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# Liner Conferences

Master thesis  
20 points

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Maritime Law / EC Competition Law

Spring 2001

# Contents

<b>SUMMARY</b>	<b>1</b>
<b>PREFACE</b>	<b>2</b>
<b>ABBREVIATIONS</b>	<b>3</b>
<b>1. INTRODUCTION</b>	<b>4</b>
1.1 Purpose	4
1.2 Material	5
1.3 Method	6
1.4 Limitations and disposition	7
<b>PART I LINER CONFERENCES IN GENERAL</b>	<b>8</b>
<b>2. ORIGINS OF SHIPPING – HISTORY OF PROTECTIONISM</b>	<b>9</b>
2.1 Early developments of the law of the sea	9
2.2 Middle ages –Discoveries – Colonialism	11
2.3 Dawn and demise of the free seas	12
2.4 Post war syndrome – cold war	14
2.4 Containerisation	16
2.5 Analysis	17
<b>3. LINER CONFERENCES</b>	<b>19</b>
3.1. Liner shipping	20
3.2 Organisation, operation and meetings of conferences	22
3.3 The Conference Agreement	23
3.4 Common Elements of Liner Conferences	23
3.4.1 Liner freight rates	24
3.4.2 Regularity	25
3.4.3 Membership of conferences	26

3.4.4 Arrangements within trades	26
3.4.5 Loyalty Arrangements	26
3.4.6 Pooling arrangements	28
<b>3.5 Competition and Conferences</b>	<b>28</b>
3.5.1 Internal competition	28
3.5.2 External competition	29
<b>3.6 Merits of Liner Conferences</b>	<b>31</b>
<b>3.7 Disadvantages of Liner Conferences</b>	<b>31</b>
<b>3.8 Analysis</b>	<b>32</b>
<b>PART II IMPORTANT CONFERENCE REGIMES</b>	<b>34</b>
<b>4. LINER CONFERENCES AND THE UNCTAD CODE</b>	<b>35</b>
<b>4.1 UNCTAD and shipping</b>	<b>35</b>
<b>4.2 UNCTAD Code of Conduct for Liner Conferences</b>	<b>37</b>
4.2.1 Principles - objectives - application	37
4.2.2 Relations among members	38
4.2.3 Relations with shippers	40
4.2.4 Freight rates	40
4.2.5 Provisions and machinery for settlement of disputes	41
<b>4.3 Analysis</b>	<b>41</b>
<b>5. LINER CONFERENCES AND THE UNITED STATES</b>	<b>43</b>
<b>5.1 Relevant governmental machinery of the United States</b>	<b>43</b>
<b>5.2 United States and Liner Conferences</b>	<b>44</b>
<b>5.3 United States and the UNCTAD Code</b>	<b>46</b>
5.3.1 Legal objections under the 1916 Regime	47
5.3.2 Policy developments following the Code	48
<b>5.4 The Shipping Act of 1984</b>	<b>48</b>
5.4.3.1 Scope	49
5.4.3.2 Common Carrier	49
5.4.3.3 Permitted agreements	49
5.4.3.4 Prohibited agreements	50
<b>5.5 Recent developments</b>	<b>50</b>
<b>5.6 Analysis</b>	<b>52</b>
<b>6. LINER CONFERENCES AND THE EUROPEAN UNION</b>	<b>53</b>

<b>6.1 The Transport industry of the European Union</b>	<b>53</b>
<b>6.2 Transport Policy of the European Union</b>	<b>54</b>
6.2.1 Extended Historical Perspective	56
6.2.2 The Common Maritime Transport Policy	57
<b>6.3 Maritime Transport and the Community Competition law</b>	<b>59</b>
6.3.1 EC Law and the UN liner Code	60
6.3.2 Block exemptions	60
6.3.3 Liner conferences	61
6.3.4 Council Regulation no. 4056/86	62
6.3.4.1 Legal basis and effect of Regulation 4056/86	63
6.3.4.2 Scope and a definition	63
6.3.4.3 Technical agreements	65
6.3.4.4 The conference block exemption	65
6.3.4.5 The non-discrimination condition	66
6.3.4.6 Obligations attached to the exemption	67
6.3.4.7 Monitoring of exempted agreements	67
6.3.4.8 Effects incompatible with the Art 82 of the Treaty	68
6.3.4.9 Conflicts of international law	69
<b>6.4 Application of Council Regulation 4056/86</b>	<b>70</b>
6.4.1 French West-African Shipowners' Association	71
6.4.2 CEWAL	71
6.4.3 Trans-Atlantic Agreement	72
6.4.4 Far Eastern Freight Conference	73
6.4.5 Trans-Atlantic Conference Agreement	73
6.4.6 Compagnie Maritime Belge	74
<b>6.5 Motives for exemption</b>	<b>76</b>
<b>6.6 Analysis</b>	<b>77</b>
<b>PART III EPILOGUE</b>	<b>79</b>
<b>7. CONCLUSIONS</b>	<b>80</b>
7.1 Liner Conferences in general	80
7.2 UN – US – EU	81
<b>BIBLIOGRAPHY</b>	<b>84</b>
<b>TABLE OF CASES</b>	<b>86</b>
<b>TABLE OF LEGISLATION</b>	<b>88</b>
<b>TABLE OF DECISIONS, REPORTS AND PUBLICATIONS</b>	<b>90</b>

# Summary

The focus of this thesis is on liner conferences. Liner conferences are formations of lines collaborating or otherwise operating collusive on specific routes at fixed schedules. Other definitions will follow. The outline comprises three parts over seven chapters whom each will end in an analytical summary of its content

The first part introduces the reader to the historical background of shipping in general, and liner conferences especially, both from a private and public perspective, but also a brief presentation of protectionism in its earliest forms, as well as recent reformed utilisation of preference programmes. History gives evidence for conferences schemes being exploit by governments as a tool to battle off activities of foreign lines, and sometimes are the victims of subsidies programmes. This will be followed by a description of the operation and characteristics of liner conferences, the common elements thereof, merits, flaws and some relevant competition problems.

The second part, a comparative study of three different legal regimes, United Nations – United States – European Union, in relation to liner conferences; what legal background the three have committed to, how the different regimes have influenced each other and, where relevant, the situation today. The chapter on the EU is the dominating section as well as the main subject of investigation within the frame of this essay. The UN and US chapters nevertheless provide the reader with important information for the further reading of the essay, the EU. Interesting legally, and naturally presented below, for this essay are, concerning the UN – the UNCTAD Code of Conduct for Liner Conferences, regarding the US – the Shipping Acts of 1916 and 1984 but also the recent Ocean Shipping Reform Act, and vis-à-vis concerning the EU – Council Regulation 4056/86. To the investigation important cases, from both US, but principally, EU Courts, will be presented and concerning the EU also an insight into the application of Council Regulation 4056/86 with Commission decisions and the practice of the Court of First Instance and the European Court of Justice.

The third part of the essay, one lone concluding chapter, attempt to summarise and analyse the whole of the essay, hopefully clarify its content and connect some loose ends in the mind of the reader. Liner conferences, albeit being competitively infringing cartels, are vital to shipping and world trade as a facilitator and stabilisator of various factors involved therein. This, however, does not completely excuse such behaviour and intuitively one is tempted to dismiss liner conferences as a future component of world trade. The fate of conferences ultimately lies in the hands of consumers, but in reality only the mighty economic powers can alter the present situation, not developing countries.

# Preface

There lies a mysterious mist around maritime transport and shipping. Many are those, including myself some time ago, who rarely reflect over the logistics networks systematically covering destinations worldwide, reassuring the needs of modern society and its metropolitan structures. The backbone of this world wide web is spelled 'shipping', and many shipping lines are members of liner conferences; cartels at sea. These liner conferences are made legitimate for various reasons – puzzling to some and clear for others.

My inauguration into the field of shipping was a fine course in 'Maritime law' given by Lars-Göran Malmberg at the University of Lund and its Faculty of Law in the spring of 2000, giving a public perspective of maritime law. Naturally, therefore Lars-Göran Malmberg deserves special thanks, being my helpful tutor, inspirational lecturer, and provider of good advice, ideas and relevant literature. I also want to thank my lovely girlfriend Karin, for support, inspiration, advice discussion and love, i.e. everything! Moreover, special thoughts go to my mom, dad and grandfather for caring, love and support on my journey to complete my education and this essay.

The subject matter of this thesis first arose as an idea to combine my two favourite legal subjects, maritime law and European competition law. Actually I owe the specific subject, liner conferences, to my girlfriend, Karin, who wrote an essay on the same subject in the spring of 2000, thus opening up my eyes to the world of liner conferences. In the fall of 2000 these ideas evolved into a piece on liner conferences under Council Regulation 4056/86 following a course with the name 'EU Competition Law', which has served as an outline and basis to this more advanced and expanded piece.

Lund, June 2001.

# Abbreviations

AIWASI	Association of Independent West African Shipping Interests
CENSA	Council of European and Japanese Shipowners' Associations
CEWAL	Associated Central West African Lines
CES	Committee of European Shipowners
CFI	Court of First Instance
CMEA	Committee for Mutual Economic Assistance
CMB	Compagnie Maritime Belge
CSG	Consultative Shipping Group of Governments
CTP	Common Transport Policy
DSVK	German Shippers Council
ECOSOC	Economic and Social Committee (EU)
ECJ	European Court of Justice
FMC	Federal maritime Commission (US)
FEFC	Far Eastern Freight Conference
GRT	Grosse tons
IATA	International Air Transport Association
ICC	Interstate Commerce Commission (US)
ICS	International Chamber of Shipping
INTCC	International Chamber of Commerce
LDC	Less Developed Country
OECD	Organisation for Economic Cooperation and Development
OPEC	Organisation of Petroleum Exporting Countries
OSRA	Ocean Shipping Reform Act
TAA	Trans Atlantic Agreement
TACA	Trans Atlantic Conference Agreement
TEU	Twenty Foot Equivalent Standard
UNCTAD	United Nations Conference on Trade and Development
WTO	World Trade Organisation

# 1. Introduction

As the title of this essay implies the subject to be dealt with is ‘liner conferences’, i.e. the price arrangement cooperation between international liner service operators on particular routes. A more detailed description will be provided later in this essay. The general subject of this essay is shipping law and restrictive policies as well as competition policies attached hereto. The specific matter is liner conferences; their history, of what they consist, under which terms they operate, under different regimes and reason to their existence. Liner Conferences are legitimate associations cooperation between shipowners operating at sea, legitimately permitted to violate general principles of competition in their operation, both in theory and practice. There are answers hereto, and certainly opinions as to whether these cartels should be legitimate, i.e. benefiting from immunity under United States laws or an exemption under Community law.

Liner conferences have not been favoured on the agenda of governments. Especially European countries have been reluctant to act upon a policy in relation to liner conferences. During a long time the matter went unregulated ahead in the most powerful trading block in the world, the European Union. The US took upon itself the regulating role stipulating rules already in 1916. The EU could not settle for a common competition approach in shipping until after the United Nations initiative, in issuing a regulation bringing maritime transport under the competition rules of the Treaty.

In recent years the conference system has been eagerly discussed, also in Sweden, but more regarding the future being or not being of liner conferences. New regulating initiatives have come on both sides of the Atlantic: from the EU when trying to further develop its rules in the regulation on consortia, and the US by its reform of 1998.

## 1.1 PURPOSE

Three basic purposes exist: First, to describe and analyse liner conferences, their characteristics, merits, disadvantages, and legal status under different regimes; moreover, to seek their history –the factors that triggered shipowners into forming conferences; and more important to endeavour an investigation with the objective to find what aims and rationales that build the foundation of exempting these cartels from ordinary competition/antitrust provisions under three different regimes. This outline tempted me to arrange a comparative section, where the United Nations, the United States and the European Union are displayed in relation to conferences.



## **1.2 MATERIAL**

Some books have been more important than others and I will present them and their authors in the following. The book by Luis Ortiz Blanco and Ben Van Houtte dates back to 1996, and is special in the sense that both authors are officials of the European Commission in the Transport Division of DG IV on the application of competition rules in the transport sector. They therefore possess not only theoretical knowledge of this subject but also wisdom concerning the practical application of the rules. Alberto Bercovitz, Professor of Commercial Law and author of the foreword to the Spanish edition, summarise with the conclusion that the book is destined to become reference text, of absolute necessity for anyone concerned either with transport law or with the competition rules of the European Union.

Mark Clough and Fergus Randolph are Barristers of the Brick Court Chambers (Brussels and London) and their work is part of the Current EC Legal Developments series. Their book on Shipping and EC Competition law is a fairly broad, but not superficial, and unbiased account for the subject.

Bruce Farthing is a lawyer, former deputy Director General for British Shipping, and current or former officer of numerous international shipping and shipowning organisations, including the (Interstate Commerce Commission) ICC, Council of European and Japanese Shipowners' Associations (CENSA), Committee of European Shipowners (CES), and International Chamber of Shipping (ICS). His book serves as an introduction to international shipping and its institutions. It is particularly interesting, with its European and British perspective, in contrast to the next book by the American view given by Amos Herman.

Amos Herman, LL.B., S.J.D. is a Lecturer in Law at Tel Aviv University / Haifa University. His book was published following the entry into force of the UNCTAD Code and is an entertaining lecture over the flagrant and irresponsible approach adopted by Europe and the UN in general and the UK in particular.

EC Shipping Law, by Vincent Power – B.C.L.(N.U.I.), L.L.M.(Cantab.) and Partner of A. & L. Goodbody, Dublin, N.Y. London and Brussels, is a true bible for any true or emerging scholar in the field of shipping. This second edition is even broader and richer in both outline and substance. This book comprises everything worth knowing concerning shipping and the Community. Moreover, the pedagogical aspect of the book is impressive with the rich set of sections.

The book by Anna Bredima-Savopoulou and John Tzoannos dates back to 1990. The former is advisor to the Union of Greek Shipowners, member of the Economic and Social Committee of the European Community as well as being a member of the Board of Directors of the Comité des Associations d'Armateurs

des Communautés Européennes (CAACE). The latter is head of the Maritime Research Department at the Institute of Economic and Industrial Research in Athens with practical knowledge of policy making on maritime issues as a member of CAACE. These two scholars delivered the first analysis of the law and regulations governing the common shipping policy of the Community.

Krister Sundin addressed a substantial number of government officials on shipping task forces with an enquiry form concerning their countries' policies of protectionism. His book, *Protektionism och bilaterala sjöfartsavtal*, is the report from his findings about bilateral and unilateral methods of excluding third parties in favour of national interests.

Hans Jacob Bull of the Scandinavian Institute of Maritime Law and Helge Stemshaug of the Centre for European Law both at the University of Oslo, edited an anthology following the 17<sup>th</sup> Nordic Maritime Law Conference 2-4 September 1996. The topic of the conference was EC Shipping Policy and among the contributors are Rosa Greaves, Allen & Overy Professor of European Law at Durham European Law Institute (UK) and Helmut W. R. Kreis, former Acting Head of the Transport Division, DG IV, European Commission.

As a general remark with regard to the literature one must state that its age is somewhat alarming. The books on liner conferences in general are more than a decade old, while the literature dealing with the Community policies are more contemporary. This fact may also suggest a further investigation on the topic, such as this essay.

Other material used include the (EEC) Treaty of Rome, the secondary legislation of the Community, the practice of the European Court of Justice and Commission of the European Union decisions, but also international law, national law, memoranda and communications.

### **1.3 METHOD**

Concerning the method a professor at the faculty of Lund once told me that law scholars do not utilise any particular method. The method of law scholars can be described as first, the gathering of material – information and facts, second the processing and accurate reproduction of the facts and information, and third, attempting to draw sound and sensible conclusions there from. It is my opinion that the above-described mode of method is utilised below.

Furthermore I want to add that all articles are named according to the provisions laid down in the Treaty of Amsterdam

## **1.4 LIMITATIONS AND DISPOSITION**

The limitations of this essay are several. First it describes shipping and competition. Second it describes liner conferences and competition. Concerning the Community rules it is limited to liner conferences – consortia and inter-modal transport are excluded. The chapter on the United Nations piece is much like the US perspective limited to only conferences, and the institutions involved in the process. The time period is in a sense unlimited, but limited to historic times.

This essay can either be seen as an anthology of individual studies of views on Liner Conferences, or as a comparative study on the same subject matter. My approach to the subject can, of course, render in reiterations of facts but hopefully not exclusion thereof. The first part may, for devoted readers on the subject, appear shallow, but should be considered as a backyard from which the comparative chapters can spring. The investigation of the EU regime is the most important, which is evident from the outline and scope provided for in the essay.

# **PART I**

## **LINER CONFERENCES IN GENERAL**

## 2. Origins of shipping – history of protectionism

When did man first utilise sea as a means of transportation and how did this mode of transport become the revolutionising catalyst of trade? Competition restrictions throughout history have been a common instrument in shipping, already during Antiquity, through to the UNCTAD Code of Conduct for Liner Conferences and beyond this important milestone in liner shipping. Can things improve or will short-term economic solutions reign in the future too? I am hopeful that these matters can be elevated, discussed and answered in the following.

### **2.1 EARLY DEVELOPMENTS OF THE LAW OF THE SEA**

Maritime law is one of the senior branches of international law, senior both regarding age, dimension and significance. We know that there were sailors before there were farmers and shepherds, that there were ships before people had settled in villages and made the first pottery.<sup>1</sup> The Romans proved that it would cost more to cart a certain quantity of grain seventy-five miles than to ship it by sea from one side of the empire to the other, thus providing the basic principle of marine transport. The Egyptians, on the other side of the Mediterranean are credited with inventing the sail some 8000 years ago, but the possibility of prior ship mobility by sail in the unknown world remain.<sup>2</sup> The earliness of Egyptian maritime commerce was not only overshadowed by the Phoenicians, whose importance in different areas, not solely shipping, cannot be disregarded, but also the Judeans, Greeks and, the often forgotten Etruscans followed in the wake of Egyptian prime. The Phoenician would predominantly become the premier seafaring peoples in the last millennium B.C. claiming the throne of shipping in the Mediterranean Sea and founding plentiful colonies including the mighty Carthage. According to the “father of history”, Greek traveller Herodotus, Phoenician sailors circumnavigated Africa around 600 B.C., a fact challenged by some scholars but by no seamen.<sup>3</sup> Trade is a catalyst of prosperity and prosperity means growth. Hence, Tyre, the main Phoenician city, presumably had a population exceeding 1 million; Carthage, the famous antagonist of republic Rome had 700,000; and Alexandria, the Greek and grain market metropolis had 1 million.<sup>4</sup> To sustain such colossal cities in terms of both food and other supplies, trade activity, in this context sea trade, was presumably enormous.

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<sup>1</sup> Gold, p. 1.

<sup>2</sup> Ibid, p. 2.

<sup>3</sup> Ibid, p. 3.

<sup>4</sup> Ibid, p. 4.

The births and demises of empires aside, insecure and chaotic states, the sea law matured in the shape of a continuous body of trade custom. This system regulating the ancient seas lived its own life for almost 5,000 years, obeyed by all navigators including pirates.<sup>5</sup> The Tigris-Euphrates Basin, cradle of Western law, had one of the earliest codifications, the Law of Babylon, based on Sumerian laws and codified around 2200 B.C. by Hammurabi. The first universal sea law, however, was the Phoenician system of business law, vital for commerce of that vast dimension. This mysterious people was the undisputed masters of the Mediterranean for over 1,000 years, not only did they invent the alphabet, built mighty cities, colonies and developed the type of ship used well into the Middle Ages, but this superiority led to their hubris-like demise in 332 B.C. after offending Alexander the Great who conquered and wiped out their capital Tyre, and of course the devastating Punic wars<sup>6</sup> with the Romans. Phoenician sea law lived on forming the basis of a significant part of present maritime law. These provisions form the core of modern-day maritime law regulating such issues as carriage of goods by sea, general average, salvage, bottomry, seamen's compensation and discipline and maritime insurance.<sup>7</sup>

The first known conventions were concluded between the different nations of South East Asia 1000 B.C. aiming at regulating the exploitation of the seas.<sup>8</sup> Since oceans cover two thirds of the earth, all nations, seaside or not, have always shown tremendous interest for the seas as convenient means of transportation and endless provider of natural resources. Supremacy and control of the seas were for a long time the most important goal for foreign policies of numerous maritime nations. After the Phoenicians maritime supremacy in the Mediterranean was passed on to the Greeks, today still a dominant maritime force. Then, after the Greek supremacy, when no maritime power was completely dominant, raids, wars and extensive piracy threatened shipping. Now the first claims of exclusive ownership of the sea materialise.<sup>9</sup> Protectionism in its earliest forms appear where the Egyptians destroying competing ships or, more elegantly, the Carthaginians or Greeks placing rigorous restrictions on foreign trade and vessels.<sup>10</sup> The Romans, originally an agrarian society regarding the sea with horror, would throughout a short period of time not merely become seafarers but the unchallenged power of the Mediterranean, or, as the Romans preferred, *Mare Nostrum* (our sea). The Romans swiftly restored faith in sea trade, almost bringing to an end the terror of piracy. Declarations of the Roman public maritime law were clear and unambiguous. According to Ulpian:

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<sup>5</sup> Gold, p. 4.

<sup>6</sup> The three Punic wars between Rome and Carthage (264-241, 218-201 and 149-146 B.C.) that led to the total annihilation of Carthage.

<sup>7</sup> Gold, p. 5.

<sup>8</sup> Bring and Mahmoudi, p. 150.

<sup>9</sup> Gold, p. 6-7.

<sup>10</sup> Ibid, p. 9.

The sea, which by nature is open to all, cannot be subjected to private servitude. For the sea as well as the shore and the air which is common to all, and by no law may one be prevented from fishing in front of my buildings.

