of the agreement and upon the fulfillment of certain specific conditions.⁴⁸ A notified agreement is protected from fines.⁴⁹

To clarify the Community's obligations and rights under Articles 85 and 86, the Council issued Regulation 17 which lays down detailed rules of procedure for the Commission.⁵⁰ The Council also empowered the Commission to issue detailed regulations whereby exemptions can be automatically granted if the agreement concerned falls within the terms of the relevant regulation.⁵¹ These are known as block exemptions.⁵² Council Regulation 17, however, does not apply to transport,⁵³ and so it was necessary for the Council to enact Council Regulation 4056/86 Laying Down Detailed Rules for the Application of Articles 85 and 86 of the Treaty to Maritime Transport.⁵⁴ This Regulation is both a procedural measure and a block exemption.

The second set of competition provisions concern aids granted by governments to various industries. The crisis created by the decline of the shipbuilding industry in Europe and the resulting social and industrial consequences has tempted member states to grant aids to the shipbuilding industry.⁵⁵ This has been done even though state aids to an industry are generally prohibited as incompatible with EEC Treaty

48. Article 85(3) contains two positive and two negative provisions. 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," then half the test is met. EEC TREATY art. 85(3). In addition, the prohibited agreement must not impose on the parties "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 regarding a substantial part of the concerned products. *Id.* The power to grant an exemption under Article 85(3) is reserved exclusively to the Commission. Regulation 17, *supra* note 47, art. 9.

49. Regulation 17, *supra* note 47, arts. 15-16.

50. *See id. passim.*

51. *Id.* art. 24.

52. "Block exemption" is a commonly used term to denote categorical exemptions in this area. For an illustration of the use of the term block exemption, see Keith Hendry & Rob Murray, *Sanctions for Breach of Community Competition Rules are Considerable*, Lloyds List, Apr. 24, 1992, available in LEXIS, Europe Library, Alleur file (noting that Regulation 479/92 allows block exemptions from competition rules to linear conferences); David Wood, *Consortia—The Next Move—Agreements to Eliminate Price Competition will not be allowed*, Lloyds List, Jan. 31, 1992, available in LEXIS, Europe Library, Alleur file (referring to Regulation 4056/86 as a block exemption of linear conference).

53. Règlement n° 141 Du Conseil portant nonapplication du règlement n° 17 du Conseil au secteur des transports, 1962 J.O. 2751.

54. Council Regulation 4056/86 of 22 December 1986 Laying Down Detailed Rules for the Application of Articles 85 and 86 of The Treaty to Maritime Transport, 1986 O.J. (L 378) 4 [hereinafter Regulation 4056/86].

55. BREDIMA-SAVOPOULOU & TZOANNOS, *supra* note 2, at 57-59.

provisions. The rationale behind this prohibition is that state aids often distort competition by favoring an undertaking in one member state over a similar undertaking in another member state.⁵⁶ From the point of view of the Community, the economic problem that the state aid attempts to address has not disappeared, but shifts from one region of the Community to another as investment shifts to the more favorable region, often the place subsidized by state aid.⁵⁷ Some types of state aids are or may be compatible with the EEC Treaty, and Articles 92 to 94 lay down rules for making this decision.⁵⁸ In order to establish whether such aid is allowable, the EEC Treaty creates a notification procedure under Article 93(3).⁵⁹

In light of the real problems that the shipbuilding industry faces, the Community has adopted several directives to regulate state aid to the shipbuilding industry.⁶⁰ State aids to the shipping industry, to shipyards, for example, must be relayed to the Commission before being granted.⁶¹ The Commission has the power to investigate whether the state aid granted by a member state is compatible with the common market.⁶² If the Commission issues a decision declaring a state aid to be incompatible with treaty principles, the member state may apply to the ECJ for review of the decision.⁶³ Similarly, if the member state does not comply with the Commission's decision, the latter may refer the matter to the ECJ directly—that is without having to engage in an Article 169 procedure.⁶⁴ If the Commission decides that the state aid is allowable, there may still be recourse to the ECJ by an undertaking that shows sufficient interest to establish legal standing to challenge the decision.⁶⁵ Additionally, the EEC Treaty itself has procedures that limit the potential abuse of the allocation of state aid. The shipping industry supports other kinds of indirect state

56. See EEC TREATY art. 92(1).

57. See Stephen George, *Regional and Industrial Policy, in THE EUROPEAN COMMUNITY* 117, 119 (Juliet Lodge ed., 1983).

58. See EEC TREATY arts. 92-94.

59. *Id.* art. 93(3).

60. See, e.g., Council Directive 90/684 of 21 December 1990 on Aid to Shipbuilding, 1990 O.J. (L 380) 27.

61. *Id.* art. 12.

62. EEC TREATY art. 93(2).

63. *Id.* art. 173.

64. *Id.* art. 93(2).

