The Southern Ocean and Marine Pollution: Problems and Prospects

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Cargo Reservation: In Search of a Standard Under Public International and U.S. Municipal Law

by Thomas Sauermilch*

I. INTRODUCTION

On October 6, 1983, the Convention on a Code of Conduct for Liner Conferences entered into force (Liner Code). The Liner Code represents the first comprehensive attempt to regulate the liner shipping industry at the international level. It addresses primarily the relationships between conferences and their customers and the organization of member lines within conferences. In addition to organizing the competition in the liner industry, a major objective of the Liner Code is to support the establishment of national fleets in developing countries and thus to contribute to their overall economic development. The final instrument had been signed in 1974, after negotiations under the auspices of the United Nations Conference on Trade and Development (UNCTAD). Only by 1979, however, did it become clear that the Liner Code would eventually enter into force when the European Economic Community (EEC) adopted a resolution providing for the ratification of the Liner Code by the EEC Member States. Yet, in the light of continuing U.S. opposition and of a variety of questions concerning its application, the future of the Liner Code remains uncertain.


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- Liner Code, supra note 1.
This article addresses the issue of cargo reservation which played a major role during and after the Liner Code negotiations. Cargo reservation schemes allocate the cargo volume of the trade between two countries among the national shipping lines of the countries at both ends of the trade and may include allowances for third country lines, so-called cross-traders. The respective provision of the Liner Code, article 2(4), reserves 40 percent of the bilateral trade to each liner fleet of the two countries directly involved and 20 percent to cross-traders.\(^5\) In a politicized debate, with the developing countries regarding cargo reservation as a cornerstone of their economic development, and with the industrialized countries, in particular the United States, viewing it as an impingement on free competition, it seems appropriate to reconsider the state of the law on the issue. Also, the economic implications of cargo reservation will be addressed. From a true free trader’s point of view, cargo reservation is a protectionist device which leads to an uneconomic allocation of resources. Yet, there is also the common understanding that newcomers to a certain industry require some protection during the early phase of operation. Therefore, the principle of free trade and the infant industry argument will be related to the actual market situation in the liner shipping industry.

The legal analysis together with the economic background to the issue may provide a suitable basis for policy decisions on cargo reservation which have to be made by the U.S. administration. In particular, the domestic antitrust regulation of the liner industry under U.S. law, the law of the Federal Republic of Germany, and the law of the European Community will be discussed. In this context it is important to note the modification of the U.S. antitrust regulation under the Shipping Act of 1984.\(^6\) Then it will be examined whether international law provides a standard as to the legality or illegality of cargo reservation schemes.\(^7\) Moreover, the position of cargo reservation under U.S. law will be analyzed. Finally, international law and practice and U.S. law and practice will be related to each other in search of a common standard which should serve as a basis for future U.S. action.

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\(^5\) See Liner Code, supra note 1, at art. 2(4).


\(^7\) There is the view that international law prohibits cargo reservation, although this has not been adhered to in practice. Comment, The Sinking Shipping Industry, 5 NW. J. INT’L L. & BUS. 99, 113 (1983). If this view were correct, it would constitute a strong argument for the U.S. policy.
II. THE HISTORICAL AND STRUCTURAL BACKGROUND

A. Historical Perspective

Public interferences in maritime transport are no modern phenomenon but reflect a pattern of protection of the domestic economic development that dates back to the very beginning of merchant shipping.\(^8\) The Carthaginians and the Greeks were among the first maritime traders who resorted to restrictions on the access of foreign ships to their harbors.\(^9\) During the seventeenth century protectionist measures were implemented by the British against the emerging merchant fleet of the Dutch.\(^10\) Previously, Dutch trading companies had acquired a considerable share of the overseas trade of the British colonies which led to pressures in England to adopt a more restrictive trade and shipping policy.\(^11\) The Navigation Act of 1651 required that goods which had been produced in English colonies had to be shipped on English vessels.\(^12\)

During the early eighteenth century these restrictive practices spread considerably.\(^13\) With her formal accession to the British empire in 1707, Scotland was able to participate in the reserved trade under the Navigation Act.\(^14\) Discriminatory practices were also implemented by the Scandinavian countries.\(^15\) Spain prohibited all direct foreign trade with its colonies.\(^16\) Similar restrictions on trade with their colonies were imposed by Holland and France.\(^17\) In particular, France set up a complex system of protective tariffs, subsidies, navigation rules, and privileged companies.\(^18\)

During the mid-nineteenth century, when the British empire had established its supremacy over world trade, pressures mounted in England to abolish the protective Navigation Acts.\(^19\) They were no longer deemed necessary in a shipping market that was solely governed by the British fleet and the prosperity of free ports such as Singapore, Hong Kong, and Gibraltar.\(^20\) Domestic protective measures became obsolete and foreign restrictions created an obstacle to the full benefit of such a

\(^8\) E. Gold, MARITIME TRANSPORTS 9 (1981).
\(^9\) Id. at 9.
\(^10\) Id. at 49.
\(^11\) Id. at 50.
\(^12\) An Act for Increase of Shipping, and Encouragement of the Navigation of this Nation, 1651, ACTS & ORD'S. INTERREGNUM 559; E. Gold, supra note 8, at 50.
\(^14\) Id. at 28.
\(^15\) Id. at 30-31.
\(^16\) C. McDowell & H. Gibbs, OCEAN TRANSPORTATION 11 (1954).
\(^17\) Id. at 13-17.
\(^18\) Id. at 16.
\(^19\) E. Gold, supra note 8, at 81.
\(^20\) Id. at 81.
dominating position. Consequently, the Navigation Acts were repealed in the mid-nineteenth century.

Yet, as the British maritime power sought to maintain its dominant position, its inefficiency grew. In the meantime the Scandinavians had established a highly efficient shipping industry and maintained a fleet much larger than necessary for their own purposes. They engaged in a profitable tramping and cross-trading business. Similarly, Greece entered the market as a major cross-trader and together with the Norwegians undercut the British on various routes. In addition, Germany, France, Italy, and the United States had built up their merchant fleets which operated almost exclusively in the liner trades.