However, the *Digests* clarify this notion of generosity by limiting this to be a right of the Roman peoples alone. What followed in the subsequent decline of the Roman Empire also scattered Roman law for a long time. Commercial maritime laws did not cease to be produced, and reproduced was the Roman usages in the *Rhodian Sea Law*.<sup>11</sup>

## **2.2 MIDDLE AGES –DISCOVERIES – COLONIALISM**

After Romans came the Saracens (Arabs), not a seafaring people at first, consisting of nomadic tribes driven out of the Central and Northern Arabic Peninsula, but a thirst and respect for knowledge made them the most civilised and advanced culture since the glory of Rome. But trade was scarce, often convoyed in the shadow of piracy, and the well-known principle of the fittest survivor was the unchallenged standard. Naturally the Saracens occupation of not only Jerusalem, but also much of the Mediterranean area, collided with the interests of Christianity and the mighty Christian armadas and armies, the eight crusades between 1096-1270, was sent with destination Holy Land. This release of expanding energy on behalf of Western Europe led to the self-sufficiency and independence of a span of Mediterranean coastal cities, and their might and ability in trade became the lifeline of goods and supplies of the Crusaders. Venice, Amalfi, Trani<sup>12</sup>, Pisa<sup>13</sup>, Genoa, Marseilles, Jerusalem and Oleron<sup>14</sup> all contributed to the relative wealth of the West as well as being active constitutors of maritime law.<sup>15</sup>

Concepts like *Mare Nostrum*, *Mare Clausum* (closed sea) or *Dominium Maris* (sea territory) have been utilised for centuries as means, for one or more maritime nations, of excluding the rest of the world from certain parts of the seas. From the Swedish perspective these modes were utilised from the mid 16<sup>th</sup> century to the beginning of the 18<sup>th</sup> century where the Baltic Sea, by Sweden and Denmark, was considered *Dominium Maris Baltici*, a sea territory in the possession of these two countries.

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<sup>11</sup> Gold, p. 16.

<sup>12</sup> On the Adriatic and now fallen into oblivion.

<sup>13</sup> Now inland from the sea but once a trading centre.

<sup>14</sup> Oleron is a small island off La Rochelle, and once English territory.

<sup>15</sup> Gold, p. 17-19.

## 2.3 DAWN AND DEMISE OF THE FREE SEAS

A novelty was introduced when Hugo Grotius, the father of international law, introduced the opposing concept of *Mare Liberum* (free seas) in his famous work *De jure praedae commentaries* in 1609 the foundation of the doctrine of the free seas was laid down. The basic principle was, according to Grotius, that the oceans could not, due to their unique characteristics, be occupied or be regarded as the territory of a nation.<sup>16</sup> Grotius, a young Dutch lawyer, sought to contest Portugal's claimed exclusive right to trade with the East Indies, although not "legally" occupied by Portugal. All nations were to be able to freely utilise the seas and during the 18<sup>th</sup> and 19<sup>th</sup> centuries the doctrine was gradually accepted as a principle of international law. Although facing fierce resistance from the mighty marine powers the doctrine won advocates during the mid 19<sup>th</sup> century in the wake of the needs of the emerging industrialism as a prerequisite thereof. These principal rights have later been established through international agreements, but time has given the meaning of the rights a variety in essence.<sup>17</sup>

The official Swedish interpretation of the meaning of *Mare Liberum* concerning trade and sea borne trade is in harmony with the one given by the International Chamber of Commerce (INTCC):

"The organisation of sea transport service must be free to choose the most suitable vessel to transport his goods. Secondly the Shipowner must be free to compete for cargo in various trades."<sup>18</sup>

However, opinions differ, something that can be illustrated by the former eastern states that claimed to have undisputable prior rights to transport of domestic goods. Brazil and several South American countries interpretation of *Mare Liberum* means that the freedom criteria gives every individual the right to go its own way in finding solutions with regard to national interests. The Polish approach is, that since the free seas only benefit the strongest it is necessary to accept protectionism of new merchant fleets, at least to a certain extent. Even the mighty American view has been that all countries have a right to possess a merchant fleet and a reasonable share of its of flow of goods. The present development is pointing towards a situation where *Mare Liberum*, in practice, is impossible. Developed countries that thrived during good economic times of free seas began to feel the stalking competitors of the rest of the world and imposed restrictions on foreign trade. It is a classic solution used, for a limited period at least by France during mercantilist eras, but the present preservation of free seas are sinking.

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<sup>16</sup> Bring and Mahmoudi, p. 150.

<sup>17</sup> Sundin, p. 13.

<sup>18</sup> Statements and resolutions of the INTCC 1971-1973, XXIV the INTCC Congress Rio de Janeiro of 1973, p. 31.



As a final part of this excursion through history I want to return to Grotius' vision of *Mare Liberum*. This universal right to the seas has since been subject to frequent agreements. International organisations have repeatedly made attempts to codify this generally accepted custom, but history has shown that no consensus could be reached upon the meaning of *Mare Liberum*.<sup>19</sup>

If interest in maritime transport was focused on military and foreign policies during the 17<sup>th</sup> century attention turned to more commercial considerations in the 18<sup>th</sup> century merchant fleet policy. Several agreements were concluded between the competent authorities regulating the main European routes between Bremen – Amsterdam and Hamburg – London, and when steamers were introduced<sup>20</sup> lines serving the same routes and trades swiftly concluded competition agreements, the first liner conferences were established.<sup>21</sup> But *Mare Liberum* was narrowed already in 1660 when Cromwell introduced the Navigation Act, containing severe restrictions of competition. England, together with Holland the leading naval power, reserved all trade with its colonies to one flag. One reason to this was said to be England fear of the Dutch superiority in technology, but also England's close connection between its merchant fleet and navy. American pressure forced England to lift these restrictions only to see the Navigation Act of 1784 impose new reservations of trade, whereby all import were to be shipped by British vessels. The antagonist, the grand maritime nation of U.S.A. was the target for this restriction and the reply was delivered in a law prescribing that all import from England was to be shipped by American vessels.<sup>22</sup> The effect of this was that all liner ships always completed one journey with empty holds, and thus an increase of costs – a situation that remained until 1849 when both nations recognised the potential economic crisis it could have evolved into.<sup>23</sup>

This is where the liner conferences first appear. Earlier technical conditions did not allow fixed schedules because of weather, but the steam revolution realised steady flow of cargo on a regular basis with set tariffs. The stage was open to conferences. The industrial revolution brought new dimensions and maritime transport was necessary to meet the needs of transportation to new markets. In 1850 the world fleet consisted of about 7 million tons, 90 percent were sail ships, and by 1900 the world tonnage amounted to 29 million tons. A voyage by sail ship from the U.K. to Australia was on average sixty-five days, shortened by fifteen days with steamships.<sup>24</sup> A group of liner steamer shippers established a common tariff with uniform rates in 1875 and a system of deferred rebates in 1877, thus the first liner conference was a fact, so were the standards for the composition and cartel characteristics. Within a few years this mode gained

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<sup>19</sup> Sundin, p. 41.

<sup>20</sup> The first steamer was launched 1819 in the United States, and was named Savannah.

<sup>21</sup> Sundin, p. 42.

<sup>22</sup> Ibid, p. 43.

<sup>23</sup> Ibid, p. 44.

<sup>24</sup> Herman, p. 7.

members from all industrialised nations, covering all international maritime trades, as well as critics.<sup>25</sup> Several inquiries have consequently been made into liner conferences; two by sceptical United States will be described below. Generally it can be said that Europe initially chose a less regulative approach.

## **2.4 POST WAR SYNDROME – COLD WAR**

The demise of the free seas, if ever existing, continued and still continues into the 21<sup>st</sup> century. If the situation was discouraging prior to the Second World War matters did not improve. Before only a few maritime nations existed on the scene and still it was difficult to limit different restrictions on competition. The United States was the only nation involved in World War II with a greater post war merchant fleet and not late to take advantage of the situation. The same situation could be found in air transport. The previously liberal United States, with preference laws concerning public goods such as mail<sup>26</sup>, state officials<sup>27</sup> and war material<sup>28</sup>, now veered in becoming a nation of extensive competition restrictive actions.<sup>29</sup> This fact and United States strong economic position made the situation of other weaker by war terrorised nations severe since much of the trade was to be made on US terms. Even the ‘Marshall plan’ was given provisions of US preference of 50 percent for cargo shipped to Europe.<sup>30</sup> The countries of Latin America, spared from the ravage of war with many shipping companies founded in the wake industrialism, adopted policies of restrictions on competition to aid its own fleet. But besides restrictive measures by Argentina, Peru, Ecuador, Brazil, Cuba and Panama, also France, Holland and Portugal adopted these regimes together with countless others.<sup>31</sup>

With great creativity and intensity competition restrictive measures soon summoned an international opinion, especially among the countries of northern Europe, for common action. The ICS stated that if no measures were taken future international trade might be jeopardized. Already in 1949 a resolution against competition restrictions in ocean trade was adopted whereby it recognized that the free flow of world commerce and exchange of international shipping was the

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<sup>25</sup> Blanco and Van Houtte, p. 104.

<sup>26</sup> The Merchant Act of 1920 Section 24 stipulated ”That all United States mails shipped or carried by on vessels, if practicable, shall be shipped or carried on American built vessels documented under US Laws.

<sup>27</sup> The Merchant Act of 1936 contained provisions meaning that employees “on official business overseas or to or from any of the United States shall travel and transport his personal effects on ships registered under laws of the United States”.

<sup>28</sup> The Cargo Preference Act of 1954 contained rules on how military transports were to be conducted, to be precise, shipped 100 percent by American built vessels.

<sup>29</sup> Sundin, p. 44.

<sup>30</sup> Sundin, p. 45, 47.

<sup>31</sup> Ibid, p. 47-48.

best guarantee of economic equity and world peace.<sup>32</sup> The situation did not immediately improve, United States sought to expand its Marshall loan reservations in 1950, while 70-75 percent of the American fleet operating on trades between foreign countries was subsidised.<sup>33</sup> At the ICS meeting of 1954 an increasing tendency was shown of countries attaching special treatment clauses to their trading agreements. An extreme was the rebuilding example of Chile, whose entire export was to be shipped by domestically owned ships.<sup>34</sup> By way of regulations reserving tonnage, relief of customs fees for domestic vessels, monopolised import licences, currency manipulation and reserved quay slots in the harbours were some of the fashions utilised toward strong merchant fleets up to 1960.<sup>35</sup>

The East engaged in ocean trade during the 1960's and 1970's and the expansion was immense with consequences around the world. In the United States the subsidies system was so extensive that the Department of Transportation considered a fully state owned merchant fleet.<sup>36</sup> The development of protectionism in South America started to give effect among Western Europe shipowners and at 1962's Chamber of Shipping's meeting new restrictions were actualised. Venezuela, however, was an outstanding South American example of differing opinion as its government early on clarified that Venezuelan sea trade was to be conducted according to purely commercial principles.<sup>37</sup> The emerging industrial power of Japan deceived its way into the OECD in 1964 when the obligation of a non-subsidiary policy as an obligation for entry remained nothing but a theory. Japan's unscrupulous attitude also resulted in systematic attempts by Japanese liner companies to sabotage the operation of the "Far Eastern Freight Conference", which to a great extent covered liner shipping between Japan and Europe.<sup>38</sup> The United States trade blockade against Cuba 1963 and failure among the Soviet crops led to competition restrictions from the United States, imposing preference provisions into its help programme to communist countries.<sup>39</sup> East State expansion, especially Soviet the leader of the Committee for Mutual Economic Assistance (CMEA), was originally initiated to secure the export and import of goods to its own countries, but both Poland and East Germany competed on other trades mostly Dutch and West German imports. Soviet also stated in 1970 that "the principle of the freedom of the seas must be upheld", but the objectives were much deeper than that as Soviet Union as well as the United

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<sup>32</sup> Sundin, p. 49-50.

<sup>33</sup> Ibid, p. 53.

<sup>34</sup> Ibid, p. 58.

<sup>35</sup> Ibid, p. 59. Brazil, Chile, Ecuador, Peru, Turkey, United Arab Emirates, USA, Argentina, India, Colombia, Czechoslovakia, Poland, Spain, Burma, China and Venezuela are some of the culprits. Sweden and Norway had an interesting relationship dating back to the Bill of Products (s.k. produktplakatet) of 1724 and its Annex of 1726, whereby Swedish merchant ships were prohibited to served the Norwegian coast line and vice versa (p. 55).

<sup>36</sup> Ibid, p. 61.

<sup>37</sup> Ibid, 62, 66.

<sup>38</sup> Ibid, p. 63-64.

<sup>39</sup> Ibid, p. 64-65.

States foremost saw shipping in terms of power of political aims, not a tool in the service of world trade.<sup>40</sup> The US policies in shipping will be further discussed below in Chapter 5.

The Soviet merchant fleet became more recognized and noticed in the third land traffic, operating as outsiders in the trades to Australia with rates well below the conferences, “Australia to Europe and Continent to Australia Conferences”, and conference measures were taken until it was evident that Soviet tonnage must be admitted into the conferences. In a short time the Soviet merchant fleet increased by 300 percent and by size now was sixth in the world. Its subsidies program, like most other upcoming shipping nations, helped build a national merchant fleet, almost swept out the Australian lines during the early 1970’s. The situation was similar for the European conferences on the Euro-American trades as the US subsidies policy made existence a challenge in the late 1970’s. The world wide governmental efforts to influence or dictate the transport conditions for importers and exporters continued, more and more countries imposed freight reservations. The situation has not changed, only the methods to impose trade and competition restrictions have and the restrictions are increasing in number.<sup>41</sup>

## **2.4 CONTAINERISATION**

In the same way as the 1860s and 1870s experienced the change from sail to steam the corresponding decades of the 20<sup>th</sup> century saw the change from break bulk liner services to container shipping. The container revolution led to new forms of cooperation. The containerised version of joint services is liner consortia.<sup>42</sup> In the following period big liner groupings began to take over the individualistic liner companies, working together internationally in even bigger groupings – consortia – in particular trades. Today consortia handle many of the trades to and from Europe, as a way of rationalising shipping to the demands of the trade and matching major competitors. The basis of consortia is that while the ships normally are owned, or chartered in, by the parties of the consortia, it is the consortia as a co-operational body that operates the fleet and deals with the liner operations.<sup>43</sup>

Consortia it was thought would out compete liner conferences, but they have not. The process of change, which occurred in liner shipping while containers were introduced in the trades, has been characterised by what shipowners label an “orderly approach, broadly respecting the positions of other conference lines and also effecting the change within established conference structure”.<sup>44</sup> The consortia

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<sup>40</sup> Sundin, p. 67.

<sup>41</sup> Ibid, p. 80-81.

<sup>42</sup> Blanco and Van Houtte, p. 154.

<sup>43</sup> Farthing, p. 124.

<sup>44</sup> Blanco and Van Houtte, p. 154.

became the conferences' internal reorganisation, an industrial co-operation allowing the shipowners to adapt to the new scale of shipping operation and jointly face necessary investments. Meanwhile, alongside consortia, liner conferences remained the traditional forum for cartel control over rates and market sharing between lines. The consortia solutions, of various modes, continue to increase as the preferred form of cooperation, a trend observed among outsiders as well. Distinguishing between liner conferences and liner consortia is not possible. A true conference capable of stabilising trades and a consortium of equal qualities are, in fact and by definition, both conferences.<sup>45</sup>

## 2.5 ANALYSIS

The fundamental aim of free sea borne trade and the right to freely compete over loads between countries have since the Second World War played a subordinated part, this is evident. The meaning of the freedom of the seas has been narrowed. Today it includes, legally; the freedom to navigate upon the high seas, freedom of fisheries, freedom to lay submarine cables, and freedom of the air space above the high seas.

Maritime law is old, it consist of ancient institutes. Trade customs developed into written, or maybe carved, law, i.e. the Hammurabi codifications. The enigmatic Phoenicians further upgraded the commercial law. Public laws, however, first arose in South East Asia.

Maritime transport, it was found, was easier than road transport and could handle larger loads. This increase of capacity led to flourishing merchant societies and city-states – even empires. Periods of lone dominance meant stability while periods of balance meant terror. The demise of the glorious Roman Empire led to different fractions of power, foremost between Christians and Muslims - still today in various interest conflicts.

The to a large extent applied concepts of *Mare Nostrum*, *Mare Clausum* and *Dominium Maris* regulated sea relations for a lengthy period. Grotius' innovation, *Mare Liberum*, altered the scene but temporarily, as the major maritime nations soon out manoeuvred the concept in favour of its own short term national interests - a concept well recognised today still. *Mare Liberum* can unfortunately be interpreted in various manners, no universally accepted or recognised definition has been concluded and individuals, deprived of the opportunity to freely thrive outside national interests, suffer there from.

The steam engine, installed into the hull of vessels, revolutionised sea trade and made possible liner conferences – the increase in tonnage and possibility of

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<sup>45</sup> Blanco and Van Houtte, p. 155.

timetables. Liner conferences, it can thus be said, is a side effect of the steam engine, i.e. a sign of progress, however, definitely more a result of the wishes of shipowners than shippers. Liner conferences have suffered severe damage and have either been systematically defied or used by governments acting in national interests through the years. In a way it can be said, in spite of its obvious detrimental effects on competition, that the conference system has the ability to function as an integrating institution between lines of different nationalities in times of protectionism. The US as well as less developed countries (LDCs) were ready protectionists during the 19th century, and the rest of the west followed after the establishing of CENSA, and their own subsidies programmes.

### 3. Liner Conferences

This chapter aims at giving the reader an understanding of what liner conferences are; organisation and characteristics, competitions aspects in general, claimed advantages and disadvantages. It is important for the reader to understand the problems that can occur where liner conferences operate, in this essay, foremost hampering of competition. This chapter will describe liner conferences as a universal concept; the following chapters will deal with the specific policies with regard to the United States approach, the UNCTAD Code of Conduct for Liner Conferences and the European Union position, both politically and legally.

Liner conferences can be described in numerous ways, and every author uses their own definition. One can generally and very simplified describe liner conferences as bodies or associations that consist of shipowners or operators who operate regular shipping services for the carriage of general cargo according to fixed schedules and rates on particular routes.<sup>46</sup> Council Regulation 4056/86<sup>47</sup>, the main attraction of this essay, follows the definition laid down in the UNCTAD Code of Conduct for Liner Conferences and can be found in chapter 7.3.4.2.

Liner conferences as a successful concept arose on the route between Calcutta and the U.K.<sup>48</sup> from the desire of importers and exporters of goods for a stable rate of freight as well as the need of shipowners for more rationalised schemes of transport in an increasingly capital-intensive industry.<sup>49</sup> Huge variations in the freight rates was a result of the over- and under supply of transport space, this because of the variation in available ships due to the many perils known to sailing ships, including weather. If a vessel would be alone in port at a given time this could charge all but moderate rates. This situation of course might be followed by an accumulation of superfluous vessels and bargain fares. With the expansion of trade in the second half of the 19<sup>th</sup> century and the transformation from sail to steam, liner companies were able to increase the regularity of their service and gradually the idea was accepted among the traders, whose risks were reduced, certainty and assurance that they were receiving identical treatment from all shippers of that conference. The original conference was born and with it followed the formation of numerous others.

Liner conferences can be classified as being either open or closed in terms of membership. The debate of liner conferences is a long-lasting one and has at times been fierce and bitter. Advocates argue that liner conferences utilise the

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<sup>46</sup> Power, p. 295. See also Gold, p. 350, for an excellent but extensive definition of the term 'liner conferences'.

<sup>47</sup> Council Regulation 4056/86 of 22 December 1986, laying down detailed rules for the application of Articles 81 and 82 of the Treaty to maritime transport, OJ 1986 L378.

<sup>48</sup> A.k.a. the 'Calcutta conference', which is still operating.

<sup>49</sup> Farthing, p. 95.

coordination of services and resources, while critics regard them as anti-competitive cartels, manipulating markets and effective competition in the interest of shipowners.<sup>50</sup> The US standpoint, and its Shipping Acts of 1916 and 1984 is in contrast to the EU position in this field as the EU governments have been reluctant to legislate in this area, instead self-regulatory approaches have been set up to encourage shipowners and shippers to establish their own regimes. The 1964 Note of Understanding, later transformed into the for the developing states unacceptable CENSA-ESC Code of Practice in 1971, concluded between a number of European shipowners and shipping companies embodied this regime. Until 1986, the regulation of liner conferences was in effect a matter for national law. English courts have declared liner conferences to be not unlawful. The US have made liner conferences operating on trades involving US' ports subject to the rules of anti-trust or competition law through the Shipping Act of 1916. The US shipping policy will be further discussed later.

Additionally I would like to stress that the term 'conference' is broad in the sense that it covers a wide variety of associations, both formal (written) and less formal agreements of rates, frequency of service, and other purely informal associations comprising only general loyalty working agreements. In the following of this chapter we will look upon the common elements of conferences. The first part of this chapter will concentrate on liner shipping, under which the liner conference system operates.

### **3.1. LINER SHIPPING**

Refined goods constitute seventy-five percent of the value of world trade. Liner shipping, i.e. regular time scheduled traffic, is the principal mean of transporting these refined goods. Container shipping<sup>51</sup> is the largest and growing mode of maritime transport, the rest is shipped by ro-ro ships<sup>52</sup> or break bulk ships.<sup>53</sup> 2,400 container ships, 1,800 ro-ro ships and 16,800 multi deck ships (General Cargo Ships) are in the service of liner shipping, and the countries of the OECD control two-thirds of the container ship fleet. EU shippers own approximately 60 percent of the OECD fleet. Between 1991 and 1997 the fleet grew by ten percent a year, in China by remarkable fifty-four percent every year between

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<sup>50</sup> Power, p. 295.

<sup>51</sup> Container ships are stowed using land-based cranes placing the containers into slots aboard the carrier. Container volumes are calculated using the system of Twenty Foot Equivalent Standard (TEU) – length 20 feet, height 8 feet and width 8 feet (the size of one container).

<sup>52</sup> Roll-on-roll-off ship: where the cargo is loaded on to mobile carriers that are rolled on the ship and rolled off at the port of call.

<sup>53</sup> The break bulk ship has one, two or several ship-length deck levels where cargo can be placed in cartons, wooden boxes, sacks etc.



1991-1997 leaving China second only to United States, which handle fifteen percent of container world total.<sup>54</sup>

Eight major routes of maritime trade can be identified in the world: (1) the North Atlantic route; (2) the Mediterranean-Asian-Australian (Suez Canal) route; (3) the South American route, including trade from North America to the East and West Coasts of South America; (4) the Caribbean Sea route; (5) the South Pacific route; (6) the North Pacific route; (7) the European-East Coast of South America route; and (8) the South African route.<sup>55</sup>

The birth and introduction of the container has been compared to, regarding efficiency, the transformation from sail to steamer ships in the nineteenth century. Efficiency is one aspect to what has been a characteristic in liner shipping, and the heavy ocean trades of the North Atlantic and Pacific Ocean is concentrated into larger and fewer shipping companies. During its first decades of existence this adaptation of container shipping was immense leaving shipowners with no option but to form consortia, of both cost- and capacity reasons. The present phase of container shipping might lead to a different position where the consortia formations are disintegrated and the giant actors of the market forming new and even greater alliances.