65. See *id.* art. 173.

aids as well, including special taxes and social security status for the industry, both of which would lessen the burdens on shipowners.⁶⁶

III. CURRENT EC MARITIME POLICY AND LEGISLATION

Although maritime transport has long-standing traditions⁶⁷ and regulations imposed by international conventions and organizations such as the International Maritime Organisation (IMO),⁶⁸ Community activity, both internally (addressing member states only) and externally (addressing nonmember states), has been minimal.⁶⁹ Some key objectives require the EC to: (1) provide shipping services, regardless of where the shipping company is established; (2) safeguard access to a world shipping market; (3) promote fair competition in the world shipping market which will guarantee, in the long run, that entrepreneurs in the EC have the skills necessary to maintain an economically viable maritime transport industry (i.e., competition in the shipping industry should be fair and on a commercial basis); (4) promote the competitiveness of the EC fleet, which will guarantee its survival in a free world market; (5) take into account the aspirations of developing countries to take part in shipping activities; (6) promote social progress for EC seamen by improving their employment and working conditions; and (7) maintain and improve safety standards and the protection of the environment.⁷⁰

Even with these well-defined objectives in place, the Community took little action prior to 1986.⁷¹ The few initiatives proposed were based to a large extent on a 1976 EC Commission Communication asking that measures be taken against the eastern bloc of countries

66. See Reference for a Preliminary Ruling Made by the Arbeitsgericht, Bremen, by Judgement of that Court of 9 October 1990 in the Proceedings between Sloman Neptun Schiffahrts AG and Bodo Ziesmer, Seebetriebsrat in Sloman Neptun Schiffahrts AG, 1991 O.J. (C 96) 14, 14 [hereinafter Reference for a Preliminary Ruling on Sloman Neptun Cases] (noting request for a preliminary ruling in Joined Cases 92/91 and 73/91 to determine whether a German law allowing employment discrimination against seamen without permanent residence in Germany is permissible). See generally MATHIJSSEN, *supra* note 1, at 189-94 (discussing state aid schemes in general and with specific applications).

67. R.P. ANAND, *ORIGIN AND DEVELOPMENT OF THE LAW OF THE SEA* 2-3 (1983).

68. IMO: *STRUCTURE, RELATIONSHIP WITH OTHER ORGANISATIONS AND FUTURE DEVELOPMENT IN THE INTERNATIONAL MARITIME ORGANIZATION* 2, 2-3 (Samir Mankabady ed., 1984).

69. See BREDIMA-SAVOPOULOU & TZOANNOS, *supra* note 2, at 113.

70. *Id.* at 36-37.

71. *Id.* at 113.

that traded with EC member states.⁷² With respect to its internal objectives, the involvement of the EC was limited to a few specific areas of concern: (1) consulting with member states⁷³ and gathering information on the aggressive shipping practices of countries that traded with the EC where the competitive position of the fleets of member states was threatened by the noncommercial basis of the trading activity of nonmember states;⁷⁴ (2) encouraging member states to accede to international conventions such as the United Nations Code on Liner Conferences;⁷⁵ and (3) supporting procedures ensuring safety and prevention of pollution.⁷⁶

With regard to external activities, the Community took part in IMO activities, put in joint proposals with the member states to the IMO,⁷⁷ and prepared Community measures dealing with geographic locations such as the North or Mediterranean Sea areas which are not covered by IMO.⁷⁸ The Community also worked closely with the Organisation for Economic Cooperation and Development (OECD).⁷⁹ Although many of these measures were well intentioned, it was not until December of 1986 that the Council adopted provisions with any lasting effects.⁸⁰

72. See Progress Towards a Common Transport Policy: Maritime Transport, *supra* note 32, at 1, 11 (noting that Community shipping policy evolved from Commission discussions on Community relations with third countries in shipping matters).

73. See, e.g., Council Decision of 13 September 1977 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, 1977 O.J. (L 239) 23; see also Council Recommendation of 26 June 1978 on the Ratification of Conventions on Safety in Shipping, 1978 O.J. (L 194) 17, 17-18 [hereinafter Safety in Shipping Recommendation] (recommending member states to advise the Maritime Consultative Organization of the ratification of certain conventions).

74. Council Decision of 19 September 1978 Concerning the Activities of Certain Third Countries in the Field of Cargo Shipping, art. 1, 1978 O.J. (L 258) 35, 35.

75. See, e.g., Council Regulation 954/79 of 15 May 1979 Concerning the Ratification by Member States of, or their accession to, the United Nations Convention on a Code of Conduct for Liner Conferences, 1979 O.J. (L 121) 1, 1-3.

76. See, e.g., Safety in Shipping Recommendation, *supra* note 73, at 17; Council Directive of 21 December 1978 Concerning Minimum Requirements for Certain Tankers Entering or Leaving Community Ports, arts. 1-2, 1978 O.J. (L 33) 33, 33-34.

77. BREDIMA-SAVOPOULOU & TZOANNOS, *supra* note 2, at 91.

78. See generally *id.* at 76-85 (discussing various EC measures).

79. See generally Werner J. Feld, *The Harmonization of the European Community's External Policy*, in THE HARMONIZATION OF EUROPEAN PUBLIC POLICY 25, 32 (Leon Hurwitz ed., 1983) (discussing the relationship between the Community and the OECD).

80. See *infra* notes 81-130 and accompanying text.

A. The 1986 Legislative Package

The 1986 legislative package was inspired by a progress report published by the Commission in 1985 which set out the main line of action for a Community maritime transport policy.⁸¹ It was clear from the report that the Commission believed that the only way to fulfill the objectives of the EEC Treaty, as well as to protect the interests of the EC fleet and its users, was to develop a coherent approach to a trade-oriented multilateral policy.⁸² The report was accompanied by several proposals for measures which the Commission regarded as necessary in order to promote the trade and shipping interests of the EC.⁸³ These proposals formed the basis of the 1986 legislative package, which constituted the first phase of the development of an EC maritime transport policy.

The 1986 package focuses primarily on the threat to Community shipping from the protectionist policies and practices of nonmember states. Free and nondiscriminatory access to cargoes for EC shipowners and fair competition on a commercial basis in trade to, from, and within the Community are the overriding principles of the 1986 legislation.⁸⁴ Action, however, was also necessary within the Community to ensure compliance with the EEC Treaty provisions and related policies, such as the nondiscrimination against ships bearing nonnational flags.⁸⁵ Accordingly, regulations were adopted to apply the competition rules to the shipping industry and to apply the

81. EEC MARITIME TRANSPORT, *supra* note 3, at 1-58.

82. Progress Towards a Common Transport Policy: Maritime Transport, *supra* note 32, at 1-7 (describing overview of Community shipping in both the international and Community context).