This development led to an increasingly aggressive pattern of competition in world shipping. The largest German lines coordinated their competitive policy in order to compete successfully with the British. The shipping cartels emerged which were brought to perfection later by the British. Other countries, such as France and the United States offered construction and navigation subsidies to support their national fleet. Consequently, the structure of maritime transport had changed considerably with the establishment of shipping cartels and liner conferences which provided internally for cargo allocation and revenue pooling.

B. The Regulatory Framework of Ocean Transport

In order to understand the problems of the shipping industry, a few economic characteristics which distinguish shipping from other industries have to be noted. One typical feature of the shipping industry is its high ratio of fixed to variable costs. It has been estimated that fixed

21 Id. at 81-82.
22 Id. at 89.
23 Id. at 111.
24 Id.
25 Id.
26 Id.
27 Id. at 111-12.
28 Id. at 112.
29 Id.
30 Id. at 115.
31 Id. at 135-36, 142-43.
32 The first successful liner conference was the Calcutta Shipping Conference, established in 1875, in which all lines agreed upon the same rates in the trade between Calcutta and England and to sail on fixed dates regardless of whether they were loaded or not. Id. at 115. Today approximately 350 conferences are recorded worldwide. Brennecke, Conferences — Strengths and Weaknesses, in CONFERENCE REPORT, supra note 4, at 76, 78.
33 Neff, The UN Code of Conduct for Liner Conferences, 14 J. WORLD TRADE L. 398, 400 (1980).
costs and constant charges constitute more than 80 percent of the operating costs of a liner.\(^{34}\) Therefore, it is an imperative for shipping companies to avoid having idle ships. Under sluggish market conditions this can cause fierce competition where liners operate below break-even in order to cover at least some of their operating expenses.\(^{35}\) Closely related is the fact that the shipping industry is extremely vulnerable to changes in demand.\(^{36}\) As has been observed: "[A] shipowner cannot hold back supply by sailing only half his ship" in times of short demand.\(^{37}\) The market mechanism is thus confined almost entirely to adjustments in the freight rates only.\(^{38}\) These industry specifics determine largely the present regulatory framework of ocean shipping.

Liner conferences are agreements between shipping lines operating liner services which are designed to organize the shipping market on particular routes.\(^{39}\) A liner service can be defined as the predetermined operation of a common carrier which sails at regular intervals on a given route.\(^{40}\) Liner conferences organize liner services in a cartel-like manner depending upon their degree of integration and cohesion. They might restrict or eliminate outside competition by fixing freight rates, regulating sailing schedules, and allocating cargoes and revenues.\(^{41}\)

The cohesiveness of conferences varies according to their purpose and type. Some conferences are created primarily to discuss matters of concern and allow each member to retain its individual tariff.\(^{42}\) Other conferences take a more active role in the organization of the market and sail under a common tariff.\(^{43}\) Moreover, conferences can be either "open" or "closed" to new members. Conferences operating in the United States foreign trade are required to be open and to grant membership to any carrier without regard to its nationality.\(^{44}\) Foreign conferences, by contrast, are generally closed and the admission of new members is contingent upon the permission of the members of that

\(^{34}\) Id. at 400.

\(^{35}\) Id. at 400; Ellsworth, *Competition or Rationalization in the Liner Industry?*, 10 J. MAR. L. & COM. 506 (1979).

\(^{36}\) Neff, *supra* 33, at 400.

\(^{37}\) Id.

\(^{38}\) Id. at 401.


\(^{40}\) Neff, *supra* note 33, at 399-401.

\(^{41}\) Id.

\(^{42}\) Comment, *supra* note 7, at 101-02.

\(^{43}\) Id.

Liners which are rejected may still enter the trade route of the conference. However, they would confront a variety of devices used by closed conferences to preempt the market. Frequently, closed conferences enter into loyalty agreements with shippers to encourage them to use the conference ships exclusively. Common practices to ensure the loyalty of shippers include preferential rates and deferred rebates which are granted to shippers after a specified period of time has elapsed, provided that the shippers did not obtain the services of other carriers in the meantime. In addition, conferences may provide for the internal pooling of cargo. Although the conference system infringes upon free competition in world shipping, it is nevertheless generally accepted that its benefits outweigh its anti-competitive impact. It ensures market stability which is necessary to induce shipping companies to incur the substantial investment in the building and modernization of ships. Since liner conferences enjoy a monopolistic market position, they can also provide transportation of small quantity cargoes all year around, a service which might not be available under competitive conditions. As a result, restrictions on maritime transportation, such as cargo allocation among conference members, are a function of a country's public policy which is implemented by its competition laws.


46 I. Heine, supra note 39, at 82; Neff, supra 33, at 401. Conferences operating in the U.S. foreign trade are barred from using deferred rebates, Shipping Act of 1984, Pub. L. No. 98-237, § 10(b)(8), 98 Stat. 67 (1984). The purpose of this prohibition is to protect “unloyal” shippers from the retaliation of shipping conferences. See D. Marx, supra note 39, at 55. Other countries do not prohibit deferred rebates. Instead they provide for the establishment of national shippers' councils as a commercial counterbalance on the shippers' side. See Gleiss, supra note 45, at 17-18, 20. The use of so-called fighting ships is another method of conferences in non-U.S. trades to prevent competition from outsiders. These fighting ships offer such low rates that they force any outsider who had previously undercut the conference rate out of the market. The loss sustained by the fighting ships is financed out of the conference pool. See I. Heine, supra note 39, at 82. Fighting ships are prohibited in U.S. trades, Shipping Act of 1984, Pub. L. No. 98-237, § 10(b)(7), 98 Stat. 67 (1984), and also article 18 of the Liner Code, reprinted in 13 I.L.M. 910, 931, prohibits the use of the fighting ships.