The Liner shipping can be described as a link between fixed port destinations with a set schedule and fixed tariffs. The ships are trafficking the routes regularly even though there is a shortage of goods, then sailing in spite not carrying a capacity load. An oddity with liner shipping is the advanced sales system providing the ships with cargo. This system can both be attached to the shipping company or to special 'liner shipping agents', which can be more or less dependent of the shipping company. It is often the skills and efficiency of the sales organisation that provide the shipping company with a chance of survival and opportunity of growth.<sup>56</sup>

Restrictions on competition are, at least for this study, of interest and for consumers especially. Even though the freight costs represent an insignificant part of the end price of a product this is where the price is most fiercely trimmed, and reversal, where the price increase is the highest when chaos strikes. Discussing restrictions on competition leads one to the subject of 'liner conferences'. Liner shipping between two trade areas is generally regulated by a liner conference; a cartel like institution regulating traffic and price. Outsiders, operators not willing or able to join the conferences, often operate alongside in competition with these. The first successful conference was one regulating the trade between England and India in 1875.

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<sup>54</sup> Sjöfartens Bok 2000, p. 58.

<sup>55</sup> Herman, p. 4.

<sup>56</sup> Sjöfartens Bok 2000, p. 59.

Most liner conferences demand their own type of special tonnage and special equipment. Investments of this kind are only possible if supported by a steady and stable rate of business. Moreover, the tariff system of liner conferences is designed in a fashion where increase or decrease of freight cargo only in plausible after a notification and negotiation. Meanwhile, in the tramp vessel markets the freight quantities can be characterised by rapid fluctuation. Most of the liner conferences apply various systems of rebates, aimed at cargo owners undertaking to solely utilise ships of that conference.<sup>57</sup> Liner Conferences, its characteristics, merits and disadvantages will be further discussed below. The basic advantage of using this system is that it provides the member lines with the opportunity to calculate with fairly fixed variables of freight cargo and reduced competition from independent lines and tramp shippers in time of depression. The cargo owners are assured of freight space aboard conference ships at a moderately steady price over long periods of time.

### **3.2 ORGANISATION, OPERATION AND MEETINGS OF CONFERENCES**

A conference needs some kind of headquartering, a main secretariat. The secretariat is normally situated in the country or region where most of the member lines are situated. Traffic and tradition are other factors leading to the location of the headquarters.<sup>58</sup>

Conferences normally have a board with all members represented, and a chairman as a rotating honorary position of the conference organisation. The duties, powers and influence of the chairman vary. A conference can also have a secretary, the chief executive officer, with limited powers, but the important task of executing day-to-day management of the conference. The expenses of establishing and maintaining a conference are normally divided equally amongst members, unless the proportion of shipped goods is varying.<sup>59</sup>

Policy decisions of conferences are made at meetings where all members vote or reach a consensus through other channels of communication. Some conferences have only one type of meetings, a conference where all members are assembled, whilst others have two or three types of meetings depending on the importance of the issue surfaced. Certain appointed committees prepare the research and investigation prior to a member conference whose normal function is to make recommendations for decisions taken by the conference. Another function of the

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<sup>57</sup> Herman, p. 60.

<sup>58</sup> The liner conference system, Report by the UNCTAD secretariat, TD/B/C.4/62/Rev.1 - United Nations – New York – 1970, (The UNCTAD Report), p. 8. For anyone seeking deeper knowledge ground knowledge of Liner Conferences this report is very rewarding.

<sup>59</sup> UNCTAD Report of 1970, p.9.

committees is to monitor arrangements following the conference agreement. Such arrangements can include restrictions on the number of sailings or pooling of cargo, and will, as well as the conference agreement, be discussed below.<sup>60</sup>

### **3.3 THE CONFERENCE AGREEMENT**

The conference agreement is the basic document defining the contractual relationship between the members of a conference – the code of conduct. In reality the agreement is primarily an arrangement between the competing member lines construed to restrict or eliminate competition between themselves and contest actual or potential competition of lines outside the conference. The content of the agreement is therefore only reluctantly disclosed. The competition limiting qualities of conference agreements make them very controversial. Despite their crucial influence over liner shipping worldwide, only the conferences agreements among the conferences operating in the overseas trades of United States are made public, filed by the Federal Maritime Commission (FMC).<sup>61</sup>

The scope of conference agreements vary widely most depending on how immense competition is internally, between member lines, and externally, from outsiders. The minimum requirement of an agreement is for all members to charge a certain minimum rate and follow the same rules governing this process. In more complex conferences the members agree to pool their freight earnings in a colossal commercial construction whereby all liners act as one both internally and externally – a touch of egalitarianism. The agreement also regulates conduct not accepted by the conference members and thus considered malpractice. More intriguingly, provisions endorsing members to report other members' malpractices to the conference chairman or secretary are common. It is normal that the member lines from developing countries act as monitors.<sup>62</sup>

### **3.4 COMMON ELEMENTS OF LINER CONFERENCES**

A few common elements can be identified among all associations depending on the degree of sophistication. The following can be identified among most conferences:

- Common freight rates<sup>63</sup>
- Agreed frequency of service<sup>64</sup>

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<sup>60</sup> Ibid, p.9.

<sup>61</sup> UNCTAD Report of 1970, p.7.

<sup>62</sup> Ibid, p. 8.

<sup>63</sup> See chapter 4.3.1.

- Common approach to membership<sup>65</sup>
- Arrangements within trades<sup>66</sup>
- Loyalty arrangements<sup>67</sup>
- Surcharge and adjustment factors<sup>68</sup>, and
- Pooling<sup>69</sup>, for the really sophisticated conferences.

This enumeration give at hand that conferences constitute sever infringements in restricting fundamental principles of competition. Conferences, however, do restrict competition but they do not monopolise trade. Conferences are, in economic theory, cartels not monopolies. This can be explained because of the conference structure being open to competition internally in terms of quality of service and externally in terms of competition from outsider shippers, increasing air transport activity, and over land, from rail and road transport. Moreover, the past situation of conferences acting out secret service and closed society club manners is altered. As will be discussed below, a number of inquiries have been made to reveal and illuminate conferences.<sup>70</sup>

### 3.4.1 Liner freight rates

A common freight rate is one of the fundamental characteristics of liner conferences. The same rate for the same goods, whether the cargo is offered in large or small quantities disregarded of whether or not the vessel is fully loaded or not.<sup>71</sup> All members agree, by reference to the agreement, to charge uniform rates. In order to implement the agreement effectively the members in many cases follow the same rules and regulations for the calculation of the freight rates, payment of freight, acceptable packaging for different commodities, issue of bill of lading and uniform rates of commission to agents or brokers.<sup>72</sup> Naturally it is up to the lines of the conference to set the level of freight rates on the various categories of commodities that are shipped. Imagine anything, it is shipped. Whatever you can find in your home, use for transportation, eat, drink or wear has most certainly been shipped, as long as it is not made in the EU. The freight rate is, however, not only set on the basis of distance, as there are many factors that can be taken into account when determining the freight rate. These include:

- The value of the goods,
- Weight/measurement fraction,

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<sup>64</sup> See chapter 4.3.2.

<sup>65</sup> See chapter 4.3.3.

<sup>66</sup> See chapter 4.3.4.

<sup>67</sup> See chapter 4.3.5.

<sup>68</sup> See chapter 4.3.1.

<sup>69</sup> See chapter 4.3.6.

<sup>70</sup> Farthing, p. 97.

<sup>71</sup> Ibid, p. 97-98.

<sup>72</sup> UNCTAD Report of 1970, p. 4.

- Nature of the cargo, easiness of handling,
- Claims record,
- Ports served and nature thereof,
- Quantities moving to a particular area,
- Competitive factors,<sup>73</sup>

Conferences have also made it practice to maintain profits by putting surcharges, often called adjustment factors, on existing rates on various grounds that can include: periods of port congestion, where neither shipowner or shipper is responsible where the ship is expensively held at the port; currency movements against the shipowner; or maybe sudden and rapid increases in bunker oil price; emergency surcharges; preshipment surcharges; and handling surcharges. The imposition of surcharges is justified, by shipowners, on the basis that they are temporary and the events giving rise to them are unexpected and swift.<sup>74</sup> Surcharges are not a fine, neither a remedy to cure inefficient ports, but a means to limit the initial losses of carriers. Sometimes the initial losses tempt shipowners to maintain the new rate level, as was the case after the Six Days War, upon breakout of which the Suez Canal was closed and all conferences using that route imposed surcharges, which were not removed or reduced by all the involved conferences following the reopening of the canal.<sup>75</sup>

### 3.4.2 Regularity

While speculators welcome one-bulk commodity deals, regular shippers prefer regularity in liner shipping, together with full geographical coverage and assurance that cargo of all qualities, attractive/unattractive, easy or difficult to handle, is accepted. A well-coordinated, time-scheduled liner service is one of the aims of conferences. Thus, an agreed share of sailing is one of the elements of conferences.<sup>76</sup> Scheduling is a difficult matter, and the more ports a vessel calls at the more likely delays become. One frequent way of solving this dilemma is by making way-port<sup>77</sup> calls, unless the line is banned from such a port.<sup>78</sup> Waste of time is a truly challenging experience for lines, given that the cost of domesticating vessels in a port easily escalates into giant dimensions doing great damage to the suffering lines.

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<sup>73</sup> Farthing, p. 98.

<sup>74</sup> Ibid, p. 102.

<sup>75</sup> Herman, p. 54-55.

<sup>76</sup> Farthing, p. 99.

<sup>77</sup> Way-port trade is any trade from or to a port, which is served by conferences as a part of a longer route (UNCTAD Report of 1970, p. 61.).

<sup>78</sup> UNCTAD Report of 1970, p. 64.

### **3.4.3 Membership of conferences**

Being a member of a conference is like being member of a club. Only reluctantly are new entries made that might upset the equilibrium within the member group.<sup>79</sup> Therefore two classes of memberships exist: ordinary or full membership with full rights according to the agreement and associate membership with restricted sailing rights in comparison with full members. Both classes are entitled a line to receive cargoes from shippers tied to the conference.<sup>80</sup>

Certain criteria to become a member can be identified: owned ships, long-term commitment to the trade, an ability to bring some new business to the trade (testimony of achievement), mutual benefit and sufficient financial resources.<sup>81</sup> Conferences operating under such terms are often called 'closed' conferences, as opposed to 'open' where every line has the intention and ability to offer a regular liner service in the conference's area and the prospect of joining the conference demand only application and acceptance of the conference agreement.<sup>82</sup> The UNCTAD Code of Conduct, which provides rules on this matter, shall be described below. The above criteria has been declared unlawful in the United States, where the mere application is to be sufficient for membership, but that matter too will be addressed further on.

### **3.4.4 Arrangements within trades**

The large conferences (from a European perspective) on the routes to India, the Far East, Australia, the African continent, the United States and Latin America cover huge areas. The lines therefore section the trading area so that each has a particular territory where they influence both loading and discharging as well as some ports on the way between the key destinations (way ports). For example in the U.K. one group of lines is restricted to the west coast whilst others load and discharge on the east coast. This is one of the obligations conferences take upon them to fully cover the trade and provide sufficient services, whether cargo is offered or not.<sup>83</sup>

### **3.4.5 Loyalty Arrangements**

Regularity, frequency and stability are not at all obvious, but the conferences expect their customers, the shippers, to be loyal. This loyalty is established by a

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<sup>79</sup> Farthing, p. 100.

<sup>80</sup> UNCTAD Report of 1970, p. 12.

<sup>81</sup> Farthing, p. 100.

<sup>82</sup> UNCTAD Report of 1970, p.12.

<sup>83</sup> Farthing, p. 101.

system giving regular customers rate advantages. Two methods exist: the deferred rebate system and the contract system. Exploiters of the deferred system retains and give back (after six months generally) a percentage discount thus imprisoning the shippers in a situation where the only way out of the relation is to be disloyal, shipping via non-conference lines, while the contract system conferences bind shippers by contract and the shippers unqualified collaboration with the possibility for shippers to temporary or definitely exit the contract whenever they wish.<sup>84</sup>

The origin of the deferred rebate system lies in the U.K. - Calcutta trade. The arrangement provide that the conference repay the shippers a certain percentage (on the Calcutta trade ten percent in 1877) at the end of each six months provided that the shipper utilised the services of the conference. This rebate is thus deferred the rebate captivating the shipper to the conference, and a failure by the shipper to dispatch its cargo with the conference is considered a breach of the agreement and earned rebates are lost. The second most significant element deferred rebate schemes is the absence of a written contractual agreement, thus shippers have little evidence of either competition restrictions or accumulated rebates kept by the conference of the rightful share of shippers. Loyalty agreements might be the most effective tools in the hands fighting competition trying to secure steady flow of freight. The deferred rebate system is available to all shippers, big or small, but naturally, provided that they are not represented by an organisation, the latter receive unequal conditions. Though not effective in cases where shippers dispatch their merchandise on an irregular basis, the loyal and regular shippers are easy prey for conferences that can raise their rates without risking a massive exodus of shippers.<sup>85</sup>

The dual rate contract is a direct discount available to shippers who dispatch all their cargo, or specified commodities, exclusively via conference operated vessels. Shippers immediately enjoy the discount as they pay the freight rates, thus are not tied annually to their scheming servants. The tariff quotes two rates for each commodity, the rates for contractual shippers and the ordinary rates. Another difference between the loyalty systems is the form of agreement, where the dual rate contracts are set in a written contract containing rights and obligations of both sides. No strict rules regarding the level of freight rates exist - the fiercer the competition, the higher the discount. When a mutual dependency arise maintaining an orderly service becomes and the threat from outsiders diminishes, and tying is an effective method to avoid opportunists from creaming off in peak seasons. The opportunity for shippers to negotiate with the conferences, not being dictated the terms, and the immediacy of the discount are the advantages of dual contracts.

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<sup>84</sup> Farthing, p. 102.

<sup>85</sup> Ibid, p. 60-61.

### **3.4.6 Pooling arrangements**

Pooling can take various forms ranging agreements to control the number of sailings of each pool member to a system where the actual cargo earnings of each member are controlled.<sup>86</sup> Only the most sophisticated conferences have pooling arrangements. In pools a balance is created between those turning a profit and those suffering a loss. Pools are almost always specialised in that a similar type of ships are pooled together, indeed a danger on the occasion where the basic trade upon which the pool rely crumple, or where a minority of pool members carry the big burden of a pool during a substantial period of time.<sup>87</sup> There are basically two types of pools: pools controlled by their members, and pools operated, organised and controlled by an administration. The pool activities can be divided into three subcategories: employment of pooled vessels on a sensible mixture of short, medium and longer term business; undertaking contracts of affreightment; and chartering in tonnage both on a speculative basis and to enhance pool activities. The pool must not, however, act too opportunistic since the reputation and public image is of vital importance to a successful operation. The pool must not only find feasible and lucrative employment for its members, but also be able to employ outside ships when such needs occur, something only possible for a pool of high regard.<sup>88</sup>

Pooling is, despite its age, still not uncontroversial from competition perspective protecting less efficient carriers at the expense of more expensive ones thus hampering the possibility of healthy competition. Nevertheless, shipping pools shave a potential to play an important role in the future of shipping. The welfare qualities aside, a well-run pool can be highly cost effective.

## **3.5 COMPETITION AND CONFERENCES**

The basic aim of a liner conference, like any other cartel, is to control competition between the members of the cartel and eliminate competition from outsider on a specific market. Conferences' internal control involves the uniform rates charged.

### **3.5.1 Internal competition**

Even if a conference has complete monopoly on a trade route, factors outside the conference's power overlooked, this does not purely lead way for a monopolistic policy of the conference. It has been stated that internal competition, i.e. forces within the conference moving in different directions, and, the endeavour of lines to

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<sup>86</sup> UNCTAD Report of 1970, p. 42.

<sup>87</sup> Packard, p. 3.

<sup>88</sup> Ibid, p. 4-12.



eliminate fellow carriers within the conference, provide a climate not willing to set monopolistic freight rates.<sup>89</sup> One must bear in mind that the members of a conference once were competitors uniting to, in the long run possibly, avoid extinction, but competition never completely disappear. The members may cover a wide range of nationalities and histories of operation, and the extent of interest each member have in a particular trade and in other lines certainly differ widely. Moreover, the policies of governments towards national lines and foreign lines can take several shapes. These conditions and factors make members inclined to capitulate only the absolute minimum allowed by the conference agreement of its competitive freedom. In order to achieve better returns, individual members will strive for maximum utilisation and deficiency. The desire for greater profits is the strongest inducement for competition among the members Normally the agreement provides the scope of competition within the conference.<sup>90</sup>

But at times the rules of the agreement aiming at regulating the behaviour of the members are broken as a result of competition amongst members. Breaches of the agreement, malpractices, can be used to attract shippers, by, for example, calculating the freight rate upon weight instead of volume to give the shipper a lower rate and thus the miscalculating member an additional shipper.

One of the most effective ways to promote its interests on the expense of competition is as stated loyalty agreements. But even these arrangements cannot tie the shipper to one carrier, and thus internal rivalry thrives. Hopefully internal competition results in better service for shippers.

### **3.5.2 External competition**

Outside competition to conferences can be identified among various sources. The traditional threats come from independent lines and tramps. Especially bulk tonnage can be a strong threat when charter vessels are overflowing the world since the charter rates then are at its lowest and usually loyal shippers become tempted. Tramps, which are usually engaged in bulk carriage, can be transformed into liner service. Generally it can be said that where there are attractive rates tramps will compete with conferences to a much greater extent than occasional bulk hauls. Still, operation of liner service outside a conference is difficult in any trade where the loyalty agreements are valid.

Conferences have two common practices when determining the type of measured to be regarded in relation to independent lines. One way is where the lines are admitted into the conference, a very common way to deal with competition in any business. The other is to cut rates, tie shippers and out best the independent lines

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<sup>89</sup> Herman, p. 31.

<sup>90</sup> UNCTAD Report of 1970, p. 4.

via better service. At times neither approach is possible and rate wars break out. A war is won by the stronger part. When the outsiders are small conferences prevail rather comfortably. But when the outsiders are subsidised or otherwise backed up by a conglomerate not dependent on maritime trade or a government war is truly devastating for conferences. Status quo can then only be reached by acts of sensibility; mediation, negotiation and an understanding that a win-win situation only can be reached by new divisions of the trade.

Conferences compete with each other too of course offering alternative routes for the transportation of similar products through different gateways. Alternative routes and products can hence limit the monopolistic trends, whereby the conferences now hoard into super constellations. The coordination of conference activities between conferences and consortia will play important roles in the future.

Competition to conferences can also be felt for the carriage of valuable goods by air transportation, and, where possible, land haul. The competition between sea borne and airborne transport may in the future grow considering the increasing capacity of aircrafts. The birth of the jumbo jet, both a passenger and freight transporter, in the late 1960's initiated a new era. These planes cover their costs via passenger fares, thus any cargo might be charged close to the handling costs. International air transportation of passengers is organised by International Air Transport Association (IATA), a private organisation of scheduled airlines – something of a gigantic 'air conference' – considering that one of IATA's main functions is to fix tariff rates for international air transport. IATA is a fairly powerful organisation without equal in the maritime world. The reason hereto is the strong ties between IATA and the governments involved in aviation matters. This may be so because of many of the companies being wholly or partially state owned. Nearly all scheduled airlines are represented at IATA, more than ninety percent of the air traffic is carried under its influence and the government ties is the key to the IATA success. Most of IATA's activities are expressed in Resolutions and Recommended Practices adopted by the IATA Traffic Conferences and become binding upon the approval of the interested governments, thus a fair chance of applicability in practice, as opposed to resolutions and recommendations in the maritime branch<sup>91</sup> Many aspects distinguish the air and sea. By virtue of its nature maritime transport could not be organised into one big association, neither could single tariffs be found to the thousands of commodities being shipped, considering the difficulties to set one tariff for one commodity, passengers.<sup>92</sup> Airfares are still too expensive, but for small and valuable commodities to be transported at high-speed air transport stand as a genuine competitor. New times are ahead, planes continue to grow and the potential air carriage threat is taken seriously.

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<sup>91</sup> Diedricks-Verschoor, p.7, 35.

<sup>92</sup> Herman, p. 81.

### **3.6 MERITS OF LINER CONFERENCES**

Advocates of the conference system, its including members, claim that conferences, in general, benefit to both customers (shippers), member lines and the trade of served countries in general. To the gain of shippers are of course the stability of freight rates, services and schedule. This means no discrimination between shippers served by a conference, occurrence of increase in price only after a notification period of two months plus and uniform freight rates over a wide range of loading and unloading ports. A shipper is sure that its competitors cannot by shopping around gain lower rates. The regular service creates confidence for both shipowners and shippers that business is secure, and in addition conferences provides broader geographical coverage than individual lines, as well as a variety of ships with flexibility and ability to provide vessels of fitting size and speed capable of meeting the requirements of the trade.<sup>93</sup>

The conferences furthermore claim that the elimination of competition between members lead to service competition, updated equipment of cargo handling and office organisation, but also that the conferences, aware that shippers are loyal, dare to make necessary investments. Moreover, and not defendable from a competition point of view, weaker lines, which might be eliminated in a free competition regime, survives under the wings of conferences<sup>94</sup>

### **3.7 DISADVANTAGES OF LINER CONFERENCES**

The major flaw of conferences from shippers view is the level of freight rates. Since they are set to balance out good times on bad times rates are constantly high it has been claimed.<sup>95</sup> The monopolistic character<sup>96</sup> of conferences; the very limited competition among the members, and substantial elimination of outsider competition can lead to self-satisfaction among the members and decline in the quality of the services provided by the conference, is perhaps the most appalling quality of conferences in the eyes of outsiders. Another alarming consequence is the effect of the loyalty agreements is, in reality, that the freedom of shippers is hampered and the risk of abuse of the conferences' dominance impending. Many shippers claim that the high rates hardly is justified by the quality of the services offered. Shippers also complain over the unequal relation in times of business negotiations unless shippers' organisations are present, both in terms of size and since the shipper is more eager to obtain conference services than the conference

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<sup>93</sup> UNCTAD Report of 1970, p. 5.

<sup>94</sup> Ibid, p. 5.

<sup>95</sup> Ibid, p. 6.

<sup>96</sup> As discussed above conferences do not, in theory, constitute monopolies, but, for better or worse, cartels.

is to dispatch the commodities of one shipper on a trade where the conference is dominant.