83. *Id.*, Annex II (containing six proposals that included draft Council regulations and directives to delineate and clarify rules affecting maritime transport).

84. See Council Regulation 4055/86 of 22 December 1986 Applying the Principle of Freedom to Provide Services to Maritime Transport Between Member States and Third Countries, arts. 1-9, 1986 O.J. (L 378) 1, 2-3 [hereinafter Regulation 4055/86]; Council Regulation 4056/86 of 22 December 1986 Laying Down Detailed Rules for the Application of Articles 85 and 86 of the Treaty to Maritime Transport, *pmbl.*, 1986 O.J. (L 378) 4, 4-5 [hereinafter Regulation 4056/86]; Council Regulation 4057/86 of 22 December 1986 on Unfair Pricing Practices in Maritime Transport, *pmbl.*, 1986 O.J. (L 378) 14, 14 [hereinafter Regulation 4057/86]; Council Regulation 4058/86 of 22 December 1986 Concerning Coordinated Action to Safeguard Free Access to Cargoes in Ocean Trades, *pmbl.*, 1986 O.J. (L 378) 21, 21 [hereinafter Regulation 4058/86]; see also BREDIMA-SAVOPOULOU & TZOANNOS, *supra* note 2, at 227, 229 (assessing the 1986 Regulations and the resulting creation of a foundation for a common market in maritime services).

85. EEC MARITIME TRANSPORT, *supra* note 3, at 36-37.

principle of freedom to provide services between member states to maritime transport.⁸⁶

The package measures themselves were in the end a compromise to satisfy various national interests.⁸⁷ The four proposals were each adopted as a regulation and form the basis of the current maritime transportation policy of the EC.⁸⁸

1. *Access to Shipping Routes With Third Countries.* Community maritime law recognizes three types of cargo routes. The first type of route, also called cabotage, lies between two ports in the same member state (e.g., Calais to Marseille). The second type of route lies between two different member states (e.g., Calais to Dover). The third type lies between a member state and a nonmember state. The freedom to provide maritime transport services between member states and third countries was established by the adoption of Council Regulation 4055/86,⁸⁹ one of the 1986 package provisions. This Regulation was intended to assist Community shipowners in their fight against restrictions imposed by third countries on shippers established in an EC member state or established in a nonmember state but with ships registered in the EC.⁹⁰ The Regulation applies to nationals of member states regardless of whether they are established inside or outside the Community.⁹¹ It also applies to shipping companies established outside the Community but which are controlled by nationals of a member state with their ships registered in that member state in accordance with its legislation.⁹²

It should be noted that the Regulation does not deal with cabotage, defined as national offshore services,⁹³ and that the total

86. See generally BREDIMA-SAVOPOULOU & TZOANNOS, *supra* note 2, at 174-75 (discussing the general antiprotectionist stance of the regulations).

87. *Id.* at 204.

88. Although the 1986 package is of primary importance, it should be noted that the EC has adopted other relevant provisions as well. See, e.g., Commission Decision of 1 April 1992 Relating to a Proceeding Pursuant to Articles 85 and 86 of the EEC Treaty, 1992 O.J. (L 134) 1 [hereinafter Commission Decision on Articles 85 and 86]; Council Regulation 479/92 of 25 February 1992 on the Application of Article 85(3) of the Treaty to Certain Categories of Agreements, Decisions and Concerted Practices Between Liner Shipping Companies, 1992 O.J. (L 55) 3 [hereinafter Council Regulation on Liner Shipping Practices].

89. Regulation 4055/86, *supra* note 84, art. 1(1).

90. See *id.* art. 1(2).

91. *Id.*

92. See *id.* art. 7.

93. See *id.* art. 1(4).

freedom to provide maritime services is to be secured by phases.⁹⁴ Cabotage had been an extremely difficult political issue, due to the desire of several member states to protect their monopolies involving trade among their island territories. The parties therefore excluded cabotage from the Regulation in order to reach an agreement on the nonmember state transport route issue. Even in its adopted form, however, this Regulation has garnered some criticism.

The main problem with this measure is that it lacks definitions of such terms as "cargo-sharing arrangements" and "fair, free and non-discriminatory access."⁹⁵ Thus far only one case addressing the problems of interpretation has been considered by the ECJ.⁹⁶ That case involved a cargo-sharing agreement in which Italy was negotiating with Algeria during the time the Regulation was being adopted.⁹⁷ The Commission had proposed that Italy be authorized to ratify the agreement on two conditions: that certain provisions in the agreement be modified in accordance with the Regulation, and that Italy ratify the UN Convention on Liner Conferences.⁹⁸ Another provision of the agreement stipulated that the cargo-sharing arrangements would cease by a given date.⁹⁹

The Council, however, allowed Italy to ratify the agreement on the "undertaking" that Italy accede to the UN Convention "as soon as possible."¹⁰⁰ The Commission brought an action against the Council seeking an annulment of its decision on the grounds that it was contrary to the Regulation.¹⁰¹ The ECJ, however, rejected this argument, stating that the Council's decision was justified by exceptional circumstances and that the Council had not departed from the aim of the Commission's proposal or altered its objective.¹⁰² Although this case does not address all interpretational problems, it is a first step in

94. *Id.* arts. 2-3.

95. BREDIMA-SAVOPOULOU & TZOANNOS, *supra* note 2, at 180.

96. *See* Case 355/87, *Commission v. Council*, 1989 E.C.R. 1517, 1539-51, 1 C.M.L.R. 586, 586-608 (1991) [hereinafter *Commission v. Council*].