47 I. Heine, supra note 39, at 82.


49 Neff, supra note 33, at 401.

50 Neff, supra note 33, at 402, challenges this proposition.

Such different public policy approaches may be illustrated with examples of the policies of United States and the Federal Republic of Germany. United States antitrust law has a considerable impact on the regulation of the shipping industry. \(^{52}\) Section 1 of the Sherman Act of 1890 is violated if there is an agreement that restrains "trade or commerce among the several states, or with foreign nations." \(^{53}\) Section 2 is violated whenever any person "shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations." \(^{54}\) Between 1890 and 1916 when the Sherman Act was in force and the Shipping Act of 1916 had not become effective, there were several antitrust proceedings brought against conferences. \(^{55}\) Following the recommendations of the Alexander Report \(^{56}\) the Shipping Act of 1916 was enacted with its Section 15 providing for the approval of conference agreements by the Federal Maritime Commission (FMC) and the exemption of such approved agreements from the antitrust laws. \(^{57}\)

From 1916 until the 1950's there was general acknowledgment of

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52 Slot, supra note 51, at 332.
54 Id. § 2.
55 United States v. Hamburg-Amerikanische Packetfahrt-Actien Gesellschaft, 200 F. 806 (C.C.S.D.N.Y. 1911); United States v. Prince Line, 220 F. 230 (S.D.N.Y. 1915). The trial court found that the stabilizing effects of conferences outweighed the harm done by the anticompetitive practices. The Supreme Court reversed, however, not on the merits but to make a later prosecution possible when necessary, since the issues became moot as Europe was at war. United States v. Hamburg-Amerikanische Packetfahrt-Actien Gesellschaft, 239 U.S. 466 (1916); United States v. Prince Line, 242 U.S. 537, 537-38 (1917).

Every common carrier by water . . . shall file immediately with the Commission . . . every agreement . . . fixing or regulating transportation rates . . . controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement.

The Commission shall . . . disapprove, cancel, or modify any agreement . . . whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this [Act], and shall approve all other agreements . . . .
the stabilizing influence of conferences on the shipping industry. The Supreme Court repeatedly stated that the Shipping Act superseded the antitrust laws in shipping matters and that conference agreements remained under the primary jurisdiction of the FMC.58

The Supreme Court weakened the antitrust exemption for the first time in the Isbrandtsen case by holding that dual-rate contracts were not under the jurisdiction of the FMC and thus subject to the antitrust laws.59 This decision led to the Shipping Act amendments of 1961 which legalized dual-rate contracts provided they were approved by the FMC.60 The 1961 amendments also broadened the authority of the FMC by adding the requirement that the FMC disapprove agreements contrary to the "public interest."61 Yet, there are conflicting views as to whether the amendments were designed to expand the regulatory power of the FMC and to limit the reach of the antitrust laws or to limit the antitrust immunity to the extent necessary to preserve the conference system.62 Subsequent Supreme Court decisions were in line with the latter view. In 1966 the Court held that Congress had not intended to grant the industry total antitrust immunity.63 Antitrust immunity was found to extend only to approved agreements and not to the implementation of unapproved agreements.64 This decision firmly established the antitrust laws as the

Id.


58 United States Navigation Co. v. Cunard Steamship Co., 284 U.S. 474, 486 (1932); Far East Conference v. United States, 342 U.S. 570, 576 (1952). Unapproved agreements were to be reviewed by the FMC under its primary jurisdiction before a court could do so. The remedies for unapproved agreements were to be found in the provisions of the Shipping Act.


62 See Fawcett & Nolan, supra note 61, at 551 for the first view and Pansius, Plotting the Return of Isbrandtsen: The Illegality of Interconference Rate Agreements, 9 TRANSPI. L.J. 345 (1977) for the second view.


64 Id. at 217. The complaint was that the defendants had entered a secret rate fixing agreement that was beyond the scope of the approved agreements and that action under the secret agreement was not exempt from the antitrust laws. Note the distinction between unapproved and disapproved agreements as the former were not being notified for approval whereas the latter were filed for approval but disapproved. Unapproved agreements were, prior to Carnation, under the primary jurisdiction of the FMC which could approve or disapprove them and thus decide their immunity from the antitrust laws. Following Carnation both unapproved and disapproved agreements became subject to the antitrust laws.
alternative regulatory regime for shipping conducted under unapproved agreements.\(^6\)

In continuation of the demise of the antitrust exemption the Supreme Court held in \textit{Svenska} that the consideration of antitrust implications was an appropriate refinement of the statutory "public interest" standard in section 15 of the Shipping Act.\(^6\) Once an agreement would be in violation of the antitrust laws, there would be substantial evidence that the agreement was contrary to the public interest.\(^5\) The burden of proof was shifted to the proponents of the agreement by requiring them to show that the agreement "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."\(^6\)

In response to the \textit{Svenska} decision, the FMC regarded restrictive agreements filed for approval as \textit{prima facie} contrary to the public interest and consequently subject to a justification requirement.\(^6\) It has to be emphasized that such a justification requirement was neither covered by the language of Section 15 nor did it conform with the congressional intent to exempt liner conferences from the antitrust law as it had been reaffirmed in the 1961 amendments.\(^7\)

Clear antitrust immunity of conference agreements, however, has been restored with the Shipping Act of 1984.\(^7\) In particular, the Act eliminates the vague standards for approval under the old legislation, such as "public interest," "detrimental to commerce," or "unjustly discriminatory." Instead it contains a list of requirements to be met by conference agreements in section 5 and a series of certain prohibited acts in


\(^{67}\) 390 U.S. at 246.

\(^{68}\) Id. at 243.

\(^{69}\) See, e.g., \textit{Pacific Westbound Conference — Application To Extend Its Exclusive Patronage (Dual Rate) Contract System To Include Its OCP Territory}, 18 F.M.C. 308, 319 (1975).

\(^{70}\) For a detailed analysis of that point see Comment, supra note 65, at 128; Fawcett & Nolan, supra note 62, at 561; Comment, \textit{supra} note 7, at 119, 120.

\(^{71}\) \textit{See} \textit{Shipping Act of 1984}, Pub. L. No. 98-237, 98 Stat. 67 (1984). \textit{See also} the legislative history of the Act, H.R. No. 98-53, 98th Cong., 2d Sess. 3 (1984). With respect to "secret" agreements that have not been filed with the FMC, a limited antitrust exposure applies. Such agreements are subject to injunctive and criminal prosecution by the Attorney General, but are not subject to any private right of action otherwise available under the antitrust laws. \textit{Id.} at 12. According to section 10(a)(2) of the \textit{Shipping Act of 1984}, it is unlawful to operate under an agreement required to be filed under section 5 that has not become effective under section 6, which is only possible after filing it with the FMC. The issue of the antitrust immunity of unapproved as compared to disapproved agreements, has been settled in favor of the antitrust exposure of such "secret" agreements. \textit{See supra} note 64. "Secret" agreements, however, may enjoy antitrust immunity if they fall within a group exemption under section 16. \textit{See} \textit{Shipping Act of 1984}, § 7(a)(2) and note 73 \textit{infra}.
Where the old legislation required that the FMC grant approval of conference agreements on a case-by-case basis before they could become effective, the 1984 Act provides that agreements are to be effective 45 days after filing. The new legislation thus appears to provide a presumption in favor of the validity of restrictive agreements.