The membership issue is also controversial. Especially before the UNCTAD Code the lines from developing countries were unable to enter conferences and compete on equal terms. The lines of developing countries were excluded from the trades affecting their own countries. As we shall see with the entry of the UNCTAD Code matters improved. On the other side of this aspect is the protectionist tool conferences have become in the hands of LDCs in post UNCTAD Code shipping. Lastly the notion of shipping pools must be mentioned as the utter evidence the somewhat socialistic welfare element of liner conferences, and the rigid structure thereof.<sup>97</sup>

As will be shown in the following of this essay, there are various standpoints in the general opinion of countries and organisations.

### **3.8 ANALYSIS**

Without being radical or bold it is safe to say that liner shipping is of utter importance to the world trade and economy of today. It is furthermore safe to conclude that liner shipping is concentrated to a few titanic maritime trades. The demand for efficiency and large capacity to minimum rates has turned a costly industry into broad forms of collaboration. Huge associations are a problem from a competition point of view, but this is nothing unique for shipping. But like other sectors of commerce regulation of competition and shipping now exist, both with regard to liner conferences and other formations as consortia.

The first liner conferences were formed to reach stability of rates, goods and sailings. The introduction of steam and the increased capacity facilitated the formation of conferences, still playing an active part in world trade. Conferences these days may be on the verge of a new period of transformation. Their characteristics, including elements like price maintenance (common freight rates), division of markets (frequency of service, arrangements within trades and pooling), unequal contract provisions (loyalty arrangements, surcharges and adjustment factors) surely qualify them as full feathered cartels. These are, in practice, closed clubs with demanding entry processes and different classes of members. Are these consequences worthy of legitimising regulation worldwide? The advocates prime arguments; employment and regularity, the almighty economic and political factors, again set the pace of reform, while critics stand aside yearning for objective factors of competition to prevail.

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<sup>97</sup> UNCTAD Report of 1970, p. 6.

Advocates claim that the internal competition of conferences, alleged rivalry originating from the time when the members were competitors outside the conference. But do members of a cartel ever stray from the group? Certainly, but the cartel repercussion is unlikely to be mild. More real is then the outside competition, permanent by independent lines, but also from air transport and, more devastating, protectionist lines. It will be interesting to investigate the conference system in the future. Will stable rates, regularity and flexibility triumph stable excessive rates, cartel structure, loyalty agreements and fighting ships?

## **PART II**

# **IMPORTANT CONFERENCE REGIMES**

## 4. Liner Conferences and the UNCTAD Code

In general, but difficult to imagine when examining their conduct (see above Chapter 2), developed countries believe in free competition and minimum governmental involvement in commercial matters. When LDCs therefore, much like the developed countries did, subsidised their emerging merchant fleets to reach the level of developed countries, the later react. LDCs supported uneconomical fleets at high costs, were constantly short of capital, had poor technical skills, but were blessed with plenty of cheap labour. The situation is identical today. The political and economic structures of LDCs make their shipping needs different from developed countries.<sup>98</sup> LDCs raised several complaints, some correct others invalid. Most LDCs had either very small or no deep-sea fleets, and up to 1975 only nine countries had merchant fleets with over half a million GRT.<sup>99</sup> As LDCs were predominantly shippers' nations consequently they oppose the rate fixing and unilaterally set schedules without consulting governments or local shipping organisations. Moreover the LDCs felt discriminated by conferences, which they mean, use old vessels on the routes serving LDCs.<sup>100</sup> Efforts towards cooperation and mutual understanding, i.e. dialogues, would eliminate the feelings of LDCs that they were exploited by conferences. Conferences' practices were and are not utopian, but claiming that intention to harm LDC economies exists seems hasty. The UNCTAD Code of Conduct for Liner Conferences is one example of the endeavours to solve conference matters in an international forum.

### 4.1 UNCTAD AND SHIPPING

The United Nations Conference on Trade and Development was established as a permanent organ of the United Nations General Assembly in 1964. Its goals were the promotion of world trade and economy with special emphasis on LDCs. The UNCTAD was believed to become a spokesman for the third world.

In the area of shipping UNCTAD adopted two Recommendations: the first<sup>101</sup>, which was adopted without dissent, stated the objective "to promote understanding and cooperation in the field of shipping". The second

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<sup>98</sup> Herman, p. 157.

<sup>99</sup> Ibid, p. 157. These nine countries were India 3,869,187; Kuwait 990,857; Philippines 879,043; Republic of Korea 1,623,532; Argentina 1,447,165; Brazil 2,691,408; Mexico 547,857; and Peru 518,361.

<sup>100</sup> Herman, p. 159.

<sup>101</sup> Annex A.IV.21 UN Doc. E/Conf. 46/141, Vol. 54 (1964).

Recommendation<sup>102</sup>, A Common Measure of Understanding on Shipping Questions, dealt directly with liner conferences stating, that “the Liner Conference system is necessary in order to secure stable rates and regular service”. Something of an openness principle evolved as the Recommendation suggested:

- Publications of conference tariffs and regulation,
- Prior notice on surcharges and rate increases,
- Loyalty agreements,
- Conference representation in LDCs,
- Adequacy of service,
- Improvement and promotion of LDC’s trades, and
- Rationalisation of routes, sailings and freight.

The UNCTAD also has a permanent Trade and Development Board. Subsidiary to the Board is the Committee on Shipping, which started to work in 1965 studying economic and legal aspects of shipping, and reports back to the Board. The Committee was assigned to promote understanding and cooperation in the field of shipping policies of governments and regional economic groupings falling within the competence of UNCTAD.<sup>103</sup>

The first Conference on Trade and Development (UNCTAD I) held in Geneva 1964 was the beginning of a new era of close cooperation and consultation worldwide setting up the guidelines for the operation of this organ. In the second Conference (UNCTAD II) in Delhi 1968 shipping was discussed in more concrete terms. LDC representatives also met in Algiers 1967 and a Charter (of Algiers) was adopted calling for stronger and more extensive cooperation, abolishment of discrimination of LDC carriers, and demanding technical assistance to facilitate development.<sup>104</sup>

In November 1971, the Consultative Shipping Group of Governments (CSG) endorsed the CENSA Code for Conferences, and soon thereafter UNCTAD III was held in Santiago 1972. The CENSA Code was criticised, mainly because the ministers present not had been invited at the drafting of the Code, and they were dissatisfied with the enforcement mechanisms of the Code, thus recommending the preparation of a new legally, binding and enforceable Code.<sup>105</sup> However, the possible creation of a Code and its form substance was not resolved in UNCTAD III as the maritime nations disagreed on an international instrument being the correct solution for implementing the Code.<sup>106</sup> Because agreement could not be reached the General Assembly was asked in 1972 to intervene with a special conference to adopt a Code of Conduct for Liner Conferences. In 1973

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<sup>102</sup> Annex A.IV.22 UN Doc. E/Conf. 46/141, Vol. 54 (1964).

<sup>103</sup> Herman, p. 167.

<sup>104</sup> Ibid, p. 168.

<sup>105</sup> Ibid, p. 169.

<sup>106</sup> Ibid, p. 169-170.



the Conference of Plenipotentiaries<sup>107</sup> was summoned by the Secretary General to consider an adoption of a convention or any other multilateral, legally binding instrument for Liner Conferences. A Preparatory Committee by appointment of the Secretary General held two sessions in 1973 and, finally after two years of negotiations, on April 6, 1974, a Convention on a Code of Conduct for Liner Conferences was adopted.<sup>108</sup>

## **4.2 UNCTAD CODE OF CONDUCT FOR LINER CONFERENCES**

After several years of conferences and discussions the United Nations Code of Conduct finally became reality. Included in this process is the CSG drafting of another Code, the CENSA Code of guidelines for the behaviour of liner conferences adopted by the shipowners' association, CENSA, after the 1968 UNCTAD II meeting.

The Code consists of a Convention containing seven chapters, an Annex with model rules of procedure for international mandatory conciliation, and three Resolutions.<sup>109</sup> Some 83 States signed it in Geneva on April 6, 1974. It did not enter into force until 1983 when the necessary twenty-four States with a combined world tonnage of twenty-five percent had been permanently committed.<sup>110</sup>

### **4.2.1 Principles - objectives - application**

The Preamble to the Convention declares the contracting parties desire to improve the conference system, recognising the need for a universally acceptable code of conduct for liner conferences, and thereby taking into account the special needs and problems of the LDCs with the respect to the activities of the conferences serving their foreign trade. Three fundamental objectives and three basic principles are also set out:

- (a) the objective to facilitate the orderly expansion of world sea borne trade;
- (b) the objective to stimulate the development of a regular and efficient liner services adequate to the requirement of trade concerned;

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<sup>107</sup> TD/CODE/13, Sales No. E.75.II.D.11, and TD/CODE/13/Add.1Sales No. E.75.II.D.12.

<sup>108</sup> Herman, p. 170.

<sup>109</sup> The UNCTAD Code of Conduct for Liner Conferences (1974) 13 ILM 910.

<sup>110</sup> Power, p. 298.

- (c) the objective to ensure a balance of interests between suppliers and users of liner shipping services;
- (d) the principle that conferences practices should not involve any discrimination against the shipowners, shippers or the foreign trade of any country;
- (e) the principle that conferences hold meaningful consultations with shippers' organisations, shippers' representatives and shippers on matters of common interest, with, upon request, the participation of appropriate authorities;
- (f) the principle that conferences should make available to interested parties pertinent information about their activities which are relevant to those parties and should publish meaningful information about their activities.

The Code is flexible, almost loose. But, the rigid centre of it is the 40:40:20 formula, meaning that exporting and importing State's national lines have forty percent of each of the trade with third State's having the balance of twenty percent.<sup>111</sup> No universal approval has been reached however as the United States, Greece, Japan and Brazil have opposed it. More important, for this essay, is the bitter opinion of the Community. In short it can be said that what originally appeared to be the most promising legal tool of change, became an instrument of extensive protectionist legislation of LDCs and the complete demise of competition in liner shipping.<sup>112</sup>

The Code applies to Liner Conferences, i.e. "a group of two or more vessel-operating carriers which provides international liner services for the carriage of cargo on a particular route or routes within specified geographical limits and which has an agreement or arrangement, whatever its nature, within the framework of which they operate under uniform or common freight rates and any other agreed conditions with respect to the provision of liner services".<sup>113</sup> The following subchapters will present the main provisions, their meaning and effect, of the UNCTAD Code, relating to relations between members, relations with shippers and freight rates.

## 4.2.2 Relations among members

Part One, Chapter II of the Convention is dealing with relations among the members of a conference, i.e. the shipping lines:

- Article 1 deals with the structure of a conference, recognising the existence of closed conferences, and making a clear distinction

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<sup>111</sup> The Code, Article 2.

<sup>112</sup> Power, p. 299, with reference to Oeter in Bernhardt (ed.), *Encyclopedia of Public International Law*, vol. 11, 1989, p. 199.

<sup>113</sup> The Code, Part One, Chapter One: Definitions.

between national lines and non-national lines, where the former have easier access when applying for membership. However, it must be stressed that conference decisions are subject to dispute settlement procedure (Article 23).

What this Article provides is assurance for the participation of national lines. Third flag carriers have different criteria for acceptance. A national line has to provide evidence as to its ability and intention to operate adequately and efficiently on a long term basis (Article 1.2), whilst non-national lines have to comply, not only with the criteria set out above but also a large sequence of further criteria (Article 1.2 and 1.3). This angle of the provision was desired by the LDCs wanting to promote their fleets and economies.<sup>114</sup>

- Article 2 is the basis of the so-called “40:40:20” formula for cargo sharing, whereby the national lines of each country shall have an equal share of the freight and volume of traffic generated by their mutual foreign trade. Third country shipping lines have the right to the remaining twenty percent.

Article 2.1, 2.2 and 2.3 set out the principles under which interested parties are to share the trade: (2.1) that every member of the conference shall have sailing and loading rights in the conference trades; (2.2) the right of every member to participate, with equal shares, where conference pools operate; (2.3) that cargo will be divided according to nationality of lines, regardless of their number in the conference. National shipping lines of a particular country are to be regarded as a single group of lines for that country. Article 2.4 provides third country shipping lines, i.e. vessel operators that are non-national in any of the two countries they serve, a substantial share of the trade, according to 2.4(b) twenty percent of the trade. It is from this provision the 40:40:20 formula, even though not in fact appearing in the Code, is deduced.<sup>115</sup>

- Article 3 deals with decision-making procedures of conferences. It is based on equality of all the members. Decisions relating to trade between two countries cannot be made without the consent of national shipping lines of those two States.<sup>116</sup>

Remaining Articles: Article 4 deals with sanctions in cases of withdrawals, “after giving a three months notice”(4.1), or expulsion of lines, in cases of malpractice and reasons are stated (4.2); Article 5 deals with self policing by conferences, whereby malpractices are identified through a comprehensive list in the conference agreement and a self policing machinery to deal with such

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<sup>114</sup> Herman, p. 177.

<sup>115</sup> Clough and Randolph, p.11.

<sup>116</sup> Compare with the Brussels package, Council Regulation 954/79, where consultation is limited to matters regulated in the conference agreement.

malpractices (5.1); and Article 6 deals with conference agreements and the right of appropriate authority to have the agreement made available at their request and inspect.

### **4.2.3 Relations with shippers**

Chapter III of the Convention deals with the relations between conference members and the shippers:

- Article 7 deals with loyalty agreements, allowing such agreements with shippers if they provide explicit mutual safeguards based on any lawful system (7.1).

Thus, both loyalty agreements containing dual rates agreements and loyalty agreements containing deferred rebates, whereby shippers receive a future rebate for goods shipped with the conference on the condition that he continues to use the conference service, are allowed.<sup>117</sup>

- Article 11 establishes consultation machinery providing for consultation, between the various interests involved.

There shall be consultations between the conference and the shippers' organisations, representatives of shippers and where practicable shippers themselves. These consultations shall take place whenever any of these parties so request. Moreover, appropriate authorities also have the right to fully participate, except for playing a decision-making role (11.1).

### **4.2.4 Freight rates**

Chapter IV of the Code deals with freight rates. Six important provisions, Articles 12-17, set out criteria for the determination, the non-discriminatory application, general rate increases, and currency adjustment factors, of freight rates:

- Article 12 states that freight rates shall be fixed at the lowest commercially feasible level (12(a)); and provides that the cost of operations of conferences should be evaluated for the round voyage of ships, with the inward and outward legs being counted as one unit. Still where applicable, the outward and inward voyage should be considered separately (12(b)).

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<sup>117</sup> Clough and Randolph, p. 13.

Article 12 was introduced to create a fairer system for the establishment of freight rates in that are not based on costs of any single leg, which might have been more costly than the whole operation. The reservation of separation was introduced to cover the situation where one conference carries the trade outward and another inward.<sup>118</sup>

- Article 13 establishes the practice of shipowners upholding the published tariffs and to “special arrangements”, i.e. loyalty rebates and deferred discounts, allowed by the Code (13.1).

The remaining articles include: Article 14 on general freight-rate increase, which shall follow a 150 days notice to interested parties (14.1); Article 15 on promotional freight rates; Article 16 on surcharges, that shall be regarded as temporary and reduced as the situation improves (16.1), and finally cancelled (16.6); and Article 17 on currency changes, i.e. currency adjustment factors, that might be introduced where exchange rate changes, including formal devaluation or revaluation, leads to changes in the aggregated operational costs; and, Article 18, where the only reference to non-conference liners are made, providing that, “Members of a conference shall not use fighting ships<sup>119</sup> in the conference trade for the purpose of excluding, preventing or reducing competition by driving a shipping line not a member of a conference out of that said trade”.

#### **4.2.5 Provisions and machinery for settlement of disputes**

The second part of the Code relates to provisions and machinery for the settlement of disputes (Chapter VI). Article 23 provides that in event of relevant dispute the parties are to settle by exchange of views and negotiations (23.3), or, if not solved hereby, by request of any of the parties, referred to international mandatory conciliation in accordance with the Code. The panel of independent conciliators, selected by the contracting parties (Article 30.1), will submit a recommendation to the parties, based on all the relevant facts.<sup>120</sup> One problem attached is that the recommendations only become binding following acceptance from the parties (Article 37) - a true Achilles heel of the enforcement of the Code.

### **4.3 ANALYSIS**

The UNCTAD Code of Conduct for Liner Conferences provides rules for relations among members of conferences, and it promotes closed conferences.

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<sup>118</sup> Clough and Randolph, p. 14.

<sup>119</sup> The term “fighting ship” is not explained among the definitions of the Code, however, the wording is explicitly arranged.

<sup>120</sup> Clough and Randolph, p. 16.

There is also a risk that the element of cargo sharing force conferences to pool the trade of conferences. To proceed chronically; while carriers from all over the world fought for free access to conferences LDC representatives forced through the biased criterion of Article 1 to the disadvantage of non-national lines, an obvious case of discrimination. According to Article 1.2 any shipping line applying for membership shall furnish evidence of its ability and intention to operate a regular service on a long-term basis, only to allow the use of chartered tonnage – a contradiction of long-term service! Furthermore, the (40:40:20) cargo sharing formula of Article 2 detain eighty percent of the cargo to national lines hence scarcely promoting competition to greater extent than bilateral agreements. Following the first review of the Code in 1988 the situation was deadlocked in the bitter question whether the formula was to apply only to conference trade or the whole trade of a route. Free traders argue the latter while protectionists the former. Given, as stated above, that the formula itself can choke competition the Code must be regarded, on a global scale and with regard to the various commercial cultural differences, even from the sturdy American school, as a positive instrument. The diplomatic initiative and solution is primarily to prefer.

Then of course another weakness of the Code appears as we look into the dispute settlement and enforcement structure. Lack of enforcement possibilities is a problem of every international instrument. The Code provide for mediation and negotiation as a primary means of solution. If not successful mandatory conciliation can be issued, but the word ‘mandatory’ is quite voluntary. A recommendation set forward by the conciliators is only binding upon acceptance of the parties.

This dilemma of international law makes one of the following chapters even more intriguing. Through the extensive powers of the Commission of the European Union (the Commission) a blunt instrument of international proportions become an efficient mechanism in the service of effective competition. Of importance for the European version of the Code are the customary principles regarding the activity of liner conferences, and its importance for EC law cannot be overestimated. The Code has been the cornerstone of Community’s approach to the enforcement of the EEC competition rules in the shipping sector. This can be deduced from the outline of the Brussels package<sup>121</sup>, the name given to the instrument enabling the countries of the Community to ratify the Code

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<sup>121</sup> Council Regulation 954/79 of 15 May 1979 concerning the ratification by the Member States of, or their accession to, the United Nations Convention on a Code of Conduct for Liner Conferences.

# 5. Liner Conferences and the United States

The United States' merchant fleet might not be of great size, although it grew by one third between 1980-1987, but the country itself, a huge market and important on a political level, is interesting to study from a shipping point of view, especially its anti trust policy, a forerunner to the EU Competition policy, and other certain policies (partly reflected in Chapter 2). However, the deeply rooted US belief in anti trust law principles, originating from the time in history when huge conglomerates (trusts) commercially monopolised the markets, possess a strong position even in shipping. The general antitrust laws of United States apply to all sectors of the industry not specifically regulated due to public discontent or lobbying success. Ocean Shipping is such a regulated industry and the Shipping Act of 1984<sup>122</sup> grants certain anticompetitive behaviour immunity from the federal antitrust laws. The regulated industries vary to a great extent as regards underlying principle, administration and intensity of their regulation; and the tighter the regulatory control the less room is there is for antitrust policy.<sup>123</sup> US policy prior to 1984 was a turmoil of differing views on the approach to shipping as a whole and liner conferences in particular. At the time of the enactment of the 1984 Act, it must be remembered, the United States was the only country in the world actively applying its antitrust law to maritime transport, and the Sherman Act Sections 1 and 2 still applied to shipping activities not granted antitrust immunity under the 1984 Act.<sup>124</sup>

## 5.1 RELEVANT GOVERNMENTAL MACHINERY OF THE UNITED STATES

In order to begin to understand the behaviour of the United States in the shipping sector a brief study of its power structures, who does what, when and to what extent?

The division of power between the President (executive), the Supreme Court (judiciary) and the Congress (legislative) is well known. The powerful committee structure of both Congress bodies, the House of Representatives and the Senate, is also well known. The notorious and in reality politicised 'Hearings' held in different committees are of an inquisitorial kind. These structures of these committees affect the departments of state making common shipping policies difficult to reach. The main committees concerned with shipping of the Senate are

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<sup>122</sup> The Shipping Act of 1984, 46 USC §§ 1710 et seq.

<sup>123</sup> Bull and Stemshaug (eds.): Helge Stemshaug, *Maritime Transport and Antitrust in the EC and US*, p. 104.

<sup>124</sup> *Ibid*, p. 105.

the Commerce Committee and its Sub-committee on Merchant Marine Affairs and the Judiciary Committee. In the House of Representatives the Merchant Marine and Fisheries and its Merchant Marine Sub-committee deal with shipping together with the Judiciary Committee.<sup>125</sup>

Departments with shipping initiatives include the Department of Transportation, with its Maritime Administration division, for the promotion of the US Merchant Marine and subsidies programme. Also worth mentioned are the Department of Justice and its Antitrust division, a supervisor in all anti trust matters, and the Department of State which is concerned with all foreign affairs, including shipping.<sup>126</sup>

An important regulatory agency in shipping matters is the Federal Maritime Commission, a purely regulatory arm of the Congress, responsible to the Congress only, but also, over the years, for the regulation of shipping under various Shipping Acts, particularly those of 1916 and the 1961 (Bonner) amendments. The FMC is not a policy-making institution albeit some of its chairmen occasionally have tried to use the FMC in that manner.<sup>127</sup>

## **5.2 UNITED STATES AND LINER CONFERENCES**

Previous chapters have described the history of shipping and liner conferences, protectionism as well as liner shipping and the liner conference system. The conference concept is not uncontroversial – some say absurd and unfair, others claim it not to be fully understood - and several major inquiries have been made into conferences. As a way of presenting the history of US activities in the field of liner conferences two inquiries and their effect will be discussed. The United States has made a number of major investigations into liner conferences, this chapter will process two: The Alexander Report of 1914 and the Congressional Hearings between 1958-1961. Besides these, five other major inquiries have been made and the system has not escaped untouched, but generally accepted despite its flaws. Even the ICC, speaking for the shippers, has supported the system for its stability and equality.<sup>128</sup>

The Alexander Report of 1914 was a report by the House of Merchant Marine and Fisheries Committee. It looked broadly into the nature of conferences, i.e. their effect. Especially the deferred rebate system, which was lawful only inwardly to the United States, fighting ships, quantity discounts and the level of freight rates.