97. *Id.* at 1541, 1 C.M.L.R. at 601.

98. *Id.* at 1543, 1544-45, 1 C.M.L.R. at 602, 604-05.

99. *Id.* at 1544, 1 C.M.L.R. at 604.

100. Council Decision of 17 September 1987 Relating to Maritime Transport Between Italy and Algeria, 1987 O.J. (L 272) 37, 37; *see also* Re Maritime Transport Between Italy and Algeria: Decision of the Council of the European Communities, 1 C.M.L.R. 603, 604 (1988) (reprinting Council decision).

101. *Commission v. Council*, 1989 E.C.R. 1517, 1540, 1 C.M.L.R. 586, 601 (1991).

102. *Id.* at 1547, 1 C.M.L.R. at 607-08.

clarifying the meaning of "cargo-sharing arrangement" and "fair, free and non-discriminatory access."

2. *Access to Cargoes in Ocean Trade.* The 1986 package also included a Council Regulation which concerned coordinated action to safeguard free access to cargoes in ocean trades.¹⁰³ This measure relies on Article 84(2) as one of its legal bases, which raises some doubts as to whether the measure may regulate external trade as intended. Article 84(2) allows the Council to lay down provisions for sea transport, but it does not state whether such measures may affect external trade or only internal trade.¹⁰⁴ This Regulation, which is of a defensive nature,¹⁰⁵ was thought necessary to ensure the free and competitive environment which is essential to the dry and liquid bulk trades.¹⁰⁶ Nonmember states are increasingly restricting access to bulk cargoes, which poses a serious threat to the merchant fleets of member states.¹⁰⁷ The Regulation provides measures and methods for coordinated action against third countries by member states in certain circumstances.¹⁰⁸

The procedure for taking action is very straightforward. First, a member state requests the Commission to take action against the offending nonmember state.¹⁰⁹ The Commission then makes appropriate recommendations or proposals to the Council.¹¹⁰ These proposals may consist of either diplomatic representations to the third country or countermeasures (e.g., quotas, taxes or duties, or permits for shipping lines from third countries).¹¹¹ Only one such request has been made to date.¹¹² In that case Denmark requested action to combat certain West and Central African cargo reservation practices.¹¹³ The Council decided that diplomatic representations in the

103. See Regulation 4058/86, *supra* note 84, pmbll..

104. EEC TREATY art. 84(2).

105. It operates against nonmember states rather than shipping companies. Regulation 4058/86, *supra* note 84, art. 4(1).

106. *Id.* pmbll..

107. *Id.*

108. *Id.* arts. 3-8.

109. *Id.* art. 3.

110. *Id.*

111. *Id.* art. 4(1).

112. BREDIMA-SAVOPOULOU & TZOANNOS, *supra* note 2, at 225-26. This single request is indicative of how often this Regulation is applied.

113. *Id.*

Danish situation would be made within the framework of the Lome III Convention.¹¹⁴

3. *Application of the Competition Rules.* In order to apply the competition rules to the field of maritime transport, the Council had to adopt implementing provisions. Regulation 4056/86, based on Articles 84(2) and 87, not only lays down the procedure by which the Commission is able to carry out an investigation and apply the competition rules to the maritime sector,¹¹⁵ but also lays down conditions under which liner conferences may obtain automatic exemption from the prohibition of Article 85(1).¹¹⁶ The Regulation also grants a block exemption to certain agreements between transport and liner conference users.¹¹⁷ The Regulation, however, is limited to "international maritime services."¹¹⁸ Such services have been very narrowly interpreted by the Commission as only applying to the sea-leg portion of the journey.¹¹⁹

Recently, the Commission used the powers conferred by Regulation 4056/86 to investigate the behavior of certain shipowners' committees which had been set up to regulate a number of liner conferences operating in the French-West African route.¹²⁰ In April 1992 the Commission issued a decision concluding that the companies who were members of these shipowners' committees were guilty of infringing Articles 85 and 86¹²¹ and imposed heavy fines on several shipping companies.¹²²

Council Regulation 479/92, a subsequently adopted enabling measure, grants legislative power to the Commission to adopt block exemptions for certain categories of agreements known as consor-

114. Council Decision Relating to Maritime Transport Between Italy and Algeria, *supra* note 100, at 226. The Lome Convention relates to trade agreements between the Community and many African countries.

115. Regulation 4056/86, *supra* note 84, art. 18; *see also* Regulation 17, *supra* note 47, art. 14 (discussing the ability of the Commission to investigate in accord with Articles 87 and 89 regarding undertakings).

116. Regulation 4056/86, *supra* note 84, art. 3.

117. *Id.* art. 6.

118. *Id.* art. 1(2).

119. *See* Communication by one Commission: Report on the Possibility of a Group Exemption for Consortia Requirements in Linear Shipping, COM(90)260 final at 12 [hereinafter Report on the Possibility of a Group Exemption].

120. Commission Decision on Articles 85 and 86, *supra* note 88, arts. 1, 4.

121. *Id.* art. 4.