Section 5(a) provides that a copy of every restrictive agreement as described in section 4 has to be filed with the FMC, except agreements related to transportation to be performed within or between foreign countries. Pub. L. No. 98-237, § 5(a), 98 Stat. 67 (1984). Section 5(b) provides that each conference agreement must:

1. State its purpose;
2. Provide reasonable and equal terms for admission to conference membership;
3. Permit each member to withdraw from the conference without penalty;
4. At the request of any member, require an independent neutral body to police fully the obligations of the conference and its members;
5. Prohibit the conference from engaging in conduct prohibited by section 10(c)(1) or (3) of this Act;
6. Provide for a consultation process designed to promote
   (A) commercial resolution of disputes, and
   (B) cooperation with shippers in preventing and eliminating malpractices;
7. Establish procedures for promptly and fairly considering shippers' requests and complaints; and
8. Provide for certain independent action of any conference member on matters of the tariff of the conference.

Section 10(1) provides that no conference or group of two or more carriers may boycott or take any other concerted action resulting in an unreasonable refusal to deal. Id. § 10(1). Section 10(3) prohibits carriers to engage in any predatory practice designed to eliminate the participation, or deny the entry, in a particular trade of a common carrier not a member of the conference, a group of common carriers, an ocean tramp, or a bulk carrier. Id. § 10(3).

However, the FMC shall reject any agreement filed under section 5(a) that, after preliminary review, it finds does not meet the requirements of section 5. Id. § 6(b). According to section 7(a) the antitrust laws do not apply to:

1. Any agreement that has been filed under Sec. 5 of this Act and is effective under Sec. 5(d) or Sec. 6, or is exempt under Sec. 16 of this Act or . . . from any requirement of this Act;
2. Any activity or agreement within the scope of this Act, whether permitted under or prohibited by this Act, undertaken or entered into with a reasonable basis to conclude that
   (A) it is pursuant to an agreement on file with the Commission and in effect when the activity took place, or
   (B) it is exempt under Sec. 16 of this Act from any filing requirement of this Act;
3. Any agreement or activity that relates to transportation services within or between foreign countries, whether or not via the United States, unless that agreement or activity has a direct, substantial, and reasonably foreseeable effect on the commerce of the United States . . . .

Antitrust immunity is further extended to certain specific activities regarding through transportation, terminal facilities outside the United States, and agreements approved under the Shipping Act of 1916. Under section 16 the FMC may:

[E]xempt for the future any class of agreements between persons subject to this Act or any specified activity of those persons from any requirement of this Act if it finds that the exemption will not substantially impair effective regulation by the Commission, be unjustly
agreement becomes effective, it may still be canceled, modified, or disapproved; however, during the pendency of any investigation the agreement would remain in force. To summarize, antitrust immunity for liner conferences in U.S. law, which had been converted from a general exemption weighted in favor of approval to a clause subordinating the internationally recognized conference system to a domestic competition rule, has been restored in a clear fashion with the Shipping Act of 1984.

German competition law provides an interesting comparison. It contains a general exemption of conference agreements from the ban on cartels and does not submit such agreements to regulatory approval. This exemption, however, does not cover the provisions on abuse of a dominant market position and on merger control which still apply. Moreover, the Federal Cartel Office, the regulatory agency administering the cartel law, has the power to intervene in so far as the exemption is being abused. The restrictive interpretation of the abuse-control provision was firmly established in the 1973 Fernost-Schiffahrtskonferenz decision of the Federal Supreme Court. The Court held that the deciding factor in determining abuse is whether an act of a conference is within or beyond the purpose of their exemption from the ban on cartels. In particular, it was irrelevant that competition might be completely excluded. The result is that German competition law unequivocally favors the benefits of reliable liner services over their anticompetitive effects and exempts conference agreements from the ban on cartels.

This rationale applies also to the EEC practice on competition law. Although there is no explicit exemption clause equivalent to Section 99
of the German cartel law, the EEC Commission recognizes conferences as being exempt from the prohibition of cartels in Articles 85 and 86 of the Treaty of Rome and has never initiated proceedings.\footnote{2}

This brief illustration of the antitrust approaches taken in the United States on one side, in particular prior to the 1984 legislation, and in West Germany and the European Community on the other shows that the legality of restrictions in maritime transport is largely a function of the domestic competition law.\footnote{3} Prior to the Shipping Act of 1984, the United States approach maximized competition and minimized the room for private market restrictions.\footnote{4} With the new legislation the United States moved towards the European approach which emphasizes market stability in liner shipping at the expense of competition.\footnote{5}

III. CARGO RESERVATION UNDER INTERNATIONAL LAW

A. Definitions

Cargo preference schemes reserve certain cargo or a portion thereof for the national merchant marine.\footnote{6} They support the national flag to maintain or expand its competitive position vis-a-vis foreign merchant fleets.\footnote{7} The foreign shipping industry is thus treated differently than its national counterpart. This different treatment to the detriment of foreign parties, regardless whether legally justified or not, defines in the following the term "discrimination."\footnote{8}

A report by the UNCTAD Secretariat identified the following forms of cargo preferences and related discriminatory practices.

1. Legislation, regulations or other administrative measures, including informal measures, for (a) government-owned or sponsored cargo, and (b) commercial cargo to be carried on national ships.

2. Bilateral treaties and regional agreements or arrangements which include provisions for reserving cargo for the ships of the contracting parties.

3. Use of terms of shipment, i.e. buying f.o.b. and selling c.i.f. to promote the carriage of goods by national flag ships.


\footnote{3} Gleiss, supra note 45, at 17.

\footnote{4} Id.

\footnote{5} As German competition law is largely based upon U.S. antitrust law, it is particularly striking to see the different development of the antitrust exemption clause prior to the 1984 legislation.