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<sup>125</sup> Farthing, p. 78-79.

<sup>126</sup> Ibid, p. 79.

<sup>127</sup> Ibid, p. 80.

<sup>128</sup> Ibid, p. 104.



The outcome of the evidence given to the committee was that this restriction of competition, albeit providing stability, should come under governmental regulation. The Recommendations of the Alexander Committee were later enacted into the US Shipping Act 1916<sup>129</sup>. The central theme was that as conferences on US trades were brought under regulation, it was considered that these were immune from US anti trust proceedings.<sup>130</sup> The new law meant that discriminating rebate schemes were prohibited, equality of rates obligatory, fighting ships and deferred rebate systems prohibited and unlawful. Furthermore, the ICC was given the authority to disapprove and investigate certain agreements. This was a turning point for conferences and shipping, as the first time governmental authorities has engaged in decisions concerning commercial shipping.<sup>131</sup> The 1916 Act also expressly granted an exemption from the antitrust laws for conference agreements on as long as those agreements were first submitted to and approved by the newly created US Shipping Board (later the Federal Maritime Board and, eventually, the Federal Maritime Commission).<sup>132</sup>

Following the enactment of the 1916 Act, and particularly in the years after World War II as carriers once again were faced with overcapacity and competition from non-conference carriers, conferences began making extensive use of “dual rate” contracts to bind shippers to the conferences and stave off non-conference carrier competition. These dual-rate contracts, also referred to as “loyalty contracts,” offered discounted rates to shippers who agreed to use only conference carriers; they differed from the outlawed deferred rebates only in that the shipper could obtain the discount at the time it paid for a shipment. The Federal Maritime Board never challenged dual-rate contracts, but the Supreme Court ruled in *Federal Maritime Board v. Isbrandtsen Co.*<sup>133</sup>, that dual rate contracts, while not specifically prohibited by the Shipping Act, nevertheless violated a provision of section 14 of the Act that prohibited resort by carriers to discriminating or unjust methods because a shipper has supported another carrier.<sup>134</sup>

Between 1916 and the 1960s was the reign of a moderate regulatory regime. The Isbrandtsen decision indicated a change in the 1950s. In the wake of the decision, the Congress amended the 1916 Act in 1961 to permit dual-rate contracts, though limiting the permissible discount to fifteen percent. At the same time, Congress also amended the Act to require the filing of tariffs, to transfer the Board’s authority to an independent Federal Maritime Commission, and to give the Commission the power to disapprove agreements between and among carriers

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<sup>129</sup> US Shipping Act of 1916, 46 USC 801.

<sup>130</sup> Farthing, p. 106.

<sup>131</sup> Ibid, p. 107.

<sup>132</sup> H.R. 3138, DOJ, Statement of John M. Nannes (Deputy Assistant Attorney General - Antitrust Division), March 22, 2000, p. 3-4.

<sup>133</sup> *Federal Maritime Board v. Isbrandtsen*, 356 U.S. 481 (1958).

<sup>134</sup> H.R. 3138, DOJ, p. 4.

that were “contrary to the public interest”.<sup>135</sup> In the *Isbrandtsen* case, the substitute of the deferred rebate system, i.e. the dual rate system, whereby loyal shippers were given the lower of two rates (normally ten to fifteen percent below normal rate), was found to be contrary to the Act.<sup>136</sup> The impact in the shipping world was immense, and the conferences operating in the US trades formed a pressure group, the CES, and the governments of Europe established the CSG. Notice had been taken as hearings continued. European shipowners were questioned; both on the dual rebates system and upon whether the legislation of 1916 was fulfilled. Congressmen Bonner and Celler, and Senator Engle led the hearings – the first named the 1961 amendment of the 1916 Shipping Act (the Bonner Act).<sup>137</sup> The important novelties of the amendment were that it required conferences to and from the United States to be open to all qualified operators, and that agreements were to be filed with the FMC and subject to the US anti-trust acts.<sup>138</sup> These Bonner Amendments, the increased trust in anti-trust policies and distrust of conferences led to strained international positions. The FMC took its role as a regulator with enthusiasm and numerous laws were stipulated. Agreements were concerned presumptively illegal until a US interest could be identified.<sup>139</sup> The Commission interpreted its public interest authority to include consideration of antitrust principles and, in *Federal Maritime Commission v. Aktiebolaget Svenska Amerika Linien*<sup>140</sup>, the Supreme Court upheld that interpretation, along with the Commission’s determination to approve conference restraints that conflicted with antitrust principles only if a conference could “demonstrate that the . . . rule was required by a serious transportation need, necessary to secure important public benefits or in furtherance of a valid regulatory purpose of the Shipping Act.” Shipowners complained that the Commission’s approach led to regulatory uncertainty and prolonged proceedings.<sup>141</sup> These were harsh time for conferences. Regulation was needed, but on an international agreed basis.

## 5.3 UNITED STATES AND THE UNCTAD CODE

The United States voted against the adoption of the UNCTAD Code of Conduct for Liner Conferences in 1974. The main reason hereto, it was expressed by the head of the American delegation in Geneva, was because of the basic differences between the American way of thinking and the Code’s position. The US opposed cargo sharing and central economic planning. Moreover, the Americans feared

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<sup>135</sup> H.R. 3138, DOJ, p. 5.

<sup>136</sup> Farthing, p. 108.

<sup>137</sup> *Ibid.*, p. 109.

<sup>138</sup> *Ibid.*, p. 110.

<sup>139</sup> *Ibid.*, p. 113.

<sup>140</sup> *Federal Maritime Commission v. Aktiebolaget Svenska Amerika Linien*, 390 U.S. 238 (1968).

<sup>141</sup> H.R. 3138, DOJ, p. 5.

that closing trades to third flag carriers would flood their routes with both foreign and American vessels. Here the protectionist side of the United States worried about that the implementation of the formula would not increase the participation of US carriers in national trades. In 1975 American liners carried only thirty percent of US foreign trade. However, when arriving at the number of thirty percent a failure to separate conference vessels from independent left a misleading percentage in many routes. In the North Atlantic route American vessels carried thirty-five percent of the trade, but American conferences carried fifty-five percent, leaving a superfluous fifteen percent when applying the 40:40:20 formula.<sup>142</sup>

### 5.3.1 Legal objections under the 1916 Regime

On a legal basis the implementation of the Code would have violated of over thirty bilateral treaties of friendship, commerce and navigation, which United States had entered into. These bilateral agreements constituted, on their own, a protective policy, in embracing the most favoured nation treatment principle, providing all cargo to be shipped on vessels to or from the territories of the signing parties – as can be seen in chapter 2.<sup>143</sup>

Furthermore, the Code was in direct conflict with certain provisions of US law. Section 814(2) of the Act<sup>144</sup> required that conferences' membership must be open to all lines on an equal basis. On the contrary, the Code<sup>145</sup> set up different criteria for national lines and third country lines, giving the latter a difficult chance of admission if unfavourably to the conference. The cargo-sharing concept of the Code<sup>146</sup> was in conflict with the general US maritime transport policies, as well as the FMC's interpretation<sup>147</sup> of the Shipping Act, the prohibition of preferential treatment of national lines. A fundamental objection was against the Code's laissez faire approach towards 'deferred rebates'<sup>148</sup>, while Section 813(2) of the Shipping Act strictly opposed such schemes. The 'dual rate' system was the lone loyalty arrangement allowed under the 1916 Act regime.<sup>149</sup>

It is evident that the contradiction between US law and the Code<sup>150</sup> was deep, but matters improved when the Shipping Act of 1916, which still applies to

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<sup>142</sup> Herman, p. 197-198

<sup>143</sup> Ibid, p. 198.

<sup>144</sup> US Shipping Act of 1916 46 USC § 814(2).

<sup>145</sup> Article 1(2)-(6).

<sup>146</sup> Article 2(4).

<sup>147</sup> *Northern Pan American Lines A7S (Nepal Lines) v. Moore McCormack Lines*, 8FMC 203, (1964).

<sup>148</sup> Article 14(7).

<sup>149</sup> Blanco and Van Houtte, p. 123.

<sup>150</sup> Additional discrepancies of the two instruments include: dual rate contracts, Article 7 of the Code – 46 USC § 813a; the consultation requirement with shippers' organisations,

domestic trade, was replaced by the Shipping Act of 1984. The 1984 Act applies to US foreign trade and is more tolerant to shipping cartels.<sup>151</sup> A partial novelty under the 1984 Act is that traditional loyalty agreements are inadmissible, unless they enjoy competition law immunity, which they only can be granted if they fulfil common competition standards for approval.<sup>152</sup>

### **5.3.2 Policy developments following the Code**

The policy situation in the late 70's was very unclear, and the future direction of the US policy on conferences too was a matter of struggle between the Department of Justice, eager to abolish or at least limit their freedom, while the Congress proposed an Omnibus Maritime Reform Act<sup>153</sup>, whereby conferences would be able to close membership to cross traders. The following discussions of the Department of Justice, the Congress, different institutes, studies, and even task forces initiated by President Carter all failed in their endeavours to accomplish a satisfying solution for both domestic and foreign policies. The situation, with the United States reluctant to alter its domestic legislation in conformity with the principles of the Code only two alternatives remained: accession to the Code with restrictions, or signing bilateral agreements with other countries to assure reasonable amount of cargo for US lines.<sup>154</sup> A third way was chosen: the Shipping Act of 1984, and the further application of the 1916 Shipping Act domestically.

## **5.4 THE SHIPPING ACT OF 1984**

The 1984 Act was signed by President Reagan on 20 March 1984, and annuls all provisions of the 1916 Act relating to foreign commerce, except the interstate commerce by water.<sup>155</sup> Section 1 of the 1984 Act establish certain goals: a non-discriminatory process for the foreign maritime carriage of goods; an efficient and economic transportation system in the ocean commerce and harmony with international practices; and to encourage development and an sound US liner fleet capable of meeting national security needs. Under the 1984 Act, any agreement or activity exempted by the Act is immune from antitrust liability. The scope of

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Article 11, while US shippers' organisations are non-existent with respect of a possible breach of US antitrust laws; and the criteria for rate determination, where the Code, Article 12(9), provide rates to be set at a level for reasonable profit for shipowners, whereas the FMC requires rates not to be detrimental to US commerce, § 817(b)(5).

<sup>151</sup> Blanco and Van Houtte, p. 104.

<sup>152</sup> Ibid, p. 123 (note 71), Shipping Act 1984, s. 3 (21), 46 USC app. 1702 (21).

<sup>153</sup> H.R. 4769, 96<sup>th</sup> Cong. 1<sup>st</sup> Sess. (1979).

<sup>154</sup> Herman, p. 200-203.

<sup>155</sup> US Shipping Act of 1916, 46 USC 801.

such immunity, the procedural requirements to achieve such immunity and a petite section on fines will be discussed in the following.

#### **5.4.3.1 Scope**

According to Section 7 of the 1984 Act agreements must be filed with the FMC to benefit from immunity. Antitrust immunity is generally granted to any activity or agreement within the scope of the 1984 Act. In order to decide the scope of the immunity one must identify the common carrier(s), what agreements are permitted and which are prohibited.<sup>156</sup>

#### **5.4.3.2 Common Carrier**

Section 3(6) of the 1984 Act defines a “common carrier” as a provider of carriage between a US port or point and a foreign port or point by a carrier that holds itself out to the general public and not by a ferry, tramp vessel or a chemical parcel-tanker, in order to obtain antitrust immunity.<sup>157</sup> Following a FMC decision, *Containerships*<sup>158</sup>, the most important indicators of a common carrier were concluded to be regularity of sailings, the number of shippers using the service and that the services are being held out to the general public. The publicity may be most important for the shipowners regarding that non-common carriers are subject to ordinary antitrust laws.<sup>159</sup>

#### **5.4.3.3 Permitted agreements**

Section 4 of the 1984 Act contains agreements where the Act is applicable, i.e. agreements detach from the ordinary antitrust rules. Included are agreements by or among ocean carriers to: “price fixing; pooling arrangements; arrangements within trades; engage in exclusive, preferential, or cooperative working arrangements; control, regulate or prevent competition in international ocean transportation; and regulate or prohibit their use of service contracts.” The conclusion here from is that service contracts, agreements related to time-volume rates, i.e. adjustment factors and surcharges, intermodal rates and conference agreements.<sup>160</sup>

Intermodal rates were approved already in the 1916 Act, but the 1984 Act clarified the situation. Some limitations exist regarding the negotiations, with the

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<sup>156</sup> Bull and Stemshaug (eds.): Helge Stemshaug, *Maritime Transport and Antitrust in the EC and US*, p. 109.

<sup>157</sup> The addition of explicitly mentioning ferry, tramp or chemical parcel-tanker resulted of a 1986 amendment. See Stemshaug op cit, p. 110.

<sup>158</sup> *Tariff Filing Practices, Etc. of Containerships, Inc.*, 9 FMC 56 (1965).

<sup>159</sup> Bull and Stemshaug (eds.): Helge Stemshaug, *Maritime Transport and Antitrust in the EC and US*, p. 111.

<sup>160</sup> *Ibid*, p. 114.

inland carriers on matters relating to rates or services provided to common ocean carriers, which must be conducted individually and not concerted among the common carriers (Section 10(c)(4)). Nor should the common carriers agree on inland division among themselves – conferences and other concerted actions among common carriers to reach agreements with inland transportation cartels are prohibited in accordance with a well-established position of the US Justice Department.<sup>161</sup>

A conference agreement on the must provide an open character regarding both entry and exit, state the purpose of the conference, contain rules of consultation and a list of malpractices. Most important is the right to independent action, which any member of a conference may take, on any rate or service, to adopt an independent rate or service. Independent action does not apply to service contracts however.<sup>162</sup> Service contracts keep shippers loyal through their commitment of a certain quantity of cargo over a special period of time, to one shipowner, for a certain rate and schedule. Finally, agreements between members of different conferences are permitted under the 1984 Act (Section 5(c)), provided that independent action is established as an inviolable right in that same agreement.

#### **5.4.3.4 Prohibited agreements**

Section 10 of the 1984 Act contains a black list, divided into four groups: (a) persons; (b) common carriers; (c) conferences or groups of common carriers; and (d) common carriers, ocean freight forwarders and marine terminal operators. Boycotting or taking concerted action such as predatory pricing to eliminate competition is prohibited (10(c)). The list of acts prohibited under the 1916 Act can be found in Section 10(b) and still applies. Classic provisions such as: (1) prohibition not to charge uniform rates within the conference; (2) prohibition of rebates, refunds or remits in any manner; (3) prohibition to deny contracted services; (5) prohibition to retaliate toward disloyal shippers; and (7) prohibition of deploying fighting ships. Moreover, negotiations between common carriers, or a group of carriers, and non-ocean carriers are not only prohibited but also subject to the ordinary statutes of antitrust law.

## **5.5 RECENT DEVELOPMENTS**

With the 1984 Shipping Act the Congress both broadened the antitrust exemption, and rationalised the process of obtaining such exemptions. Now not only agreements that had gone into effect under the Act was covered by the

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<sup>161</sup> Bull and Stemshaug (eds.): Helge Stemshaug, Maritime Transport and Antitrust in the EC and US, p. 115.

<sup>162</sup> Ibid, p. 116.

exemption, but also activities, “whether permitted under or prohibited by this Act,” if they were undertaken “with a reasonable basis to conclude” that they were in connection with an effective agreement. The 1984 Act abolished the Commission’s public interests standard when reviewing carrier agreements, but otherwise preserved the common carrier provisions of the 1916 Act, under which the conferences were required to file published tariffs with the Commission, held on and somewhat expanded the list of explicit prohibitions against specific acts, including the prohibitions against fighting ships and deferred rebates. In addition, the Act stipulated a ‘study commission’ to be established to make recommendations to the Congress about further legislative changes that might be warranted.<sup>163</sup>

This study commission, unable to reach consensus recommendations, nevertheless issued a report that would subsequently, in 1998, become the Ocean Shipping Reform Act (OSRA).<sup>164</sup> The OSRA ensures conference members a greater extent of independent actions, i.e. to negotiate service contracts with shippers where the tariffs differ from the conference standard. But the OSRA also allows conference members to adopt “voluntary” guidelines, whereby certain behaviour can be indicated. The FMC will not "reject" defective tariff material under the new regime. Instead it will seek to ensure voluntary compliance with the regulations by contacting carriers and requesting correction of material that is unclear, incomplete or in violation of applicable law or regulations. The law no longer requires tariffs to be filed with the FMC. Instead, all ocean carriers subject to FMC regulation (that is, those offering service between the United States and a foreign country) are required to publish their rate tariffs electronically. As regards commodity description numeric codes are recommended to utilise facilitate the U.S. Harmonized Tariff Schedule commodity classifications. Finally the FMC can grant exemptions from any of the statutory requirements if it finds that exemption not will result in substantial reduction in competition or be detrimental to commerce.

These and other provisions of the 1998 Act endorsed the conference system, either by facilitating inter-carrier agreements that would be unlawful in the absence of an exemption or by restricting the ways in which conference members can meaningfully compete on an individual basis for the business of large and small shippers alike. It is safe to say that, under American conditions, the conference system could not exist in the absence of an antitrust exemption.<sup>165</sup>

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<sup>163</sup> H.R. 3138, DOJ, p. 7.

<sup>164</sup> Ocean Shipping Reform Act of 1998 46 USC 1701 – PL 105-258, Sec. 1, 1 Oct 1998, 112 Stat. 1902.

<sup>165</sup> H.R. 3138, DOJ, p. 8.

## 5.6 ANALYSIS

This chapter has described under to what extent shipping activities are subject to the antitrust laws of US. The power structure of the country makes it tempting to conclude that often politics interfere in the reigns of economy and commerce and vice versa. The US has a long history of antitrust, and its position as forerunner to the European competition policies is evident. The view on conferences has changed substantially. The US approach to conferences was during a long period stern. The Alexander Report of 1914 and the 1916 Shipping Act established a stronghold for antitrust application in shipping. The reluctance to regulate during the following forty years led to slow disintegration of the conference system and erosion of antitrust immunity, starting with the *Isbrandtsen case*, where the Supreme Court held that the immunity only applied to expressly enumerated practices. The *Svenska Amerika Linien case* added the public interest standard, as well as shifting the burden of proof over to the conferences.

A number of 1916 Act legal objections forced the US to vote against the adoption of the UNCTAD Code. United States withheld its antitrust principles and defended its liner participation share, which exceeded the 40:40:20 formula. Deferred rebates have always constituted the deepest discrepancy between US and other policies. The 1984 regime offered greater possibilities for conferences to both withhold its cartel characteristic, and applying for exemption at the FMC. The 1984 Act grants antitrust immunity to liner conferences and common carriers, thus meaning that liner shipping in general and liner conferences in particular are subject to less restrictive antitrust regimes than the majority of economic activities. This immunity given to conferences, still supported by the FMC (Section 8 of 1984 Act), under US laws has been criticised by both the Federal Trade Commission and the Department of Justice, but the situation in the 1980's and the decade before gave certainly rise to a need for particular protection of merchant fleets, all nations agreed hereto, as did the US, to stay alert in relation to the activities of LDCs as well as domestic opportunistic commercially detrimental regimes.

The OSRA, then, was meant to guide the US into an era of universal contentment in the shipping industry, but rate increases followed. These increases (up to eighty percent), mainly surcharges were explained by the Asia financial crisis when rates dropped to forty percent below the 1996 level.<sup>166</sup> The OSRA's first commandment is to let the market set the prices, but because of the antitrust immunity arrangement still being applicable the joint setting of prices is still permitted. The OSRA, however, became effective on May 1 1999 and evaluating this instrument at this stage might prove to be rash.

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<sup>166</sup> Lloyds' s Shipping Manager, September 2000 – London – 2000, p. 23.



## 6. Liner Conferences and the European Union

This chapter is the primary and most important piece of this essay, in aiming at describing the relation between the EU and liner conferences. The EU and its powerful Commission have brought new dimensions to the ability of international institutions to enforce competition. The powerless UNCTAD piece of legislation has through the Commission reached new dimensions in the assessment, enforcement and punishment of conferences infringing competition laws agreed by the EU.

The beginning of this chapter will be the birth of the European Community in 1957, and continue through the idle policy drought up to the UNCTAD Code and the diligent activities following it only to be summed up by a testimony of the recent practice of the European Court of Justice (ECJ) and Commission.

### 6.1 THE TRANSPORT INDUSTRY OF THE EUROPEAN UNION

Since the ratification in 1957 and entry into force of the Treaty of Rome 1958 the transport industry has undergone fundamental change in order to adapt to the still growing needs of a global market and the internal market. Road transport may have undergone the greatest change considering both the increase of passengers and goods, and the infrastructure additions the Channel Tunnel and the Öresund Link.

Regarding passenger transport European railway has developed into a high tech industry; constantly developing new strategies and means to compete with the other modes of transport, especially air traffic. The immensely increased air transport long haul capacity has left the maritime transport sector relegated to the short-haul ferry market.<sup>167</sup>

In the transport of goods field, road transport has become the fierce competitor of the railway, due to the latter's inability to provide the services demanded by the industrial users. Furthermore, the liner shipping has experienced a revolution with the introduction of containers in 1970.<sup>168</sup>

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<sup>167</sup> Blanco and Van Houtte, p. 1.

<sup>168</sup> Ibid, p. 1.

The transport sector as a whole represents four percent of EU's GNP, and if personal and private transport is included the figure increases to more than seven percent. In 1991 between more than four percent of the waged labour (5,6 million people) were employed in the sector. Of these forty-five percent were employed in the road haulage, sixteen percent in the rail transport, 0,4 percent in inland waterway transport, 3,9 percent in maritime transport, 6,2 percent in air transport and twenty-eight percent in transport related activities. The transport sector is furthermore an expanding industry in the EU, growing proportionately with the GNP. The freight activities have increased during the last twenty years by fifty percent: road transport has doubled in absolute terms representing around seventy percent of the sector, whilst rail transport has decreased by fifteen percent in absolute terms now representing fifteen percent totally leaving the inland waterways with nine percent totally despite a slight growth and oil pipelines at six percent.<sup>169</sup>

Despite its modest role as an employer, the maritime transport is of vital importance in terms of tonnage for the longest international routes, carrying approximately ninety per cent of EU goods in international trade and increasing thirty-five per cent between 1975-1985 and still 2,1 per cent annually. Maritime transport is depended on in both international and intra-community trade as the prime mode of transport. Approximately ninety per cent of the Union's participation in international trade is shipped by sea, and thirty-three per cent regarding the intra community trade.<sup>170</sup>

It is important to stress though, the huge industrial importance of the transport sector. Industrial meaning transportation's role as a basic production factor making other industrial sectors efficient as well as being the support activity on which the entire international trade depend - the tying link between the European Union and the rest of the world, but also the between different regions within the European Union, especially the remote regions.