122. *Id.* art. 6.

tia.¹²³ The exemption is limited to agreements whose object is “to promote or establish cooperation in the joint operation of maritime transport services between liner shipping companies, for the purpose of rationalizing their operations by means of technical, operational and/or commercial arrangements with the exception of price fixing.”¹²⁴

4. *Unfair Practices of Third Countries.* Unfair pricing practices of third countries are dealt with in Council Regulation 4057/86, often referred to as the Maritime Dumping Regulation.¹²⁵ The Community already had experience in handling unfair trade practices in nonmaritime sectors. The Community adopted its first dumping regulation in 1979¹²⁶ which defined “dumping” and “injury, and established a number of procedural options ranging from the stage when complaints are made to the imposition of dumping duties. The Maritime Dumping Regulation closely follows the framework of that general dumping regulation¹²⁷ and lays down similar complaint procedures for those acting on behalf of the Community shipping industry who consider themselves injured or threatened by unfair pricing practices. The rules of procedure which are to be followed during the investigation are set out clearly, such as the conditions necessary for parties to inspect information.¹²⁸ The first measure under this Regulation was adopted in 1989. Council Regulation 15/89¹²⁹ introduced a regressive duty on containerized cargo that was to be transported in liner service between the Community and Australia by Hyundai Merchant Marine Company Ltd.. Hyundai appealed to the ECJ, but the case was

123. Council Regulation on Liner Shipping Practices, *supra* note 88, art. 1.

124. *Id.* art. 1(1).

125. Regulation 4057/86, *supra* note 84, arts. 1–7.

126. Council Regulation 3017/79 of 20 December 1979 on Protection Against Dumped or Subsidized Imports from Countries Not Members of the European Economic Community, arts. 2–12, 1979 O.J. (L 339) 1, 2–4, *replaced by* Council Regulation 2176/84 of 23 July 1984 on Protection Against Dumped or Subsidized Imports from Countries Not Members of the European Economic Community, arts. 2–12, 1984 O.J. (L 201) 1, 4–6 [hereinafter Regulation 2176/84].

127. *Compare* Regulation 4057/86, *supra* note 84, arts. 5–17 with Regulation 2176/84, *supra* note 126, arts. 5–17. Although the framework is similar, the maritime unfair pricing Regulation differs in that it does not provide for provisional duties. *Compare* Regulation 4057/86, *supra* note 84, arts. 11–13 (only discussing redressive duties) with Regulation 2176/84, *supra* note 126, art. 13(1) (anti-dumping duties imposed “whether provisional or definitive”).

128. Regulation 4057/86, *supra* note 84, art. 7.

129. Council Regulation 15/89 of 4 January 1989 Introducing a Redressive Duty on Containerized Cargo to be Transported in Liner Service Between the Community and Australia by Hyundai Merchant Marine Company Ltd. of Seoul, Republic of Korea, 1989 O.J. (L 4) 1.

removed from the Registry by order of the President of the Court of Justice of the European Communities (ECJ).¹³⁰

B. Post-1986 Legislation

Although the 1986 package forms the foundation of current EC maritime transport policy, other recent legislation is equally important. One key measure is Council Regulation 613/91 on the Transfer of Ships from One Register to Another Within the Community.¹³¹ The purpose of this Regulation was to eliminate national technical requirements which were applied as conditions for registration and constituted obstacles preventing an easy transfer of ships from one register to another. The Regulation applies to cargo ships of 500 tons gross tonnage or greater which: (1) were built on or after May 25, 1980 (or if built earlier, those which comply with the 1974 SOLAS Convention); (2) have been flying the flag of, and registered in, a member state for at least 6 months; and (3) carry valid certificates.¹³² If a member state refuses to transfer a registry on the grounds that interpretation of requirements or provisions has been left by the Conventions to the discretion of the member states, it must notify the Commission.¹³³

IV. PENDING LEGISLATIVE PROPOSALS

Several areas in the shipping market need to be addressed before a single European shipping market can be said to exist. Not only will the Community have to deal with the sensitive problem of cabotage, it will also have to introduce measures to enhance Community fleets.¹³⁴ The regulation of passenger liners (mostly ferries) and tramp trading (ships engaged in the carriage of bulk cargo or in the time chartering business) also needs to be considered.¹³⁵

In 1989 the Commission submitted to the Council several proposals to complement the four 1986 measures. The proposals sought to improve the operating conditions of Community shipping. The measures, which have not yet been adopted, consist of four

130. Removal from the Register of Case 163/89, 1992 O.J. (C 81) 12, 12.

131. Council Regulation 613/91 of 4 March 1991 on the Transfer of Ships from One Register to Another Within the Community, 1991 O.J. (L 68) 1 [hereinafter Council Regulation 613/91].

132. *Id.* art. 2.

133. *Id.* art. 5(1).

134. See *infra* notes 140-94 and accompanying text.

135. See BREDIMA-SAVOPOULOU & TZOANNOS, *supra* note 2, at 174-75 (setting forth a Council statement on proposals for the regulation of passenger and tramp shipping).

elements: (1) a Council Regulation applying the principle of freedom to provide services to cabotage;¹³⁶ (2) a Council Regulation establishing a Community ship register and providing for the flying of the Community flag by sea-going ships;¹³⁷ (3) a Council Regulation providing for a common definition of a Community shipowner;¹³⁸ and (4) a Commission Recommendation on improving the effectiveness of Port State Control in the Community.¹³⁹

A. Cabotage

Cabotage describes maritime transport services provided between ports located within one member state.¹⁴⁰ Cabotage is a sensitive issue because many countries try to restrict access to these routes and insist that only ships carrying their own flag are allowed to provide these services.¹⁴¹ In practice, this amounts to a national monopoly in the coastal trade.¹⁴² Due to the decline of the shipping industry and the resulting competition from ships of other nations, member states have hesitated to open the cabotage trade to nonnational ships.¹⁴³ Because a merchant navy is not only a kind of status symbol but also a possible defense weapon, member states are typically protective of their fleets and often direct business to national shipping lines to enhance their effectiveness.