\footnote{6} W. Kewenig, Nicht-Diskriminierung 196 (1972).

\footnote{7} Id.

\footnote{8} Id. at 173.
4. Exchange control measures, such as blocking of foreign currencies earned by foreign ships or imposing unfavorable multiple exchange rates.

5. Discriminatory import and export license practices for goods carried on foreign ships.

6. Higher dues and charges for foreign ships; higher taxes and fees on goods carried on foreign ships.

7. Priority in berthing accorded to national vessels; time consuming documentation for foreign ships.\textsuperscript{89}

B. Economic Aspects

Cargo Reservation schemes do not increase the trade between countries but only reallocate it by giving nationals preference over foreigners. Under the assumption that cargo reservation laws would have been unnecessary if the national lines operated more efficiently than the foreign lines, cargo reservation schemes tend to displace the more efficient lines from the reserved trade.\textsuperscript{90} Moreover, protectionist measures are likely to be self-stabilizing once they are in force. This implies that the displacement of more efficient lines results in higher cost levels in the long run, since there is no incentive for the protected national line to reach a lower cost level in the absence of competition.\textsuperscript{91} Thus, cargo reservation schemes prevent maritime transport from being conducted in the most efficient manner.

It has to be kept in mind, however, that cargo preference schemes are largely the result of a world shipping order that saw developing countries more as customers than as participants in maritime transport.\textsuperscript{92} The protection of developing countries' emerging fleets can therefore be justified under the infant industry argument.\textsuperscript{93} The point is not only to facilitate their market entry, but to shield them over some time until they reach a state of competitiveness in which they can operate without protection. Ideally, this procedure would call for phasing out of the protec-


\textsuperscript{90} Neff, supra note 33, at 412.

\textsuperscript{91} Beth, Economics of Regulation in Liner Shipping, in Conference Report, supra note 4, at 55-56.

\textsuperscript{92} According to an UNCTAD study, the developed countries generated 55 percent and the developing countries generated 38.5 percent of the world seaborne cargo. However, 82.4 percent of that cargo was transported on ships owned directly or indirectly by the developed countries, while 10 percent of that cargo was carried by the developing countries' fleet. See Shukla, Containerization — A Third World View, in Conference Report, supra note 4, at 213-14.

tive measures once the level of unprotected competitiveness has been realized. In reality, however, the continuous protection of the national fleet appears to be the more likely case.

The support of newcomers from developing countries through cargo reservation cannot be discussed without reference to the technological development of transport modes. To some extent the rationale behind cargo reservation is that developing countries would be able to raise the funds for the development of a national fleet against inter alia the security of an assured cargo share in their liner trades. In this context it is important to consider the technological advancement of the liner industry. In particular, the overcapacity in liner tonnage has led to increased competition that has accelerated the steady increase in productivity in the industry through modernization. The increase is reflected in the development of second generation container ships, “ro-ro” ships, and LASH systems. New building programs of the twenty-five biggest liner companies suggest an increase in the world liner tonnage in 1985 by 30 percent from the 1983 position. The vessels replaced will be of medium age, and still of such technical standards as to be too useful to be broken up. This in turn is likely to accelerate the overcapacity spiral. It is estimated that at present approximately 20 percent of the general cargo traffic is containerized, with forecasts reading 80 percent for the year 2000. This development forces developing countries, regardless of whether they may be able to protect inefficient fleets for some time, to adjust and to pursue the advanced technology path. This, however, requires access to significant external finance to carry the substantial costs of modern container and ro-ro ships which, at 45 to 50 million U.S. dollars, cost 4 to 5 times as much as a classic multipurpose freighter. Only recently have some fleets of developing countries been equipped with precisely the multipurpose freighter which now appears to be outdated in some trades.

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94 See question of Mr. Rajwar (India) in discussion, CONFERENCE REPORT, supra note 4, at 241-42.
95 In the case of ro-ro ships, (standing for roll on, roll off) the cargo is driven on board with container trucks, shipped to the port of destination, and simply driven off the ship directly to the final destination. In the case of LASH systems, (meaning “lighter aboard ship”), barges or lighters are lifted onto large ships, carried to the port of destination, hoisted off in a short time, and then either unloaded or towed by tug boats to their final destination.
96 Svendsen, Competitive Interrelationship between Liner and Tramp, in CONFERENCE REPORT, supra note 4, at 15, 17.
97 Fakida, The Future of Liner Shipping in View of the New International Maritime Order, in CONFERENCE REPORT, supra note 4, at 41, 51.
98 Id. at 50-51.
99 Id. In addition, containerization requires substantial modernization of port facilities in developing countries which further increases their financial needs. See generally Shukla, supra note 92, at 215.
Yet there are no indications that the banking community is at present prepared to supply these funds. Aside from the general reluctance to assume sovereign risks, bankers do not regard the furtherance of world liner tonnage as the correct way to secure the repayment of their ship financing loans. Neither do they tend to accept cargo reservation rules as sufficient security for the repayment of such loans. The reason is that cargo reservation schemes may assure the national fleet of a certain percentage of the trade, yet they do not guarantee a certain volume of trade. Even if there are full cargoes, cargo reservation schemes do not guarantee that these freights can be obtained at profitable rates. The development of a national shipping industry in a rapidly changing environment is therefore a major fiscal undertaking which requires substantial financial resources.

In addition, it has to be realized that the protection of the national shipping line which operates at higher costs than its foreign competitors causes an increase in shipping expenses for the national shipper. Whereas shippers could previously pick the most efficient line, they have to ship on less efficient and thus more costly operating lines under a cargo reservation scheme. The shippers and eventually the national economy, which ultimately bears the higher shipping costs in the form of a higher price level on commodities and transactions related to the shipping industry, subsidize indirectly the national shipping line. The economic development of the country may be enhanced in maintaining a national shipping industry with all of its spillover effects on the remainder of the economy. However, productivity will be drawn from other sectors of the economy to bear the increased costs of a subsidized national shipping industry. Moreover, factors of production are drawn to the protected industry although they may contribute more in other activities.