## **6.2 TRANSPORT POLICY OF THE EUROPEAN UNION**

Transport policy is one of the original three common policies of the Community<sup>171</sup>, but the provisions of the Treaty do not establish any common principles for the implementation of such a policy. The provisions merely offer a procedure whereby the Council must adopt the guidelines for a common policy. The reason hereto is the absence of a consensus on a direction of a common

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<sup>169</sup> Blanco and Van Houtte, p. 2.

<sup>170</sup> Ibid, p. 2-3.

<sup>171</sup> The Common Policies of the European Community are (original three) Transport, Agriculture, Competition and (Subsequent) Foreign Trade.

transport policy. Then as well as now governmental intrusion and a confused complex composition of bilateral and multilateral inter-state agreements characterise the EU transport sector. Every Member State was devoted to protecting their carriers from the callous international competition, therefore fundamental principles of the Community were not implemented, or at least being applicable following considerable delay, in the transport sector. But not all principles though, the delay of using the crucial principle of *freedom to provide services* in the transport sector was the clear status of Article 49<sup>172</sup> as not being direct applicable in transport matters.<sup>173</sup>

Until 1974 uncertainty, due to unclear wording of Article 80<sup>174</sup>, prevailed concerning the application of the Treaty in maritime matters. In 1974 a Court ruling swept this uncertainty away. This was the *French Seamen* case<sup>175</sup>, in which the Court, for the first time, held that Article 51.1<sup>176</sup> established an exemption from the general rules of the Treaty governing services in transport matters, if the Council has not decided otherwise. Article 71 provides that, within the framework of the common transport policy, the Council would have to establish ‘the conditions under which non-resident carriers may operate within a Member State’.<sup>177</sup> Given the wording of Article 80.1, the above stated is only applicable to road, rail or inland waterway transport; whereas air and maritime transport, Article 80.2, confers upon the Council to decide upon measures to be taken. In the *French Seamen* judgement the Court finally ruled that regardless of the fact that the rules in Title IV (now Title V -Transport) of Part II of the Treaty were not applicable to maritime transport until the Council had decided otherwise, the general rules of the Treaty applied to shipping, as well as any other mode of transport.<sup>178</sup> The question remained as to what rules of the Treaty that are to be regarded as ‘general rules of the Treaty’, a matter not satisfactorily dealt with in the *French Seamen* ruling. This question was answered in a later by the Court in the 1986 case *Nouvelles Frontières*<sup>179</sup>, where the Court ruled that the competition rules were part of the general rules of the Treaty, thus applicable to air transport. The French Government claimed that the prejudicial scope of the *French Seamen* case did not include Part III of the Treaty. The reply of The Court was that economic sectors of the Treaty could only be excluded from the competition rules by an express provision of the Treaty, for example, Article 42 on agriculture.

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<sup>172</sup> Article 49; governing the freedom to provide services.

<sup>173</sup> Blanco and Van Houtte, p. 4-5.

<sup>174</sup> Article 80.1 of the Treaty: The provisions of the Title shall apply to transport by rail, road and inland waterway, and Article 80.2: The Council may, acting unanimously, decide whether, to what extent and by what procedure appropriate provisions may be laid down for sea and air transport. Only article 80.2 explicitly mentions maritime and air transport.

<sup>175</sup> Case 167/73, *Commission v. France*, [1974] ECR 359 2 CMLR 216.

<sup>176</sup> Article 51.1; providing that the free movement of services in the transport sector is governed by the transport provisions of the Treaty.

<sup>177</sup> Article 71.1(b) of the Treaty.

<sup>178</sup> Case 167/73, *Commission v. France*, at paras 32 and 33.

<sup>179</sup> Joined Cases 209-213/84 *Ministère Public v. Lucas Asjès* (‘Nouvelles Frontières’) [1986] ECR 1425.

Consequently, the competition rules, Articles 81 and 82, apply invariably to Articles 71 and 80.<sup>180</sup>

### 6.2.1 Extended Historical Perspective

To aid the reader in obtaining a greater understanding of the common transport policy a historical presentation is likely to assist. The Common Transport Policy (CTP) is very much a political issue and its evolution is often divided into three phases.<sup>181</sup>

The first phase of Community transport policy stretch from the entry into force of the Treaty in 1958 to 1974. The Community, during this period, focused entirely upon creating a common market for road, rail and inland waterways, stimulating competition between carriers from all the Member States. The concept was formulated and presented in a Memorandum 1961 and an Action Programme 1962<sup>182</sup>, both receiving a frosty response in Member States.

In 1973, at the end of the first phase, when Denmark, Ireland and the U.K. became members of the Community the stagnated transport policy was liberalised and less land-centred, making the Commission re-define its policy scheme with a Communication to the Council in October 1973<sup>183</sup>, on the common transport policy - thus leading the Community into the next phase. The Commission concentrated on harmonisation of the conditions of competition, the opening up of the common market, often being the big issue in contradiction with Member States interests. Significant events occurred in 1974 in the maritime and air transport sector: the Court gave its judgment in the *French Seamen* case, and the UNCTAD<sup>184</sup>, adopted a Code of Conduct for Liner Conferences.<sup>185</sup> Neither the *French Seamen* nor the Code prevented the Commission from continuing its efforts in inland transports with inept technical regulations outside the real objective of the CTP – the creation of a single market.

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<sup>180</sup> Blanco and Van Houtte, p. 41-42.

<sup>181</sup> Blanco and Van Houtte, p. 5.

<sup>182</sup> *Memorandum sur l'orientation à donner à la politique commune des transports*. Document VII/COM (61) 50 final, of 10 April 1961, and *Programme d'action en matière de politique commune des transports*.

<sup>183</sup> Commission Communication to the Council on the development of the common transport policy, Document COM (73) 1725 final, of 24 Oct. 1973, and Supp. 16/73 of the *Bulletin CE*.

<sup>184</sup> United Nations Conference on Trade and Development, Geneva, *Conference of plenipotentiaries of the United Nations on a Code of Conduct for Liner Conferences. Held at Geneva from 12.11. to 15.12.1973 (Part One) and from 11.3. to 6.4.1974 (Part Two)*. Vol. II, Final Act (including the Convention and Resolutions and tonnage requirements). United Nations, New York, 1975. [Document TD/CODE/13/Add. 1].

<sup>185</sup> Convention on a Code of Conduct for Liner Conferences (the UNCTAD Code), Geneva, 6<sup>th</sup> of April 1974.

Beginning in 1983 through 1985 the Commission presented a series of proposals for the benefit of a structured development of the CTP piloting the Community into the third phase. This third phase also contained the adoption and entry into force of the Single European Act in July 1986, expressing the Member States' political will to complete the internal market by 1993 at the latest. The initiative unleashed an intense process of liberalisation trying to create open space for competition between commercial interests, important for the transport sector, especially the immature air and maritime sectors.<sup>186</sup>

## 6.2.2 The Common Maritime Transport Policy

Sea transport is mentioned in the Treaty only once, in the above shown Article 80.2. This second paragraph was added on Dutch initiative, the Netherlands being the principal ministers of the principle of freedom in maritime transport. But action was unlikely since the provision, at first glance, offers more than it can give. Instead of providing for a proposal of the Commission Article 80.2 offers a unanimous decision of the Council. No such decision was made between 1958 and 1977; making Article 80.2 a waterproof compartment for conservative forces, isolated from the rest of the Treaty.<sup>187</sup> In the period prior to 1973 the EC was extremely reluctant to engage in the maritime transport policy. However, a number of instruments were created with either the intention to exempt maritime transport from the competition rules or celebrating a marriage of the common maritime sector and competition rules in empty words of action. I will not give a further account of these meagre means in the history of CTP.

The addition of Denmark and U.K. in 1973 meant that shipping was given greater attention.<sup>188</sup> Considerations were given the fact that neither Ireland nor the U.K. could be reached other than by sea or air. The only significant legislative measure taken by the EC was the adoption of Council Regulation 954/79<sup>189</sup>, a regulation part of a policy based on four elements: freedom to provide services, a competition regime, a system of protection against unfair trade practices, and the implementation of the United Nations Code of Conduct for Liner Conferences.<sup>190</sup> This Code appeared to be the most promising piece of legal effort to change the global economic order, but as has been shown in the earlier parts of this essay, LDCs have utilised the Code for their preferential, i.e. protectionist, policies and legislation. Protectionist regulation of conferences has led to an increase in non-

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<sup>186</sup> Blanco and Van Houtte, p. 7-9.

<sup>187</sup> Savopoulou and Tzoannos, *The Common Shipping Policy of the EC – North-Holland – Amsterdam – 1990*, p. 71.

<sup>188</sup> Bull and Stemshaug (eds.): *Rosa Greaves, EC's Maritime Transport Policy: a Retrospective View*, p. 25.

<sup>189</sup> Council Regulation 954/79 OJ 1979 L121/1.

<sup>190</sup> Bull and Stemshaug (eds.): *Rosa Greaves, EC's Maritime Transport Policy: a Retrospective View*, p. 26.

conference shipping. An increase of non-conference shipping leads to demands of protectionist regulation of the same, in the end the complete demise of competition in liner shipping.<sup>191</sup> The latter was the true catalyst of Community maritime policy. Council Regulation 954/79, the Brussels package was an important milestone but the policy remained in complete hibernation until 1986.

Shipping again came into focus when Greece accessed and fleets all over the Community diminished into oblivion due to many shippers out flagging in order to survive. Moreover, the European Parliament took the EC Council before the European Court of Justice to put pressure on the Council to act and adopt a CTP as required by the Treaty.<sup>192</sup> The concept of a single European market was now beginning to mature. In 1984 the Commission published a *Memorandum on maritime transport*<sup>193</sup> containing the main lines of EC shipping policy, and in 1985 the Commission addressed a Communication to the Council.

In December 1986 the EC Council adopted the 1986 maritime package, consisting of four regulations, giving legal force to the flexible approach outlined in the Commission's Memorandum. These were: Council Regulation 4055/86 applying the principle of freedom to provide services to maritime transport;<sup>194</sup> Council Regulation 4056/86 applying Articles 81 and 82 of the Treaty to maritime transport;<sup>195</sup> Council Regulation 4057/86 setting out procedures for dealing with unfair pricing practices in maritime transport;<sup>196</sup> Council Regulation 4058/86 coordinating actions to safeguard free access to cargoes in ocean trades.<sup>197</sup> However, only Council Regulation 4056/86 has made a substantial impact, thus the sole instruments to be further examined below.

The 1986 package focused primarily on the threat to Community shipping from the protectionist policies and practices of non-Member States – the free and non-discriminatory access to cargoes EC shipowners and fair competition on a commercial in trade, both from and within the Community.<sup>198</sup> This was only the beginning, and the 1986 package, despite working fairly well, did not halt the decline of the shipping industry. Further measures were inserted into the

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<sup>191</sup> Power, p. 298.

<sup>192</sup> Case 13/83 *Parliament v. Council* [1985] ECR 1513; [1986] 1 CMLR 138.

<sup>193</sup> Memorandum on maritime transport COM(84) 668 final.

<sup>194</sup> Council Regulation 4055/86 OJ 1986 L378/1, applying the principle of freedom to provide services to maritime transport between Member States and between Member States and third countries.

<sup>195</sup> Council Regulation 4056/86 OJ L378/4, laying down detailed rules for the application of articles 81 and 82 of the Treaty to maritime transport.

<sup>196</sup> Council Regulation 4057/86 OJ L378/14 on unfair pricing practices in maritime transport.

<sup>197</sup> Council Regulation 4058/86 OJ L378/21, concerning coordinated action to safeguard free access to cargoes in ocean trades.

<sup>198</sup> Bull and Stemshaug (eds.): Rosa Greaves, EC's Maritime Transport Policy: a Retrospective View, p. 28.

programme in the shape of proposals assembled in a Communication<sup>199</sup> to the Council, some of them so controversial in relation to national interests and thereby making them impossible to adopt as a package.<sup>200</sup> An exception of importance for competition law was the early 1990's adoption of the Council Regulation 3577/92, the cabotage regulation.<sup>201</sup> The main concern during the 1990's was safety at sea. Bearing the Herald of Free Enterprise, Scandinavian Star, and, the still delicate and controversial catastrophe, Estonia in mind this strategy does not stand out as an enigma.<sup>202</sup>

### **6.3 MARITIME TRANSPORT AND THE COMMUNITY COMPETITION LAW**

This chapter will focus on the concept of Liner Conferences and the special status these conferences are enjoying under Community law. I will not present maritime transport, in the field of Community competition law, as a whole.

Do the competition provisions in Articles 81-86 apply to maritime transport? While Regulation 17/62 implemented articles 81 and 82 of the Treaty, Regulation 141/62 disapplied Regulation 17/62 in relation to transport.<sup>203</sup> This could have led to serious confusion. The issue was briefly touched on earlier in this essay, where it is stated that the *French seamen case* where the Court held that sea and air transport, even though excluded from the provisions of Title V of the Treaty, the common transport policy, it is subject, to the same extent as other modes of transport, the general rules, including the competition rules (*Nouvelles Frontières*), of the Treaty. However no secondary legislation was approved prior to 1986 when Council Regulation 4056/86, applying to "international transport services from one or more Community ports, other than tramp vessel services", was adopted.<sup>204</sup> By this time Regulation 17/62 had been in operation over three decades. The competition rules of the Treaty include Article 81.3, the block exemption rule – crucial to the upcoming feature of Liner Conferences.

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<sup>199</sup> Communication title – "A Future for the Community shipping Industry: measures to improve the operating conditions of Community shipping" COM(89) 266 final.

<sup>200</sup> Bull and Stemshaug (eds.): Rosa Greaves, EC's Maritime Transport Policy: a Retrospective View, p. 30.

<sup>201</sup> Council Regulation 3577/92 OJ 1992 L364/7, applying the principle of freedom to provide services to maritime transport between Member States (cabotage).

<sup>202</sup> Bull and Stemshaug (eds.): Rosa Greaves, EC's Maritime Transport Policy: a Retrospective View, p. 28-31.

<sup>203</sup> Power, p. 316.

<sup>204</sup> Bull and Stemshaug (eds.): Helge Stemshaug, Maritime Transport and Antitrust in the EC and US, p. 93.

### 6.3.1 EC Law and the UN liner Code

Considering the amount of space dedicated the UNCTAD Code in the preceding aside, it is vital to investigate from a Community point of view as well. There was no representation at the Conference from the Commission, other than an observing role, as the Community Member States were not united in their approach to the Code. Some states voted in favour<sup>205</sup>, a few against<sup>206</sup>, others abstained<sup>207</sup> and two states did not attend.

Some elements of the Code were not compatible with EC law, especially the EC law principles of non-discrimination on the basis of nationality<sup>208</sup>, freedom of establishment in another Member State<sup>209</sup>, freedom to provide services to persons in other Member States<sup>210</sup> and the general rules on EC competition law.<sup>211</sup> Regulation 954/79 attended two needs: the harmonisation of the position of the Member States in relation to the Code, as well as establishing common reservations to uncomfortable Code provisions.<sup>212</sup> The most important role of the Regulation, it must be stated, was to provide for Member states to ratify or accede to the Code, and for the Code to enter into force the important tonnage countries were needed as Contracting States and thus trigger the entry of the UNCTAD Code.<sup>213</sup> The main mission of the Regulation was for the EC to decide that the 40:40:20 cargo sharing formula was inapplicable, at least, in the relations between Member States.

### 6.3.2 Block exemptions

Article 81.3 provides the basic provision for possibility of exemption from, under EC Competition law (Article 81.1), otherwise prohibited cartel agreements, decisions and concerted practises. Thus both individual-and block/group exemptions can be benefited from or granted.<sup>214</sup>

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<sup>205</sup> Belgium, France and Germany were supporters from an early stage. The former two say cargo opportunities together with Italy and Spain.

<sup>206</sup> Denmark and the U.K. voted against.

<sup>207</sup> Italy and the Netherlands later acceded to the Code.

<sup>208</sup> Article 12 of the Treaty.

<sup>209</sup> Article Articles 43-48 of the Treaty.

<sup>210</sup> Article 51 of the Treaty.

<sup>211</sup> Articles 81-87 of the Treaty. See Power p. 309.

<sup>212</sup> Clough and Randolph, p. 17.

<sup>213</sup> Remember Article 49 of the Code, which provides that, the Code only would come into force six months following the accession of no less that 24 States with a combined world tonnage of at least 25 percent.

<sup>214</sup> Bull and Stemshaug (eds.): Helge Stemshaug, Maritime Transport and Antitrust in the EC and US, p.129.



To benefit from a block exemption two alternative solutions exist: first through a Council Regulation based on Article 83, under which the Council acts upon a Commission proposal and adopt a suitable regulation, or, the Council adopt, on the basis of Article 83, an implementing regulation, by which it is granting itself a block exemption for certain categories of agreements. In liner shipping there exist to date only two block exemption regulations: the liner conference block exemption, an implementing Council regulation, and the consortia block exemption, a Commission regulation based on an enabling Council regulation. The remainder of this modest essay will mainly focus on the phenomenon of liner conferences.<sup>215</sup>

### 6.3.3 Liner conferences

The first successful conference was the Calcutta Conference.<sup>216</sup> The conference contained the crucial characteristics of owner cartels, price fixing and market sharing. The British shippers initialised the system, and, given that the British fleet was the dominant maritime power, it rapidly grew into an international practice. In less than a decade conferences covered all maritime routes of the world. Signs of dissent were slowly detected on both sides of the Atlantic and in the beginning of the 20<sup>th</sup> century measures were taken. The United States embraced a regulatory approach adopting their first Shipping Act in 1916<sup>217</sup>, which was not succeeded until the Shipping Act of 1984<sup>218</sup>, the latter with a more tolerant scheme towards shipping cartels. The U.K. preferred the lenient approach permitting conferences to exercise their schemes without public interference. This was generally the case in Western Europe, where conferences even were encouraged and excluded from the application of competition law. In the 1960's developing countries started to criticise the conferences claiming them to be remains of the colonial past, which undermined their emerging fleets. This fact led to the adoption of UNCTAD's Code of Conduct for Liner Conferences in 1974.<sup>219</sup>

The EC attitude towards the UNCTAD Code differed. The Commission was at first critical threatening to bring the Member States, which had signed it before the

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<sup>215</sup> Bull and Stemshaug (eds.): Helge Stemshaug, *Maritime Transport and Antitrust in the EC and US*, p.130.

<sup>216</sup> Blanco and Van Houtte, p. 104. The conference gathered steamer owners, on the route between U.K. and Calcutta, who customised a common tariff with harmonised rates in 1875 and a binding system of delayed refunds for shippers in 1877.

<sup>217</sup> Shipping Act of 1916, 46 USC 801.

<sup>218</sup> Shipping Act of 1984 46 USC app. 1701.

<sup>219</sup> Blanco and Van Houtte, p. 104. UNCTAD's Code of Conduct for Liner Conferences introduced the cargo sharing formula of 40:40:20. This formula is found in Article 2.4 of the Code, meaning in practice that 80% of the cargo carried by a conference is due for its national countries at each end of a route, while the remaining 20% ends up in third country conference lines ('cross traders'), while it originally was intended as a tool to develop the merchant fleets of poorer nations (p.104, note 11).

Court under Article 226 because of the incompatibility of certain provisions of the Code with the Treaty. The issue was solved with the adoption of Council Regulation 954/79, the Brussels Package, which aimed at settling this contradictory relation, enabling the Code entering into force within the Community 1983, nine years after its inauguration. Was it possible to merge the cartel-friendly Code with the restrictive competition law set out in Article 81 of the Treaty? The last recital of Regulation 954/79 provided the answer, whereby both recognizing the stabilizing role of conferences as a provider of consistent commerce - a tacit block exemption, but then again also mentioned is a proposal for a regulation on the implementation of articles 81 and 82 to maritime transport - thereby making infringements of these provisions liable for penalties. The result was to be the famous Regulation 4056/86, whose negotiation stretched over five years beginning in 1981<sup>220</sup> seven years after the *French Seamen* judgement and adoption of the Code 1974. It took, however, the pressure of the Parliament to push the Council<sup>221</sup> to adopt the regulation.<sup>222</sup>

### 6.3.4 Council Regulation no. 4056/86

Liner conferences have existed in Western Europe since 1875, thus during 125 years, 82 years longer than the Community. Their traditional practice of systematic distortion of competition is given authorisation through Regulation 4056/86, thereby repeating the design laid down in Regulation 1017/68<sup>223</sup>. The role of Regulation 4056/86 is not merely the one as the instrument of Articles 81 and 82 in the transport sector, but in particular as a pillar of the maritime transport policy. It was probably clear already in 1979, during the preparatory work, that the regulation in no way was to be an instrument for the promotion of free competition, but a formalisation of the Community acceptance of the 'status quo', i.e. conference schemes, in international and Community maritime transport.<sup>224</sup>

The main content of Regulation 4056/86 is the block exemption in favour of specific agreements of liner conferences, the main objective of adopting the regulation. On proposal of the Commission the Council grant an exemption, lined out in a remarkably brief fashion, lacking the detailed lists of 'black' and 'white' clauses typical for earlier Commission exemption regulations. The reason hereto may be that, as opposed to Commission practice, no previous experience in the individual application of Article 81.3 to conferences could be relied on. I will now

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<sup>220</sup> The draft document can be traced to Document COM (81) 423 final, of 13 Oct. 1981, and OJ 1981 C 282, p.4.

<sup>221</sup> Case 13/83 *Parliament v. Council*.

<sup>222</sup> Blanco and Van Houtte, p. 105-106.

<sup>223</sup> Council Regulation (EEC) 1017/68 of July 1968 OJ 1968 L175. This regulation, as well as Regulation 4056/86, deals with both application and exemption at the same time. The substantive elements of the latter are far more numerous and economically important. (Blanco and Van Houtte, p. 106).

<sup>224</sup> Blanco and Van Houtte, p. 103.

further analyse Regulation 4056/86, issue-by-issue - provision-by-provision, starting with a definition of Liner conferences.