It was for political reasons such as these that cabotage issues were withdrawn from the 1986 legislative package.¹⁴⁴ The Commission's proposal initially had included regulation of coastal shipping, but the

136. Commission Proposal for a Council Regulation Applying the Principle of Freedom to Provide Services to Maritime Transport within Member States, 1989 O.J. (C 263) 17 [hereinafter Proposal for Freedom to Provide Services to Maritime Transport].

137. Amended Commission Proposal for a Council Regulation Establishing a Community Ship Register and Providing for the Flying of the Community Flag by Sea-Going Vessels, art. 1, 1992 O.J. (C 19) 10, 14 [hereinafter Amended Proposal for a Community Ship Register].

138. Proposal for a Council Regulation on a Common Definition of a Community Shipowner, 1989 O.J. (C 263) 16.

139. Commission Recommendation on Improving the Effectiveness of Port State Control in the Community, 1989 O.J. (C 263) 15.

140. BREDIMA-SAVOPOULOU & TZOANNOS, *supra* note 2, at 157-59.

141. *See, e.g., id.* at 158-59. The geography and history of a country will impact whether cabotage is a concern. *Id.* at 158. Within the EC, France, Italy, Greece, Spain, and Portugal supported continuing traditional cabotage regulations, while the United Kingdom, The Netherlands, Belgium, Ireland, Germany, and Denmark opposed the idea. *Id.* Specific cabotage restrictions are in force in France, Germany, Greece, Italy, Portugal, Spain, and, to some extent, Denmark. *Id.* at 42.

142. *See id.* at 158-59.

143. *Id.*

144. *Id.* at 159, 257.

Council was unable to adopt those provisions when Greece, Spain, and Portugal resisted giving up their national monopolies on shipping within their island territories.¹⁴⁵ The Council agreed, however, that further consideration should be given to cabotage,¹⁴⁶ and a second proposal has now been submitted by the Commission.¹⁴⁷ The Commission will continue to pursue the matter because it considers this measure necessary to achieve a single European market.¹⁴⁸

Under this measure the definition of maritime transport services will include several types of services as long as they are usually performed for remuneration.¹⁴⁹ Legitimate cabotage services include the transportation of passengers or goods by sea between ports in any one member state, including overseas departments of the state, and the carriage of passengers or goods by sea between any port in a member state and installations or structures on the continental shelf of that member state (off shore supply services). The provision, however, allows the concerned member state to require that the ships used for these services are manned with nationals of the member state to the same degree as is required of domestic ships which provide similar services.¹⁵⁰ Further, the member state may require that these nationals have the same training as that required of its own ships' national employees.¹⁵¹

The proposal is restricted to ships which operate short sea routes and which do not exceed 6,000 gross register tonnage (GRT).¹⁵² One of the provisions also allows the member states to mandate maritime transport services to provide public services such as cabotage between

145. See Proposal for Freedom to Provide Services to Maritime Transport, *supra* note 136, art. 1(3).

146. BREDIMA-SAVOPOULOU & TZOANNOS, *supra* note 2, at 159.

147. Amended Commission Proposal for a Council Regulation Applying the Principle of Freedom to Provide Services to Maritime Transport within Member States, 1991 O.J. (C 73) 27 [hereinafter Amended Commission Proposal on Freedom to Provide Services].

148. BREDIMA-SAVOPOULOU & TZOANNOS, *supra* note 2, at 165.

149. Amended Commission Proposal on Freedom to Provide Services, *supra* note 147, art. 3 (amended proposal retains this definition unchanged from the original proposal). See generally BREDIMA-SAVOPOULOU & TZOANNOS, *supra* note 2, at 12-13 (describing diverse activities of the shipping industry).

150. Amended Commission Proposal on Freedom to Provide Services, *supra* note 147, art. 1(4).

151! *Id.*

152. *Id.* art. 1.

the mainland and its islands and from island to island.¹⁵³ In addition, safeguard measures have been included in the amended proposal.¹⁵⁴

There has been much opposition to this proposal. The southern member states wish to preserve their monopolies over island transport.¹⁵⁵ In June 1992 a compromise was reached whereby deregulation will take place in stages, starting January 1993 and ending in 1999.¹⁵⁶ In 1993 deregulation of tramp ship services (i.e., services carried out by cargo boats with no regular route) will begin, followed by deregulation of offshore operations, and eventually of all cabotage operators.¹⁵⁷ It has also been agreed that after 1999 the law of the member state of registration will apply to the crew members of ships over 650 GRT; however, until 1999 the law of the host member state will govern.¹⁵⁸ In the case of ships under 650 GRT, the law of the host member state will apply indefinitely, starting in 1993.¹⁵⁹

B. Ship Registration

The second proposal deals with owners who register ships under a flag of convenience in order to minimize costs associated with complying with legal provisions or to take advantage of lower safety standards. This practice, called flagging out, has affected enormously the size of Community fleets in recent years.¹⁶⁰ The increase in the number of offshore registries indicates the gravity of the matter, and some member states have introduced second international registers to try to prevent flagging out.¹⁶¹ Various aspects of these second registers are being considered by the ECJ in the *Firma Sloman Neptun*

153. *Id.* art. 2 (unchanged from the initial proposal).

154. *Id.* art. 3.

155. See BREDIMA-SAVOPOULOU & TZOANNOS, *supra* note 2, at 159 (discussing the southern member states' historical opposition of cabotage regulation); see also *id.* at 257 (contrasting the positions of northern European countries with those of the southern nations on the issue of cabotage regulation).

156. See, e.g., EC: Majority Council Decision on Gradual Liberalisation of Maritime Cabotage, Agence Europe, June 25, 1992, available in LEXIS, Europe Library, Alleur file; see also *Coastal Boost: Liberalization of Cabotage at Last Agreed*, Lloyds List, June 25, 1992, available in LEXIS, Europe Library, Alleur file (editorial applauding compromise agreement).