Yet, it also has to be recognized that shipping is an instrument of national policy in that it serves the overall necessities of commerce and defense. Although the preferential treatment of the national shipping industry creates visible costs, these costs might well be balanced by invisi-

100 Davis, Liner Shipping — A Banker's Perspective, in CONFERENCE REPORT, supra note 4, at 233, 238.
101 H. GRAY, INTERNATIONAL TRADE, INVESTMENT AND PAYMENTS 120-21 (1979), discussing the impact of cargo reservation laws in the U.S.-Canada trade. Cargo reservation laws protect the high cost industry from competition and grant it monopoly profits at the expense of the users of the transportation mode.
102 Id.
103 Id. Higher general price levels in the islands of Hawaii and Puerto Rico were attributed to cargo reservation laws. Imports to and exports from the islands were reserved to the U.S. merchant marine. Id. at 121.
ble benefits. These might include economic advantages, such as reduced foreign currency needs of developing countries using their national fleet, and might also consist of strategic benefits, such as independence from foreign services, a technological development basis, and the fulfillment of military needs. Therefore, it appears very difficult to quantify the benefits and disadvantages of cargo preference schemes.

C. Aspects of International Law

The purpose of this section is to analyze whether the various international instruments applicable to the shipping industry contain a standard on the conformity of discriminatory cargo reservation schemes with international law.

1. Developments Under the League of Nations

Article 23 of the Covenant of the League of Nations called upon the members of the League to "[m]ake provision to secure and maintain freedom of communications and of transit and equitable treatment for the commerce of all Members of the League." A conference was held at Barcelona in 1921 that adopted two international conventions, the Convention and Statute on Freedom of Transit and the Convention and Statute on the Regime of Navigable Waterways of International Concern.

Article 2 of the Convention on Freedom of Transit provides that "the measures taken by the Contracting States . . . shall facilitate free transit by rail or waterway on routes in use convenient for international transit. No distinction shall be made which is based on the nationality of persons, flag of vessels, . . . or any circumstances relating to the ownership of goods or of vessels . . . ."

Article 4 of the Convention on the Regime of Navigable Waterways provides that "[i]n the exercise of navigation . . . the nationals, property and flags of all Contracting States shall be treated in all respects on a footing of perfect equality. No distinction shall be made between . . . the flags of the different riparian States, including the riparian State exercising sovereignty . . . no distinction shall be made between . . . the flags of riparian and non-riparian States."

Following these conventions, another conference was held in 1923

105 Id. at 274-75.
108 Statute on Freedom of Transit, supra note 107, at art. 2 (emphasis added).
109 Statute on the Regime of Navigable Waterways, supra note 107, at art. 4 (emphasis added).
which adopted the Convention on the International Regime of Maritime Ports. Article 2 of the Convention provides that "[s]ubject to the principle of reciprocity . . . every Contracting State undertakes to grant the vessels of every other Contracting State equality of treatment with its own vessels, or those of any other State whatsoever, in the maritime ports situated under its sovereignty . . . ." Article 5 of the Convention provides that "[i]n assessing and applying Customs and other analogous duties . . . no distinction may be made to the detriment of the flag of any Contracting State whatsoever as between that flag and the flag of the State under whose sovereignty or authority the port is situated . . . ."

Although these conventions did not address the problem of maritime transport over the seas, they nevertheless established for the first time in an international convention the principle of non-discrimination or equality of treatment with regard to the flag of vessels. Moreover, not only did they formulate the principle of non-discrimination between foreign flags, but also the principle of national treatment or equality between foreign and national flags. Since this principle of non-discrimination was adopted in no less than three international conventions by a considerable number of states at that time, these instruments reflect evidence that non-discrimination between flags was generally regarded as desirable. Equal treatment, however, was subject to the principle of reciprocity; equality of treatment was limited to cases where such treatment was granted on a reciprocal basis.

2. The International Maritime Organization

While the previous conventions did not apply directly to the issue of cargo reservation, that issue was addressed in the Convention of the Intergovernmental Maritime Consultative Organization (IMCO). The principal purpose for the establishment of IMCO was to coordinate the

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111 Id. at art. 2.

112 Id. at art. 5.

113 The Statute on Freedom of Transit was signed by 34 states. See Statute on Freedom of Transit, supra, note 107, at 22. The Statute on the Regime of Navigable Waterways was signed by 27 states. See Statute on the Regime of Navigable Waterways, supra note 107, at 46. The Convention on Maritime Ports was signed by 26 states. See Convention on Maritime Ports supra note 110, at 298.

114 See Statute on Freedom of Transit, supra note 107, at art. 5; Statute on the Regime of Navigable Waterways, supra note 107, at art. 3; Convention on Maritime Ports, supra note 110, at art. 2.

technical shipping activities of governments. According to the IMCO Convention, set up as a technical organization. There was a secondary objective:

[T]o encourage the removal of discriminatory action and unnecessary restrictions by Governments . . . engaged in international trade so as to promote the availability of shipping services to the commerce of the world without discrimination; assistance and encouragement given by a Government for the development of its national shipping and for purposes of security does not in itself constitute discrimination, provided that such assistance and encouragement is not based on measures designed to restrict the freedom of shipping of all flags to take part in international trade.

The IMCO Convention constitutes the first international instrument addressing discriminatory practices in seagoing transport. The force of the provision is nevertheless considerably limited. First, by recognizing the needs of developing countries to establish a national shipping industries, assistance provided by these countries to their merchant marines is not considered discriminatory so long as such measures are not designed "to restrict the freedom of shipping of all flags to take part in international trade." Thus, the principle of non-discrimination is not understood in the context of national treatment as requiring equality between national and foreign flags, but instead is to be observed primarily with regard to foreign flags. No distinction shall be made between foreign flags whereas the national flag may be subjected to some kinds of preferential treatment. The concept of the "management of national shipping," however, does not authorize a state to completely evade its international obligations, nor are the international obligations likely to be interpreted very broadly today.