#### **6.3.4.1 Legal basis and effect of Regulation 4056/86**

The Regulation was adopted on the basis of Articles 80.2, providing that the Council of Ministers may, acting by a majority, decide whether, to what extent and by what procedure appropriate provisions may be laid down for sea and air transport, and 83 of the Treaty.<sup>225</sup> The importance of legal basis for substantive Community legislation had been established in numerous cases before the ECJ. This includes the difference in voting procedure between Article 83 - majority vote - and Article 80(2) – unanimity vote. The differences of views between the Commission, whose original proposal in 1981 was to be adopted solely upon the basis of Article 83, and the Parliament, who opposed this adoption together with the Economic and Social Committee (ECOSOC), has also affected the adoption. Despite accepting the Brussels package and its endorsing approach to the UNCTAD Code, the Commission attempted to introduce provisions preventing conferences from breaching competition rules. The Commission aimed at, through the Regulation, “amplify or clarify a number of points (of the Code) through Community rules”, not “simply reaffirm the principles” thereof.<sup>226</sup> But the Parliament insisted that there should be the “greatest possible concordance between the UN Code and the Regulation with respect to the rules of competition laid down in the Treaty”.<sup>227</sup> Thus, the rare “dual basis” adoption was a fact.

Article 27 of the Regulation provides that it is binding in its entirety and directly applicable to all Member States. Thus no need for national implementation was needed. Regulation 4056/86 gave the Commission the means of implementing Articles 81 and 82 to maritime transport.

#### **6.3.4.2 Scope and a definition**

In accordance with Article 1.2 Regulation 4056/86 “shall apply only to international maritime transport services from or to one or more Community ports, other than tramp vessels services”. Thus, neither cabotage traffic or tramp vessel services are able to be exempt under this regulation.

Liner Conferences are, as defined in Article 1.3(b) of Council Regulation 4056/86,

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<sup>225</sup> Council Regulation 4056/86, Preamble, first paragraph.

<sup>226</sup> Eleventh Competition Report (1981), para 6, p 21.

<sup>227</sup> European Parliament Resolution on the proposal from the EC Commission to the EC Council for a Regulation laying down detailed rules for the application of Articles 81 and 82 of the Treaty to maritime transport, OJ C172 2.7.84, p. 178, at paras 2 and 4.

“a group of two or more vessel-operating carriers which provide international liner services for the carriage of cargo on a particular route or routes within specified geographical limits and which has an agreement or arrangement, whatever its nature, within the framework of which they operate under uniform or common freight rates and any other agreed conditions with respect to the provision of liner services”.<sup>228</sup>

The definition follows the one set out in the UNCTAD Code.<sup>229</sup> The reference in the definition to ‘a group of two or more vessel-operating carriers’<sup>230</sup>, infer the first limitation, through which agreements between carriers who do not operate vessels, although subject to the regulation, are not qualified for an exemption.

The wording ‘International liner services’, excludes both restrictive agreements in non-liner shipping and specialised neo-bulk transport, and cabotage conferences. Also excluded, even though included in the 1981 draft regulation, are restrictive agreements between passenger shipping companies. Consortia and joint ventures are not included.

The requirement ‘on a particular route or routes within specified geographical limits’, is not specified in the regulation, but conference shipping companies are not free to select routes since the monopolistic character of the conferences curb each company into its own niche.

The conference members also have to operate ‘under uniform or common freight rates and any other agreed conditions with respect to the provision of liner services’. To understand the meaning of uniform or common freight rates one has to turn to the UNCTAD Code, whose Article 13 clarify that rates have to be non-discriminatory and unique for each product. The Commission has therefore interpreted that rates have to be the same irrespective of the offeree operating outside (uniform rates) or within (common rates) the conference. Therefore, as the Commission has found<sup>231</sup>, a conference, with differential rates and agreements between conferences and outsiders, cannot receive the benefit of Article 3 exemption.

We can therefore conclude liner conferences to be bodies or associations which coordinate the operation of regular shipping services for the carriage of general cargo on set routes with fixed schedules and tariffs. These conferences standardise or harmonise the uniform freight rates, sailings et cetera of the members of the conference. Conferences furthermore, as widely discussed earlier in the essay, utilise a monopolistic structure of powers for their operation,

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<sup>228</sup> Council Regulation 4058/86 OJ L378/21, Article 1.3(b).

<sup>229</sup> Convention on a Code of Conduct for Liner Conferences (the UNCTAD Code).

<sup>230</sup> So called ‘Non-Vessel-Operating Carriers’ (NVOCs).

<sup>231</sup> Commission decision, Trans-Atlantic Agreement (TAA) OJ 1994 L 376, 1.

preferably: restricted membership; cargo sharing and pooling; loyalty agreements; and agreements on a common tariff and general conditions.<sup>232</sup>

#### **6.3.4.3 Technical agreements**

Article 2.1 of the Regulation provides an exemption under Article 81.3 of the Treaty for certain types of agreements, decisions and concerted practices, if they do not, as a general rule, restrict competition, and their sole object and effect is to achieve technical improvements or cooperation. These goals can be achieved by; (a) the introduction of uniform application of standards or types of vessels and other means of transport, equipment, supplies or fixed installation; or (b) the pooling for the purpose of operation transport services, of vessels, space on vessels or slots or other means of transport, staff, equipment or fixed installations; moreover (c) the organisation and execution of successive or supplementary maritime transport operations and the establishment and application of inclusive rates and conditions for such operations; (d) the coordination of transport timetables for connecting routes; (e) the bulking of individual consignments; and finally (f) the establishment or application of uniform rules concerning the structure and the conditions governing the application of transport on condition that such rules do not directly or indirectly fix rates and conditions of carriage.<sup>233</sup> A classic example of a white list, similar to that contained in comparable air transport measures.<sup>234</sup> It must be stressed that the sole object and effect must be to conclude a technical agreement. Any other motive will inactivate the exemption. Article 2.2 impose upon the Commission, if necessary, to submit proposals of amendment of the list to the Council.

#### **6.3.4.4 The conference block exemption**

Article 3 is the principal provision of Council Regulation 4056/86 as the giver of life to liner conferences, as well as being the second test. This provision provided the long awaited legal security as regards the application of the Treaty's competition rules to maritime transport.<sup>235</sup> Liner conferences, meeting the criteria in the definition of Article 1.3(b), qualify for exemption under Article 3 of the Regulation. It is stated that 'agreements, decisions and concerted practices of all or part of members of one or more liner conferences' are exempted from the application of Article 81.1 of the Treaty. The exemption may be withdrawn under certain circumstances, but is otherwise for an unlimited period of time. Furthermore, the exemption is not complete since conditions (Article 4) and obligations (Article 5) are imposed.

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<sup>232</sup> Report of ECOSOC's Section for Transport and Communications on the Proposal for a Council Regulation 4056/86... (CES) 211/82.

<sup>233</sup> A similar list of exception can be found in Article 3 of Council Regulation 1017/68.

<sup>234</sup> Power, p. 326.

<sup>235</sup> Ibid, p. 328.

Liner Conferences and agreements are exempted when they have as their objective the fixing of rates and conditions of carriage of goods and, as may well be, one or more of the objectives as stated under Article 3(a)-(e). Following one or more of these objectives: (a) the co-ordination of shipping timetables, sailing dates or dates of calls; (b) the determination of the frequency of sailings or calls; (c) the co-ordination or allocation of sailings or calls among members of the conference; (d) the regulation of the carrying capacity offered by each member; (e) the allocation of cargo or revenue among members.<sup>236</sup> Thus, the main characteristic of the liner conference block exemption is that the members of liner conferences fix rates.<sup>237</sup>

#### **6.3.4.5 The non-discrimination condition**

Article 4 of Council Regulation 4056/86 require a conference agreement, enjoying exemption pursuant to Article 3, not to, ‘...within the common market, cause detriment to certain ports, transport users or carriers by applying for the carriage of the same goods and in the area covered by the agreement, decision or concerted practice, rates and conditions of carriage which differ according to the country of origin or destination or port of loading or discharge...’ There is a contradiction in the apparent aim, to require non-discrimination for purposes of tariffs. Situations of discrimination appear when like is treated differently and unlike is treated equally. The regulation can thus consider non-discriminatory that which normally would be considered discriminatory, i.e. requiring different ports to be treated equally. An important reservation is invoked meaning that ‘unless such rates or conditions can be economically justified.’ The result thereof is that the condition no longer is automatically activated.<sup>238</sup>

The consequence of defying the provision is automatic nullity, as a whole, or if severable in part, according to Article 81.2 of the Treaty. The importance of Article 4 is apparent considering that the agreement could be automatically void. The condition ‘detriment’ has been criticised since the criteria for the application are left out. The level of detriment necessary to trigger activation is not defined neither are ‘rates and conditions of carriage’ or ‘economically justifiable’ – possible subjects of considerable debate.<sup>239</sup>

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<sup>236</sup> Article 3(a)-(e) of Council Regulation 4056/86.

<sup>237</sup> Bull and Stemshaug (eds.): Helmut W.R. Kreis, *Liner Services: The Block Exemptions and Inter-modal Transport*, p.131.

<sup>238</sup> Blanco and Van Houtte, p.120.

<sup>239</sup> Power, p. 331.

#### **6.3.4.6 Obligations attached to the exemption**

Article 5 of Council Regulation 4056/86 constitute a number of obligations that shall be attached to an exemption:

- consultations between transport users and conferences to seek solutions concerning rates, conditions and quality of liner services;
- conference members shall be able to conclude and maintain loyalty arrangements with transport users;
- transport users shall be entitled to utilize undertakings of their free choice in respect of inland transport-and port services not covered by the freight charges;
- tariffs, related conditions and regulations of the conferences shall be made available to transport users; and
- awards given at arbitration and recommendations made by conciliators shall be notified to the Commission.

These five obligations form part of the requirements to maintain an exemption once the shipowners have fulfilled and agreed to abide the conditions for obtaining it. Defiance is not immediately hazardous since the Commission must adopt an act denying the liner conference the benefit before withdrawal. The last three are common in nature, requiring the conferences to exercise certain activities. The first two imply restrictive practices that are exempt from the prohibition in Article 81.1 of the Treaty by virtue of Article 6 of the regulation.<sup>240</sup> Article 6 states that agreements between transport users and conferences and agreements between transport users which may be necessary to that end, are also block exempted if they concern rates, conditions and quality of liner services as long as they are the subject of consultations and loyal agreements. This exemption is also governed by the non-discrimination condition set out in Article 4 of the regulation.<sup>241</sup> Article 19.2(b) enable the Commission is in all cases authorized to impose fines on shipping companies who default in their obligations.

#### **6.3.4.7 Monitoring of exempted agreements<sup>242</sup>**

The conference block exemption is subject to monitoring. Monitoring is an exercise where observation of an agreement, and the behaviour of the parties thereof, can come in question. The provision governing this aspect of the liner conference regulation is found in Article 7 of Council Regulation 4056/86.

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<sup>240</sup> Blanco and Van Houtte, p.122.

<sup>241</sup> Bull and Stemshaug (eds.): Helmut W.R. Kreis, Liner Services: The Block Exemptions and Inter-modal Transport, p.132.

<sup>242</sup> Section based on: Bull and Stemshaug (eds.): Helmut W.R. Kreis, Liner Services: The Block Exemptions and Inter-modal Transport, p.132-135.

Monitoring takes place in the following two cases: breach of an obligation and where the effects of an exemption are incompatible with Article 81.3 of the Treaty. Only the latter is of practical importance. Article 7 gives the Commission the sole power to monitor an exempted agreement. If the practices are found incompatible with the mentioned provisions the Commission can take appropriate measures under Article 7.2(c). The gravity of the measures must be in proportion to the gravity of the situation. Naturally the principle of proportionality applies here as everywhere else in Community law. Certain special circumstances can trigger monitoring, such as:

- acts of conferences whose outcome is absence of actual or potential competition;
- acts of conferences which may prevent technical or economical progress;
- acts of third countries which prevent the operation of outsiders in a trade or which impose unfair tariffs on conferences (cargo-sharing, limitations on type of vessels).

If these circumstances result in the absence or elimination of actual or potential competition contrary to article 81.3(b) the Commission shall withdraw the exemption, but at the same time investigate whether an individual exemption under Article 7.1(c) can come in question. The fundamental concept behind the rules was the increasing trend to exclude non-conference competition from trades in which the so-called closed conferences, those who practise under the rules of the UN Code of Conduct for Liner Conferences. According to Article 19.2(a) the Commission is in all cases authorized to impose fines on shipping companies who default in their obligations while Article 20.1(a) provides the right to impose periodic fines.

#### **6.3.4.8 Effects incompatible with the Art 82 of the Treaty**

The provision in the regulation for application of Article 82<sup>243</sup> of the Treaty is found in Article 8 of Council Regulation 4056/86, where it is stated that ‘the abuse of a dominant position within the meaning of Article 82 shall be prohibited, no prior decision to that effect is required.’ Where the Commission, either by its own initiative or following a request by a Member State, finds the conduct of a

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<sup>243</sup> Article 82 of the Treaty prohibits certain types of abuse of a dominant position as incompatible with the Common Market, by one or more undertakings holding such a dominant position within the Common Market or in a substantial part of it, insofar as such abuse affects trade between the Member States. What the different criterion of this definition essentially represent subject matter for another essay, but also part of the rich praxis of the ECJ.



conference benefiting from a block exemption being incompatible with Article 82 it may withdraw the benefits and take other measures to stop the infringement. The Commission may thus withdraw the benefit of an exemption and take, pursuant to Article 10, appropriate measures to bring to an end the infringements of Article 82, however, before taking a decision from the above said the Commission may address the conference concerned with recommendations for termination of the infringement.<sup>244</sup>

Determination of a dominant position, in the maritime sector, depends on many factors including the level of services and not only upon percentages of the trade shared between the conference and the outsiders. Each given trade must be examined and there is no established answer depending only on the percentage.<sup>245</sup> In order to solve this issue a traditional analysis of the market must be made. A market definition must be established, in long-haulage defined by the Commission by studying the substantiality between different types of transport on the same routes and similar technical attributes offered on different maritime routes – both a technical and a geographical analysis.<sup>246</sup> The next step in the analysis under Article 82 is to assess the existence of a dominant position, a work similar to that of assessing other industries, basically relating to market structure, the structure and operation and their conduct on the market.<sup>247</sup> In relation to market structure market share and potential competition is very important. A large share is crucial but not necessarily sufficient to examine whether dominance exist.<sup>248</sup> Potential competition, as indicated by the Commission, is effective only when it imposes a direct and certain threat, at least credible.<sup>249</sup>

#### **6.3.4.9 Conflicts of international law**

The liner conferences are not only a question for Community legislation. The reader cannot possibly have escaped this fact while travelling through the previous chapters of this essay. Conflicts of international law are conflicts with the laws of third states. The conferences have members from every continent and are therefore also an object to international law and a variety of national laws. Laws of conflict can be very important components in areas of both Community and international importance and interest. Article 9 of Council Regulation 4056/86 seeks to establish an internal and international institutional procedure to consult and negotiate with third countries. Paragraph 1 provides that where the application of the Regulation to certain restrictive practices or clauses is liable to

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<sup>244</sup> Power, p. 338.

<sup>245</sup> Savopoulou and Tzoannos, p. 187.

<sup>246</sup> Blanco and Van Houtte, p.135-136.

<sup>247</sup> Ibid, p.136.

<sup>248</sup> As stated in Case 85/76 *Hoffmann-Laroche v. Commission* [1979] ECR 461, a monopolist is, by definition, dominant.

<sup>249</sup> Blanco and Van Houtte, p.136.

create a conflict with the provisions laid down by law, regulation or administrative action of certain third countries<sup>250</sup> which would compromise important Community trading and shipping interests the Commission shall consult the relevant authority of this third country, merging its interest with the Community interests. Two steps exist: the consultation stage and an optional step of negotiation. This procedure has never been used to its full consequence, but the Commission has had contact with the US Federal Maritime Commission.<sup>251</sup>

## **6.4 APPLICATION OF COUNCIL REGULATION 4056/86**

Unlike the other regulations originating from the 1986 package<sup>252</sup> regulation 4056/86 had been applied on several occasions. The Commission has dealt with a number of cases concerning liner shipping, potential breaches of Articles 81 and 82 of the Treaty and the question whether these breaches can become subjects to the exemption in the regulation or not. The Commission has in these cases interpreted the text and meaning of the Regulation very restrictive and has therefore had problems giving the current liner conferences an exemption and has, on occasions, imposed fines.

The *French-West African Shipowners' Committees*<sup>253</sup> was the first case in which fines were imposed for substantive breaches of Articles 81 and 82 in the shipping sector. The Commission found that not only article 81 was infringed but also Article 82. The extremely interesting cases *Cewal, Cowac and UKWAL*<sup>254</sup>, where fines were imposed for abusing their joint dominance by offering loyalty rebates as a means to eliminate competition. The Commission decision, appealed to the Court of First Instance (CFI)<sup>255</sup>, as *Compagnie Maritime Belge v. Commission* later found its way to the ECJ<sup>256</sup> and will be examined in the following. So will the Trans Atlantic Agreement (TAA) and Trans Atlantic Conference Agreement (TACA) decisions.

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<sup>250</sup> Blanco and Van Houtte, p.139, Article 9 was drafted with USA in mind.

<sup>251</sup> American Shipper (Magazine), January 1990, p. 14 and onwards (cited in Power, p. 340).

<sup>252</sup> Blanco and Van Houtte, p.140, Regulations 4057/86 and 4058/86 have been applied only one time each while regulation 4055/86 has been utilized six times.

<sup>253</sup> *French-West African Shipowners' Committees*, OJ 1992 L134/1, 18.5.1992 - IP/92/242.

<sup>254</sup> *Cewal, Cowac and 479/92 UKWAL*, OJ 55/3 29.2.92 – IP/92/1110.

<sup>255</sup> Joined Cases T-24/93 to T26/93 and T28/93, *Compagnie Maritime Belge Transports SA and Others v. Commission* [1996] ECR II-1201.

<sup>256</sup> Joined Cases C395/96 and C-396/96P, *Compagnie Maritime Belge and others v. Commission*.

### 6.4.1 French West-African Shipowners' Association

Already in 1992 the Commission adopted the above mentioned negative decision within the ambit of shipping trade between France and West Africa.<sup>257</sup> Sir Leon Brittan, responsible Commissioner of Competition at the time stated that the “case was an important breakthrough for competition policy in the sea transport sector”, in general it sent out a message to ensure compliance, by operators, of the Community’s competition rules.<sup>258</sup> The Commission found that the shipowners’ committees set up in respect of trades between France and 11 West African and Central African countries constituted agreements contrary to Article 81 whilst their practices were in breach of Article 82 (both provisions of the Treaty). The concrete infringements were the attempted cartel formation of the whole of the trade, whereby hindering outsider entry and eliminating effective competition. It was found to be a major breach and fines of ECU 15,000,000 were imposed on the major players.<sup>259</sup>

### 6.4.2 CEWAL<sup>260</sup>

An extensive legal saga started following a complaint raised by the Danish Shipowners’ Association, the Danish Government and AIWASI against anticompetitive practices by shipping conferences operating in the shipping trade with West Africa. Eleven shipowners’ committees and four liner conferences (CEWAL, MEWAC, COWAC and UKWAL), and, the Commission found in its proceeding that Articles 85 and 86 of the Treaty imposing heavy fines in relation to the CEWAL shipping conference, where Compagnie Maritime Belge was the dominating line, two lines owned by CMB and Nedlloyd. The fines imposed on CEWAL and CMB amounted to ECU 20,000,000.

In its decision the Commission defined the relevant market as the market for services supplied by liner vessels for the transport of general cargo principally between ports of Europe and those of the Democratic Republic of Congo, where the members of the CEWAL conference had a market share of seventy percent. In its Statement of Objections the Commission first claimed: (1) claimed that CEWAL, COWAC and UKWAL had infringed Article 81.1 by entering a non-competition agreement, (2) the members of CEWAL had abused their joint dominant position in three modes: (a), by participating in the implementation of the

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<sup>257</sup> Commission Decision 92/262/EEC, *French West-African Shipowners’ Committees*, OJ 1992, L134/1, 18.5.1992 – IP/92/242.

<sup>258</sup> Commission Report on Community Competition Law in the Transport Sector – Recent Landmarks 1991-1997, 27 October 1997 (Press Release: 1992-04-01), p. 29.

<sup>259</sup> Recent Landmarks 1991-1997, p. 30.

<sup>260</sup> Commission Decision 93/82/EEC, *CEWAL Liner Conference*, OJ L 34, 10.2.1993 – IP/92/1110.

‘Ogefrem’<sup>261</sup> cooperation agreement, concluded between Ogefrem and CEWAL, under which all cargo on this route would be carried by the latter’s members; (b), the application, by members of CEWAL, of the fighting ships<sup>262</sup> method where the shortfall was borne equally by all members; (c), the application the imposition by CEWAL members of 100 percent loyalty agreements reaching beyond the exemption under Article 5.2 of Regulation 4056/86, with black lists of disloyal shippers attached - leading to dissimilar conditions to equivalent transactions with trading partners.

### 6.4.3 Trans-Atlantic Agreement

The ‘*Trans-Atlantic Agreement*’ was notified on 28 August 1992 for individual exemption under Article 81.3. The TAA is an agreement between fifteen liner shipping operators who provide transatlantic liner shipping services representing an eighty percent market share between Northern Europe and the USA. The TAA includes rules on establishing freight rates, service contracts and capacity management.

The Commission decision<sup>263</sup> of 19 October refused exemption on the grounds that the agreement infringed Article 81.1 and unqualified for an exemption under Article 81.3. The Commission also held that an agreement or liner conference that established at least two rates levels or provides for the non-utilisation of capacity falls outside Article 3 of Regulation 4056/86.

In December 1994 the shipowners of TAA appealed to the CFI<sup>264</sup> was successful in having the decision partially annulled by the CFI<sup>265</sup> on March 5 1995, and the ECJ<sup>266</sup> confirmed the suspension. The CFI held that the decision had failed to assess the impact of the agreement on inland, through multimodal<sup>267</sup> rates, as part of the market for maritime services, but also to show how the inland rates affected the trade between Member States.<sup>268</sup>

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<sup>261</sup> L’Office Zairois de Gestion de Fret Maritime.

<sup>262</sup> Whereby the conference modify the freight rates in parity or lower than the ones of independent competitors with the aim of eliminating the same.

<sup>263</sup> Commission Decision 94/980/EC, *Trans-Atlantic Agreement*, OJ 1994 L 376, 31.12.1994 - IP/94/956, p 1.