157. See EC: Majority Council Decision on Gradual Liberalisation of Maritime Cabotage, *supra* note 156.

158. See *id.*

159. See *id.*

160. See generally BREDIMA-SAVOPOULOU TZOANNOS, *supra* note 2, at 53 (describing reasons for flagging out and the consequential loss in competitive advantage).

161. See *id.* at 53.

cases currently before the ECJ on a reference from a German court.¹⁶²

Flagging out has more than mere social and economic implications; it also means a loss of control for the member state. Although shipping operates in an international market, it is through the link between a country and its fleet that standards are applied and maintained, and laws governing the terms and conditions of seafaring employment are determined. Even questions of legal responsibility are often settled under the law of the flag nation.¹⁶³ Thus, a viable and efficient Community fleet registered in the member states is considered necessary to uphold Community standards of behavior. One measure which has been proposed to combat the problem of standards is the establishment of an EC register, EUROS, which will exist alongside the national registers.¹⁶⁴ Ships registered in EUROS would carry the Community flag as well as that of the country of registration.¹⁶⁵

Registration, however, is more than a mere formality. Many member states consider the registration of ships an act of sovereignty similar to the granting of nationality to natural persons and therefore strongly argue against any suggestion that the right of establishment automatically confers a right to register under the national flag of the country of establishment.¹⁶⁶ In the view of the member states, no state can be compelled to grant its nationality or, in the case of shipping, its flag.¹⁶⁷ The Commission, upholding the concept of an integrated market, has responded that registration is a corollary to the right of establishment of shipping companies.¹⁶⁸ This controversial subject is currently governed by national legislation insofar as the legislation is not in conflict with Community law.¹⁶⁹ The importance of this matter is heightened by the fact that some member states use

162. See Reference for a Preliminary Ruling on *Slovan Neptun* cases, *supra* note 66, at 14.

163. See generally O'CONNELL, *supra* note 30, at 750-57 (discussing choice of law and nationality of ship); C. JOHN COLOMBUS, *INT'L LAW OF THE SEA* 297 (6th ed. 1967) (stating that the law of the flag state governs all occurrences on board).

164. Amended Proposal for a Community Ship Register, *supra* note 137, art. 2.

165. *Id.* art. 1.

166. See Case C246/89, *Commission v. United Kingdom*, 3 C.M.L.R. 706, 716 (1991) [hereinafter *Commission v. United Kingdom*].

167. *Id.* at 714-15.

168. *Id.* at 716; see also Amended Proposal for a Community Ship Register, *supra* note 137 at 13 (noting the connection between freedom of establishment and the access to registers of any member state).

169. See *Commission v. United Kingdom*, 3 C.M.L.R. at 717.

the flag to confer economic advantages on their shipping industries.¹⁷⁰

This parallel registration proposal, which is based on Articles 84(2) and 92(3)(d) of the EEC Treaty, envisions a ship remaining under the control and jurisdiction of the member state of registration.¹⁷¹ Before the ship can be registered in EUROS, however, certain conditions must be satisfied which ensure that the ships meet high standards of quality, reliability, and safety, and that they are managed by highly qualified Community sailors. In order to qualify for registration in EUROS, and apart from the requirement of being registered in a member state, the ship must: (1) be owned by a Community shipowner;¹⁷² (2) be a sea-going merchant vessel not more than twenty years old and with at least 500 GRT;¹⁷³ (3) be staffed by a minimum proportion of Community nationals, as reflected by the ship's minimum manning certificates;¹⁷⁴ and (4) meet technical and safety standards.¹⁷⁵

Guidelines concerning the manning of ships registered in EUROS are to be formulated by the Commission in accordance with IMO resolutions.¹⁷⁶ The national authorities will have the duty of monitoring compliance.¹⁷⁷ Ships registered in EUROS are entitled and obliged to fly the European Community flag in addition to their national flag and to carry identification on the ship's stern under the name of the port of national registry.¹⁷⁸

One benefit of the scheme is that the legal and practical problems of a single Community ship register would be solved immediately. The proposal is also made attractive by connecting it with other privileges. One such privilege might be to permit the transport of food aid to be carried only by ships registered in EUROS; another might be to

170. For example, France reserves coastal shipping rights to ships flying the French flag. See *BREDIMA-SAVOPOULOU & TZOANNOS*, *supra* note 2, at 42. Other countries, such as the United Kingdom, have no such restrictions. *Id.*

171. See Amended Proposal for a Community Ship Register, *supra* note 137, pmbll. This legal base comes under the general state aid provisions of Article 92 and has been added to remove legal arguments that Article 84(2) is an insufficient legal base for this proposal. See EEC TREATY arts. 84(2), 92.

172. Amended Proposal for a Community Ship Register, *supra* note 137, art. 4(b).

173. *Id.* art. 4(c).

174. See *id.* art. 12(1). In most cases all officers and at least half of the crew shall be Community nationals, but for passenger ships and ferries, all crew shall be Community nationals.

175. See *id.* arts. 10-11 (discussing safety and monitoring).

176. *Id.* art. 11(1).

177. *Id.* art. 11(6).