Second, the language of Article 1(b) of the IMCO Convention does not appear as clear and forceful as that of the previously discussed conventions which address specific problems in the form of outright prohibitions. The IMCO Convention does not refer to specific practices, such as cargo reservation or subsidies and, in addition, the Convention remains vague in encouraging states to promote the removal of discrimina-

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116 IMCO Convention, supra note 115, at art. 1(a).
118 IMCO Convention, supra note 115, at art. 1(b).
119 Id. This clause was introduced by India and addressed especially the needs of developing countries. N. Singh, Maritime Flag and International Law 73 (1978).
121 See, e.g., Convention on Maritime Ports, supra note 110, at art. 2 (which employs language such as "every state" and "equality of treatment shall cover").
tory action.\textsuperscript{122}

Third, the effectiveness of the non-discrimination provision was curtailed by a number of reservations made upon acceptance of the IMCO Convention. Several developing countries declared that their protectionist measures had the sole purpose of supporting their national fleets and were thus in accordance with article 1(b) of the IMCO Convention.\textsuperscript{123} The review of such measures was thereby practically excluded from the authority of the organization. In addition, several states made reservations to the effect that IMCO should confine its activities to technical and nautical matters and that any action of an economic or commercial nature would cause them to reconsider their membership.\textsuperscript{124}

Several conclusions can be drawn from article 1(b) of the IMCO Convention. It can be assumed that the Contracting States regarded discriminatory practices in maritime transport as undesirable. Yet, due to the reservations made, discussions on the issue have never developed.\textsuperscript{125} In addition, the language of the provision is too vague to satisfy the requirements for a suitable standard on the legality of discriminatory practices. However, the provision contains an important balancing test in that assistance to the national fleet does not constitute unjustified discrimination as long as it does not restrict the freedom of all national flags to participate in international trade.\textsuperscript{126} The allotment of cargo to the national fleet is not an unjustified discriminatory action as long as it does not monopolize the trade for the national merchant marine. According to the \textit{argumentum e contrario}, cargo reservation appears to be justified when foreign vessels are permitted to carry a certain share of the national cargo and when no distinction is made as to the allocation of cargo among the foreign flags.\textsuperscript{127} In determining the share of national cargo which should be made available to foreign carriers a standard of reasona-

\textsuperscript{122} See \textit{supra} text accompanying note 118.


\textsuperscript{124} \textit{Id}.

\textsuperscript{125} N. Singh, \textit{supra} note 119, at 79. Only during the Geneva discussions in 1948 was the question of subsidies raised under article 1(b). See Padwa, \textit{The Curriculum of IMCO}, 14 \textit{Int’l Organization} 541 (1960).

\textsuperscript{126} See IMCO Convention, \textit{supra} note 115, at art. 1(b).

bleness has been suggested. To define this admittedly vague standard further international agreements have to be considered.

3. The Organization For Economic Cooperation and Development

The Organization For Economic Cooperation and Development (OECD) has suggested a standard that clearly favors free competition in international shipping over any governmental interference:

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

This statement is part of an interpretative note to the OECD Code of Liberalization of Current Invisible Operations (OECD Code). In order to assess the legal force of the Code, its language, and the systematic position of the interpretive note have to be considered.

The Code of Liberalization was adopted as a decision of the OECD Council. According to article 5(a) of the OECD Convention, decisions of the organization are binding on members, except as otherwise provided. In essence the OECD Code provides that members shall eliminate among each other restrictions on current invisible transactions and transfers, referred to as "current invisible operations." This obligation is subject to certain safeguard clauses. A list of examples of cur-

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128 N. SINGH, supra note 119, at 80.
130 ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, CODE OF LIBERALISATION OF CURRENT INVISIBLE OPERATIONS 33 (1976) [hereinafter cited as OECD CODE].
131 Id.
132 Id. at 9.
133 OECD Convention, supra note 129, at art. 5(a). The members of the OECD are Australia, Austria, Belgium, Canada, Denmark, Finland, France, Federal Republic of Germany, Greece, Iceland, Ireland, Italy, Japan, Luxembourg, Netherlands, New Zealand, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, United Kingdom, and the United States.
134 OECD CODE, supra note 130, at art. 1(a).
rent invisible operations annexed to the OECD Code includes "maritime freights," e.g., chartering, harbor expenses, disbursements of fishing vessels, etc.\textsuperscript{135}

The interpretative note to this example provides that the provision of maritime freights, and of the other items that have a direct or indirect bearing on international maritime transport, is intended to give residents of one member state the unrestricted opportunity to avail themselves of, and pay for, all services in connection with international maritime transport which are offered by residents of any other member states.\textsuperscript{136} It follows the above quoted statement on maritime policy.\textsuperscript{137}

The following conclusions can be drawn from the OECD Code. It is legally binding only on member states. Its language does not suggest that third parties would be beneficiaries of the members' obligations. It is questionable, however, whether cargo reservations schemes constitute invisible restrictions. As the list of examples given in the OECD Code is not exclusive, cargo reservation arrangements might well be included. Yet the list is exclusively concerned with financial operations and this focus is reinforced in the first sentence of the interpretative note.\textsuperscript{138} Therefore, cargo reservation schemes that directly allocate foreign trade by legislation, administrative action, or international agreements and that do not indirectly influence the apportionment of cargo by the levying of financial charges, have to be regarded therefore as visible operations which do not fall within the OECD Code.

Nonetheless, the above quoted statement of shipping policy is sufficiently broad to include cargo reservation schemes as being contrary to the competitive, commercial practices that should govern OECD maritime transport. In particular, the statement provides that the freedom of transactions and transfers in connection with maritime transport should not be hampered by legislative provisions in favor of the national flag nor by arrangements giving preferential treatment to national flag ships.\textsuperscript{139} Since this general statement is contained in an interpretative note to the annex of the OECD Code, it can be evaluated independently and its reach is not confined to invisible operations. Yet its language carries less legal force than the wording of the OECD Code provisions. Therefore, it can only be regarded as a statement of principle on maritime policy of the OECD member states.

To summarize, cargo reservation schemes are contrary to the declared policy of the OECD member states to follow a regime of liberal

\textsuperscript{135} Id., Annex C1, at 27.
\textsuperscript{136} Id., at 33 n.l.
\textsuperscript{137} Id.
\textsuperscript{138} Id.
\textsuperscript{139} Id.
and competitive commercial shipping practices. There is no concrete prohibition of cargo reservation under the OECD regime.