<sup>264</sup> Case T-395/94, *Atlantic Container Line and Others v. Commission*.

<sup>265</sup> Case T-395/94R, *Atlantic Container Line Ltd AB v. Commission*, [1970] ECR II-595.

<sup>266</sup> Case C-149/95P, *Commission v. Comité de Liason Européen des Commissionnaires at Auxiliaires de Transport du Marché Commun* (CLECAT).

<sup>267</sup> Multimodal transport refers to transport in which various modes of transport are connected, e.g. maritime and inland transport (in North American terminology – intermodal transport), Blanco and Van Houtte, p. 13n.

<sup>268</sup> Power, p. 360.

#### **6.4.4 Far Eastern Freight Conference<sup>269</sup>**

The Far Eastern Freight Conference (FEFC) has members on the liner trade between Europe and the Far East. On December 21 1994 the Commission prohibited the conference from fixing multimodal freight rates on the European land portions for containerised cargo. According to the Commission such activities do not qualify for group exemption benefited by liner conferences. Furthermore, the practice did not fulfil the criteria of Article 81.3 of the Treaty. Symbolic fines of ECU 10,000 were imposed to mark the offence and provide for future compliance with the competition rules.<sup>270</sup>

On 28 April 1989, the Commission received a complaint from the German Shippers' Council (DSVK), concerning certain price fixing activities of the members of the FEFC relating to multimodal transport. The group exemption for liner conferences, contained in Regulation 4056/86 permits price fixing for sea transport services. The DSVK complained that members of the FEFC agreed between themselves prices not only for sea transport but also for the other elements of a multimodal transport service, including inland transport services. The Commission concluded that it was difficult to receive an exemption widening the scope of Article 3 of Regulation 4056/86 outside the scope of the Regulation itself.<sup>271</sup> On 7 April 1995 the FEFC applied for suspension of the decision in the CFI. The price agreement, it was furthermore concluded, did not as such improve multimodal transport, and the users did not benefit from the agreement, which in no way was indispensable for the maintenance of such services.<sup>272</sup>

#### **6.4.5 Trans-Atlantic Conference Agreement**

The TACA is a revised version of the TAA, a supplementary submitted to the Commission seeking an exemption under Article 81.3 of the Treaty. Amongst other restrictions of competition the TACA contains price agreement relating to inland transport services supplied within the territory of the Member States to shippers as a part of multimodal transport operation for the carriage of containerised cargo. The like of agreement was prohibited already in the TAA decision and in the following FEFC Decision. The Commission issued warning to the sixteen maritime companies if matters remained unaltered.

In principle when parties notify their agreements to the Commission they obtain immunity from fines. In November 1996 the Commission adopted a Statement of Objections lifting the immunity from fines in respect of inland rate fixing on behalf

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<sup>269</sup> Commission Decision 94/985/EC, The Far Eastern Freight Conference, OJ 1994 L378/17 - IP/94/1260.

<sup>270</sup> Recent Landmarks 1991-1997, p. 42.

<sup>271</sup> Commission Decision 94/985/EC, at para. 75.

<sup>272</sup> Ibid, at paras 115-118 and 119-139.

of the TACA parties.<sup>273</sup> Naturally the TACA parties lodged for a suspension of this decision to the CFI who dismissed the application. Finally, on 16 September 1998, the Commission issued a decision in which the by TACA notified agreement was concluded to constitute an infringement of both Articles 81 and 82 of the Treaty. The Commission used the same arguments as in the TAA and FEFC decisions. Fines of EURO 13,500,000 were imposed on the parties of TACA, who again sought relief at the CFI<sup>274</sup> and a pending case at the ECJ.<sup>275</sup> Furthermore, the parties also sought interim relief, unsuccessfully, from the fines awaiting the ruling of the ECJ<sup>276</sup>, not surprisingly in vain. – a complicated case travelling through a complex system.

#### 6.4.6 Compagnie Maritime Belge

The CEWAL decision was brought on appeal before the CFI and later also before the ECJ, the first opportunity of the Court to pronounce itself on anti-competitive behaviour by liner conferences. It furthermore clarified the requirements for collective dominance, and it serves as prevention against liner conferences considering their abuse of the benefits given to them through Regulation 4056/86. The parties appealed to the CFI<sup>277</sup>, which reduced the fines but otherwise sympathised with the Commission's findings, thus dismissing the applicants.

Advocate General Fennelly delivered an Opinion on 29 October 1998 whereby it was stated that the CFI correctly had applied the two-fold test of collective dominance as well as making the right assessment regarding the other abuses (Ogefrem agreement, fighting ship and loyalty rebates). The entirety of the fines imposed, however, should, according to Fennelly, be quashed. The Commission had imposed fines on the members of CEWAL individually since it assumed that CEWAL itself lacked legal personality, but according to Article 19.2 of Regulation 4056/86 fines could be imposed on 'associations of undertakings', which CEWAL must be regarded as.

The ECJ agreed with Fennelly in that the implemented agreement enabled the conduct of the members of the conference to be assessed collectively. The members were so linked that their conduct on the market presented them as a collective entity to their trading partners and consumers.<sup>278</sup> As regards the other abuses the ECJ referred to dominant undertakings special responsibility not to

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<sup>273</sup> Commission Decision C (96) 3414 final of 26 November 1996 – IP/96/1096.

<sup>274</sup> Case T-191/98 *Atlantic Container Lines and Others v. Commission*, on 1 March 1999.

<sup>275</sup> Case C-364/99 P(R).

<sup>276</sup> Case C-361/00 P(R).

<sup>277</sup> Joined Cases T-24/93 to T26/93 and T28/93, *Compagnie Maritime Belge Transports SA and Others v. Commission* [1996] ECR II-1201.

<sup>278</sup> At para, 44 of the Judgement.

allow their conduct to impair genuine competition<sup>279</sup> and that the Ogefrem agreement had such effect. Also fighting ships constituted an infringement of Article 82, thus the applicants argument that fighting ships were a mere reaction to competition and not selective price cutting, in the meaning the ECJ delivered in the AKZO case<sup>280</sup>, and the ECJ pointed out that it was settled case law that the enumeration in Article 82 cannot be considered exhaustive.<sup>281</sup> Moreover, the fact that the conference held a seventy percent relevant market share and the appellants had admitted that the purpose of their conduct was to eliminate competition helped the ECJ to sympathise with the CFI position. The loyalty agreements, even though not insisted on, were held to be abusive, since the CEWAL market share made it an unavoidable trading partner, and more, the fact that the practice is authorised (in this case exempted under Article 5.2 of Regulation 4056/86) does not mean that the conduct can never constitute an abuse of the dominant position.<sup>282</sup> In respect of the fines imposed, challenged by appellants as err in law by both the Commission imposing and the CFI for confirming, the ECJ pointed out that it is established case law that since the essential safeguard of a fair hearing is the Statement of Objections this must set out all points on which the Commissions case rests.<sup>283</sup> The Commission failed to notify the members of CEWAL of their exposure of the fines, thus infringing the right of a fair hearing; consequently the ECJ followed Fennelly and quashed the decision relating to fines.

The CMB case is not only of importance for the maritime transport but interesting from the competition law as a whole since the CFI and ECJ pronounced themselves explicitly on the required links, between the undertaking holding collective dominance, which must exist. An innovation is the statement of the ECJ<sup>284</sup> implying that links may be constituted by mere oligopolistic interdependence, maybe a step toward healthier control of abusive conduct by oligopolies. Following the annulment of the fines, what is left of the case is an important warning to liner conferences with regard to their legal position, and their benefits enjoyed under the regime of Regulation 4056/86, which should not be interpreted with the megalomaniac confidence of the past. Liner Conferences can, by their very nature, be characterised as collective entities.

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<sup>279</sup> Case 322/81, *Nederlandsche Banden-Industrie Michelin NV v. Commission*, [1983] ECR 3461, para 57.

<sup>280</sup> Case 62/86, *AKZO Chemie BV v. Commission*, [1993] 5 CMLR 215, paras 115-144.

<sup>281</sup> Case 6/72, *Europemballage and Continental Can v. Commission*, [1973] ECR 215, para 26.

<sup>282</sup> Case 85/76, *Hoffmann-La Roche*, [1979] ECR 461, para 41.

<sup>283</sup> Joined Cases 100 to 103/80, *Musique Diffusion Française and Others v. Commission*, [1983] ECR 1825, paras 10 and 14.

<sup>284</sup> Para 45 of the Judgement. See also a Commentary Note by Sigrid Stroux, p. 1260.

## 6.5 MOTIVES FOR EXEMPTION

In its Explanatory Memorandum to the original proposal the Commission stated that Article 81.2 of the Treaty permits the exemption of a category of agreements from the prohibition set out in Article 81.1, and the natural evolution, bearing in mind the considerable part conferences played in regular transport services world-wide and the establishment of the UNCTAD Code, would be to grant exemption for such agreements between shipowners as a recognition of their beneficial role.<sup>285</sup> The Commission proceeds by stating that sea transport, more than any other mode of transport, is hampered by severe fluctuations, of both business and seasonal character in demand for cargo. Furthermore, absence of regulation would lead to the instability of freight – a problematical situation for both shipowners and shippers: for the former in the lack of foresee ability and thus possibility of planning future investments; and the latter stability in freight services, stable rates, and, because of the shipowners possibility of secure investments, modern equipment for their transportation. The ECOSOC also stated that a conference block exemption primarily would be for the benefit of shipowners, but that effort must be to facilitate the entry into conferences of any national shipping company on the same conditions as existing members.<sup>286</sup> In another Memorandum<sup>287</sup> of 1985, which led to the adoption of the 1986 package including Regulation 4056/86, the Commission express its concern about the decline of the EU fleet, partly caused by unfair competition from state trading countries, i.e. protectionist policies via subsidies programmes. The shipowners were hence advised to formulate a justification of why antitrust immunity is needed for liner conferences in the present and future.

The Council, upon the adopting Regulation 954/79, considered that it is recognised that the stabilising role of conferences, by its nature, guarantees regular service to shippers, but that it is necessary to avoid possible breaches of the EC competition law by conferences. The Preamble of the Regulation set forth the purpose as being to steer a middle course between perils in dire straits: to approach undue distortion of competition within the common market by either a liberal or regular means.<sup>288</sup> The conflicting interests between shipowner and shipper are the important issue the Regulation addresses, as well as providing increased legal certainty and clarifying the relation between the involved interests.<sup>289</sup>

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<sup>285</sup> Commission Explanatory Memorandum COM(81)423 final, pp. 6-7.

<sup>286</sup> Power, p. 330.

<sup>287</sup> COM (85)90 final.

<sup>288</sup> Savopoulou and Tzoannos, p. 181.

<sup>289</sup> Power, p. 369.



## 6.6 ANALYSIS

The transport policy of the European Union followed at first a steady non-development curve and during its later stages leaps of evolutionary character. This essay has presented this progress and the maritime transport in particular. The explanation to this evolution is the composition of the Community when the Treaty entered into force in 1958 – it was a continental block, thus naturally the inland transport modes were in the centre of attention. The enlargement of the Community altered the situation, and when paramount maritime nations Great Britain and Denmark became members maritime issues attained greater attention. The relation to the other economic superpowers, United States and Japan, both giant maritime nations, made the community eager to form an alliance and protect its interests.<sup>290</sup> The mere geographical expansion of the European Union is another factor in the increased attention, when considering the distance between, for example, harbours in northern Sweden or Finland and Portugal or Spain. Moreover, the clarification of the European Court that the general rules of the Treaty were applicable to transport as a whole and, more specifically, to maritime transport and the adoption of the UNCTAD Code of Conduct for Liner Conferences in Geneva hastened and matured the Community attitude. But the most important step towards a common maritime transport policy was taken with the 1986 package and the synchronisation of differing Community views in this field of transport.

The main implications of the 1986 package were probably to strengthen the Community position in international maritime affairs, but also to appear committed in the work for an international maritime regime. At the strict Community level the creation of the single market was an important aim. However, the Commission may, in spite of expressing a desire in December 1986 to proceed into stage two of the common maritime policy, have to accept that liberalisation of the maritime markets are proceeding independent of common markets.<sup>291</sup>

Are there no critical voices of Liner Conferences then? The conference schemes are flagrant violations of the holy provisions in the early eighth decade of the Treaty. Can nothing be done even with the strong provisions and position of Community law and the executive and enforcement powers of the Commission? One answer to this lack of critical assessment can be the view of the Commission that the results of the negotiations with the Council were inescapable regarding the wishes of the Commission to obtain powers of control and sanction early on.<sup>292</sup>

The shipping industry is, due to its long history, regional habits and the weak International Maritime Organisation, problematic. Explanations to the Community measures being at all effective are their enforcement powers and available

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<sup>290</sup> Wiberg, p. 23.

<sup>291</sup> Savopoulou and Tzoannos, p. 237.

<sup>292</sup> Blanco and Van Houtte, p.257.

remedies in joint collaboration with its supremacy and direct applicability. One could say that the unexplored depths of the mighty oceans of this planet may well be used as a parallel when trying to understand the situation maritime authorities around the world have to function in and assess.

Cooperation between shipowners has intensified since the transformation to container shipping, and even more so during the last decade. The world's shipping lines are divided up under three large agreements, respectively monitoring the Europe-Asia trade, the Trans Atlantic trade and the Trans Pacific trade. Shipowners need and desire to cooperate following the development during the 1970's led to the engagement of far reaching joint service agreements – the in this essay not discussed Liner Consortia. An interesting addition in this respect is the Commission Consortia Regulation 870/95<sup>293</sup>, which assess and exempt a second category of agreements, decisions and concerted practices under the provisions in Council Regulation 497/92<sup>294</sup>. The consortia block exemption is welcomed, but complicated and lacking legal certainty, having provisions outside the scope of the Council enabling provision.<sup>295</sup> This fact may lead to the consortia regulation giving the liner conference system a renaissance rather than the terminal blow.

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<sup>293</sup> Commission Regulation 870/95 OJ 1995 L5, on the application of Article 81.3 to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia), p.3.

<sup>294</sup> Council Regulation 479/92, OJ 1995 L55, p.3.

<sup>295</sup> Bull and Stemshaug (eds.): Helmut W.R. Kreis, Liner Services: The Block Exemptions and Inter-modal Transport, p.159.

# **PART III**

## **EPILOGUE**

# 7. Conclusions

Liner conferences are of utter importance to the logistics systems involved in ocean transportation of general cargo. They have served well during 125 years as reliable freighters. Even the most passionate opponents do not question the existence of conferences. A matter of debate, however, is the different practices utilised by conferences in their operation.

## 7.1 LINER CONFERENCES IN GENERAL

A great many things can be deduced from this essay. Shipping is ancient, and upon maritime merchant activities were all the most important empires of the ancient west built. Around these activities rules of custom arose, of commercial character initially, but also, and for this essay important, public laws regulating international relations. Laws, naturally, did not emerge out of the blue – a need for regulation existed. But, however, need for regulation does not always pave way for regulation. Endless are the examples of neglecting regulatory need, as a result of both principal and economical interests. Numerous are also the examples where regulation of an area, both regarding territory and law, which impose restrictions on the opportunity of outsiders exploiting the same areas. This thesis of preferential or protectionist behaviour can also be applied on the micro level of economics, in the context of the study conducted within the frame of this essay, liner conferences. The protectionist ideals are also ancient, thus the Roman maxims of *Mare Nostrum*, *Mare Clausum* and *Dominium Maris* only named a custom haunting us still today. Protectionist schemes have been ambitiously applied by existing and emerging maritime powers throughout the history of maritime transport, and, in a way, it is rather hypocritical of existing established maritime nations to ban and condemn LDC measures to fulfil the ambitions of any maritime nation – to possess and operate in the vital transport upon water. The same hypocritical actors utilised the same behaviour in their youth.

Given that liner conferences played, and still plays, an important part in the field of shipping, and thus in world trade as a whole, they have of great interest to both major and minor actors of trade. Liner conferences have been used as a tool of protectionism. The recent trend of container shipping has even more tightened the cooperation structure of conferences into formations like consortia, but the extent of conferences being utilised as a means ambitious activities has not diminished. But now even greater formations of associations of lines and shipowners are merging, into what may be the only option for operators of survival faced with the challenge of providing regularity, stability and flexibility at a fair price. Naturally the rate is the controversial issue, both here in this study and in the everyday operation of shippers.

The observant reader has now understood the important role liner shipping hold in this global economy we all, willingly or not, habituate. Liner Conferences then, by some observers sturdily rejected while others – more moderate and realistic (maybe even cynic) – refer to the conference system as a necessary evil; a different breed of lobby group and cartel for the sake of shipowners and lines (much like the OPEC etc.) and their well being providing them the certainty to perform the part in the world trade drama.

Must the conclusion therefore be - liner conferences, an ugly duck? Liner conferences formed in the wake of industrialism, as a side effect or rationalistic catalyst thereof. Their origin surely makes me ponder upon conferences in terms of efficiency, rationally, utility, flexibility and stability. Honorary terms in the world of many economists, but these terms do not always constitute the most rational method economically. Economically justifiable or not conferences have survived over a century and this because of their sharp qualities and abilities, set out in the conference agreement, and characteristics forming the foundation of their capacity to survive, not operate competitively best. The nature of conferences is restrictive, the outline of operation of conferences contain severely restrictive elements; price maintenance, division of markets, loyalty agreements and other imposed factors to the relations between shipowners and shippers such as surcharges, and the practices regarding entry into conferences of outsiders and independent shipowners.

Still civilised legal regimes continue to protect these enterprises, built on repeated and calculated infringements of competition laws, customers' rights and ultimately the interest of consumers worldwide. The answer hereto, a mantra of shipowners and advocates: regularity, stability and flexibility.

## **7.2 UN – US – EU**

Three different legal regimes, three different legal traditions, but as the millennium rests behind us divergences slowly smoothen out. The legal systems of United Nations and the European Union are relatively immature, and compared United States, with a short history of relations to conferences. The US has always been and considered itself a pioneer in the field of competition, or antitrust as called in America. This background directed US towards a harsh policy established in the Shipping Act 1916 and maintained through to the Shipping Act of 1984.

The UN regime is by far the weakest of the three. As many opportunities to make a difference before the UNCTAD Code has shrunk, diminished, and sunk into the depths of the opportunistic oceans of protectionism. The Code of 1974 was greeted as a tool of the future, a promoter trade, not just for the benefit of the northern hemisphere, but for all members of the UN community. Sadly the group

of countries that were the target of the Code exploited it in the name of nationalistic ambitions to promote merchant fleets unable to freely float commercially. Moreover, the lack of enforceability has put the Code in the back yards of global economic and political agenda. No actor in the market deliberately surrender its immunity from sanction, thus surrender its instinct of self-preservation, for the sake of competition. Even I as a layman hold considerable doubts to as whether I would my immunity, or advice a client to do so. But the Code stands as a prototype for Council Regulation 4056/86.

The EU as well as UN are both legal systems of their own, *sui generis*. The EU, much like the UN have their origins in a period where peace, consensus and consent were leading ideals. This background has made the EU a rigid and slow organisation, much like the UN, but with one great and important difference, enforcement possibilities. The thrilling feature of the EU is that the respective governments have surrendered powers to the organisation, and so the Commission seek, investigate, assess, stop and fine liner conferences infringing the already generous rules relating to their activities. But for a long time, until the accession of the UNCTAD Code by the Community on behalf of its Member States, Council Regulation 954/79, a reign of uncertainty ruled Western Europe through three decades - a flexible approach of Europe versus the regulatory Americans. The leaders of Europe finally realised that certainty through regulation was the lone way out of the shipping chaos that had followed in the wake of the oil crisis of the 1970's.

Since a legal history exists regarding liner conferences it is interesting to see what similarities and differences that have evolved between the three legal regimes. As exhibited above general policy discrepancies have continuously played the main part of the drama, but also details in the regulations evidently differ.

An immense matter of prestige has been the controversial deferred rebate schemes: distinctly prohibited in the US until 1984 when some possibilities arose, while the UNCTAD Code allow all loyalty agreements, as well as Regulation 4056/86, provided they are based on the contract system of any lawful legal system.

The famous 40:40:20 cargo-sharing formula: initiated by LDCs as a part of the UNCTAD Code and promptly rejected by the US and initially also the Member States until Regulation 954/79 decided that the formula was inapplicable between Member States.

Membership of conferences and the admission thereto has seen different policies during the years: the US approach was the sacred status of open membership systems and equal possibilities of all lines to enter a conference, whereas under the UNCTAD Code a distinction was made between national and non-national lines, while the Community in Regulation 954/79 made a reservation in this

respect (on the definition ‘national lines’) in relation to existing conferences, new conferences and establishment.

As presented above, the everlasting dissident is the United States. The US belief in enforcing antitrust principles has, if not diminished, been replaced by a more cynic policy in an attempt to rescue marine merchant activities. Still, and I agree, with the voices constantly raised in complaint over the immunity regime now choking the industry. Protectionist measures, in whatever guise, is, and this is a fact, detrimental in the long perspective to trade and commerce especially in the interests of customers and consumers, which always end up on the losing end. Given this I hold that the wealthy and developed countries own a special responsibility in acting as forerunners and pioneers in areas where policy statements and changes are needed.

One could easily become a believer of cooperation, on an international basis, as to the regulation of conferences and salute the UNCTAD Code. The consensus and attention given to the LDCs proved to be dissatisfying, a loose instrument without enforcement possibilities have tainted the once optimistic faith of believers of progressive development in shipping. What could have been a cunning tool in assisting LDCs to a fair share of the global economy misfired and sunk. The tendency now is far away from the creation of competitive merchant fleets worldwide, but the continuing story of short term profits on the account of others – the true side of monopolised capitalism.

Regarding the EU perspective it is my distinct feeling that the special regulation of conferences might prove to be wrong in the end. When Regulation 4056/86 arrived the merchant fleets of Member States were devastated by the competition from southern hemisphere fleets, so the measure was fair in the eyes of the 1980’s and 1990’s. Today, a year into the third millennium the situation has altered. Today, with the calls of global free trade without restrictions echoing out from the headquarters of WTO, is it then possible to accept further pampering of conferences? Should liner conferences even exist given their attributes making them the ultimate anti-competitive combinations, advocates will have to sharpen their pencils into swords on the day of the battle, for I am sure that the discussion will rage intensely in the future, both regarding the being or non-being of conferences, but also its cousins the shipping pools and consortia. Of this only regularity, stability and flexibility know.

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