178. *Id.* arts. 21-22.

facilitate financial aids for the building of ships to be registered in EUROS.¹⁷⁹ The real incentives for shipowners to register their ships in EUROS, however, are the proposed financial benefits that will offset the extra costs incurred when a ship is registered in a member state. Previously, it was less costly to register ships in a nonmember state.¹⁸⁰

The proposal also furthers the Community's social policy by setting out requirements regarding working hours and other labor conditions.¹⁸¹ For example, it is proposed that seafarers who are not nationals of a member state shall be governed "in accordance with the laws and regulations of the member state in whose national register the vessel is registered and the Community regulations if any."¹⁸² As far as wages are concerned, these "shall be at least in accordance with the ILO Wages, Hours of Work and Manning (Sea) Recommendation (No. 109), 1958, subject to any arrangement on collective wages agreed upon with organizations" satisfying ILO Convention No. 87.¹⁸³ As far as social security is concerned, an obligation is imposed on the country of residence unless legislation expressly provides otherwise.¹⁸⁴ In that case, the laws of the member state of registration apply.

In addition, the proposal provides for reimbursement to the shipowner of income tax due from sailors who have their fiscal residence in a member state.¹⁸⁵ This reimbursement, however, is not available to those ships engaged in regular cabotage trades.¹⁸⁶ Ships registered in EUROS will be entitled to be transferred to the register of another member state without the imposition of additional technical requirements, provided that the ship has valid certificates.¹⁸⁷

C. Community Shipowners

Once the Community decided to propose its own ship register, it was necessary to define "Community shipowner" because such a

179. See generally BREDIMA-SAVOPOULOU & TZOANNOS, *supra* note 2, at 258-60 (several of these incentives were suggested at the Antwerp Symposium in May of 1987).

180. See generally *id.* at 261 (noting the lost differential between open and EC registries and the possibility of a less-expensive EUROS registry).

181. Amended Proposal for a Community Ship Register, *supra* note 137, art. 14.

182. *Id.* art. 14(1).

183. *Id.* art. 14(2).

184. *Id.* art. 16.

185. *Id.* art. 18(1).

186. *Id.* art. 18(2).

187. *Id.* art. 19.

person will have privileged status both as to registration in EUROS and to having access to coastal shipping routes. Another of the pending proposals defines a "shipowner" as "a natural or legal person providing a liner or tramp service in the field of maritime transport of passengers or goods . . ." ¹⁸⁸ Such a person becomes a Community shipowner when he or she is a national of a member state and domiciled, or usually resident, in a member state. ¹⁸⁹ If that person is not domiciled or usually resident in a member state, he or she will also qualify if his or her ships are registered in a member state in accordance with its legislation. ¹⁹⁰

When a company or firm has been formed pursuant to the legislation of a nonmember state, then that company must satisfy certain nationality requirements; either more than 50 percent of the parties participating in the company must be nationals of the member states or the shareholders controlling more than 50 percent of the overall company capital must be nationals of the member states. ¹⁹¹ Similarly, if the company has registered its ship in a member state in accordance with the legislation of that state and meets either of the percentage-of-nationals requirements set out above, then Community shipowner status will be granted. ¹⁹² Both of these provisions require an economic link with a member state in order to find that a Community shipowner exists.

D. Port State Control

The final measure still awaiting adoption by the Community deals with port state control. Port control measures are utilized to ensure safety at sea and protection of the environment, two key protections which exist in all aspects of commercial activity. In the area of maritime transport, where the safety and operation of the ship are governed by the law of the country where the ship is registered, it is difficult for the European Community to enforce standards. However, when nonmember state ships carry goods to Community ports, the Community can indirectly enforce its preferred standards, some of which are more stringent than those set forth by some nonmember

188. Amended Proposal for a Council Regulation on a Common Definition of a Community Shipowner, art. 3, 1991 O.J. (C 73) 25, 26.

189. *Id.* art. 4(1)(a).

190. *Id.* art. 4(2)(a).

191. *Id.* art. 4(2)(b).

192. *Id.* art. 4(1)(b).

states, by requiring the member states to enforce various international conventions which they have signed.

All member states which contain international ports have signed the Memorandum of Understanding on Port State Control, which requires its signatories to sign and ratify several international conventions in the field of safety of life at sea, protection of the marine environment, and standards of living and working conditions on board ships.¹⁹³ The Memorandum is intended to ensure that member states perform their obligations and ratify various international conventions.¹⁹⁴

V. CONCLUSION

This survey gives an overview of the different areas of Community legislative activity which affect the shipping industry directly. There is no doubt that the maritime policy of the EC is global in sphere and aims for its ultimate goal of liberalizing maritime transport services within GATS.

In terms of its internal policies, this year marks the completion of the Community's program of removing obstacles to the free provision of maritime services within the Community. Although the first legislative package removing obstacles to maritime trade was only passed in 1986, it was quickly followed by a number of proposals, most of which have been adopted. In order to establish a single European market, it is necessary to set up a common transport policy and liberalize maritime transport to carry goods and passengers to, within, and from the Community. The Community has already indicated that it will make sure that any obstacles to those ends are not reintroduced through private agreements. The recent decision by the Commission signals that the EC competition rules will be strictly applied.¹⁹⁵

Currently, the Commission is considering the regulation of other shipping routes, starting with those in the North Atlantic. As far as relations with third countries are concerned, the EC is determined to maintain an economically viable Community fleet and has adopted measures to deal with the unfair practices of the fleets of third

193. See Memorandum of Understanding on Port State Control in Implementing Agreements on Maritime Safety and Protection of the Marine Environment, Jan. 26, 1982, §§ 1-2, 21 I.L.M. 1, 2-4.

194. *Id.* §§ 1.1, 2.1, 21 I.L.M. at 2.

195. Commission Decision of 1 April 1992 Relating to a Proceeding Pursuant to Articles 85 and 86 of the EEC Treaty (IV/32.450: French-West African Shipowners' Committees), 1992 O.J. (L 134) 1.

countries. Nevertheless, the EC continues to approach relations with nonmember states with cooperation, coordination, and consultation.