4. The United Nations Conference on Trade and Development

The issue of cargo reservation has been addressed in a universal form under the UNCTAD-initiated Convention on a Code of Conduct for Liner Conferences (Liner Code). One of its cornerstones is the provision on trade participation of national shipping lines, often referred to as the 40-40-20 formula:

When determining a share of trade within a pool of individual member lines and/or groups of national shipping lines in accordance with article 2(2), the following principles regarding their right of participation in the trade carried by the conference shall be observed, unless otherwise mutually agreed:

(a) The group of national shipping lines of each of two countries the foreign trade between which is carried by the conference shall have equal rights to participate in the freight and volume of traffic generated by their mutual foreign trade and carried by the conference;
(b) Third-country shipping lines, if any, shall have the right to acquire a significant part, such as 20 percent, in the trade and volume of traffic generated by that trade.

To date, this is the most explicit clause on cargo allocation in an international convention intended to have general application. In analyzing its legal effect several points have to be considered, such as the number of ratifications and accessions to the Liner Code, reservations, the object and purpose of the Liner Code and of article 2(4), the language and systemic position as well as the preparatory work.

The Liner Code went into force among 58 countries in October, 1983. Although a majority of the EEC countries have not ratified the Liner Code yet, an EEC Council Regulation sets forth the reservations to be made by the member states upon ratification of the Liner Code. These reservations deserve special attention. The EEC countries were particularly concerned with compliance with the rules of competition under the Treaty of Rome and with the principles laid down under the OECD Code.

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140 Liner Code, supra note 1.
141 Id. at art. 2(4).
142 Id. at art. 2(4).
143 Id. at art. 2(4).
145 See Treaty of Rome, supra note 82, at arts. 83, 86; OECD Code, supra note 130. The delay of the ratification of the Liner Code by the EEC countries with regard to the EEC competition rules has been criticized, as the EEC Commission has never investigated into the cargo sharing practices of the European lines in the conference trades. See Shah, Liner Conference Operations, supra note 130.
Article 3 of the Council Regulation provides for the intracommunity pooling and redistribution of 60 percent of the trade volume with developing countries according to the previously established market shares of the European lines. The remaining 40 percent are left to the national lines of developing countries reflecting the share these countries are entitled to under article 2(4) of the Liner Code. Article 4(2) of the Council Regulation provides that the cargo sharing provision of the Liner Code shall not be applied in conference trades between the EEC member states or between the OECD countries which are parties to the Liner Code. Thus, the EEC countries do not apply the cargo reservation formula internally and instead abide by the commercial competition principle in their internal trade. At the same time they accede to the cargo allocation scheme of the Liner Code in so far as the trade with developing countries is concerned.

Similarly, the COMECON (Council for Mutual Economic Assistance) countries entered reservations which exclude the application of the cargo sharing provision from their internal bilateral trade. The reservations of both the EEC countries and the COMECON states raise questions as to their compatibility with the object and purpose of the Liner Code. Although reservations are implicitly envisaged by the Liner Code, they may nevertheless be impermissible regardless of whether they are commonly accepted, if they are incompatible with the object and purpose of the Code.

According to its preamble, the Liner Code should reflect six fundamental objectives which were addressed at the liner conferences with the


147 See text accompanying note 141.


149 See the reservations of the Soviet Union, Bulgaria, Czechoslovakia, the German Democratic Republic. UNITED NATIONS, MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL, U.N. Doc. ST/LEG/SER.E/2, at 476-77 (1983). The Socialist Bloc countries provide in bilateral agreements among themselves and other countries that all cargoes must be shipped on the vessels of the trading partners. H. BOEHME, RESTRAINTS ON COMPETITION IN WORLD SHIPPING 48-49 (1978).


151 For the implicit reference to reservations, see Liner Code, supra note 1, at art. 53(1)(d), which refers to the function of the depositary regarding reservation. See Vienna Convention on the Law of Treaties, supra note 150, at art. 19, for the object and purpose test. Article 53(1)(d) does not specify whether certain reservations are permitted or not. It seems, therefore, more appropriate to assume that no explicit provision on reservations was intended which makes their permissability subject to the object and purpose test. See generally Kyougun Koh, Reservations to Multilateral Treaties: How International Legal Doctrine Reflects World Vision, 23 HARV. INT'L L.J. 97 (1982).
view to improving the conference system. The reservations do not appear to be in conflict with these privately targeted objectives. Of considerable importance, however, is the question, whether the Liner Code requires the universal and uniform compliance of all member states with its material provisions or whether the Liner Code permits certain mutually agreed upon deviations.

Evidence of such a universal character is contained in the preamble, which refers to "the need for a universally acceptable code." Indeed, this argument was raised by the spokesman of the COMECON countries when he questioned the legality of the EEC reservations under international law. The EEC spokesman in turn referred to the central objective of the Liner Code to take consideration of the special needs of developing countries. Deviations from the Liner Code would be permissible as long as the interests of the developing countries would be observed. This interpretation is supported by the fact that the Liner Code grew out of the dissatisfaction of the developing countries with the conference practices. Also, the whole scheme of the Liner Code is one of flexible arrangements which leave room for the needs of individual conference trades.

This flexibility is in particular apparent in article 2(4) of the Liner Code which provides that the cargo allocation principles shall be observed "unless otherwise mutually agreed." This language indicates that the universal uniform application of the cargo reservation rules is not a major objective of the Liner Code. In fact, this exception appears to be a safeguard clause for the developing countries in the sense that it ensures that no cargo allocation schemes can be implemented without their consent. At the same time this clause does not prevent other countries from reaching a different accord on their trade shares than prescribed under the Liner Code, provided the 20 percent share for

152 See Liner Code, supra note 1, at preamble, considerations (a)-(f).
153 Id. at second consideration.
155 UNCTAD REPORT, supra note 154, at Annex III, B.1.-12.
156 Id.
157 See supra note 2 and accompanying text.
158 Shah, supra note 4, at 83, 84. At the time of his writing Mr. Shah was Chief of UNCTAD's Maritime Legislation Section.
159 See Liner Code, supra note 1, at art. 2(4).
160 Id. It should be noted also that the preamble of the Liner Code calls for the universal acceptability of the Liner Code and not for its universal applicability. Indeed, universal acceptance might only be reached through flexible application.
developing countries is being observed. Consequently, the reservations of the EEC and the COMECON countries appear to be compatible with the object and purpose of the Liner Code.

In assessing the legal force of the cargo reservation provision, it remains unclear whether the term "equal participation in trade" is meant to be a principle or a right. Article 2(4) calls for the observance of the following "principles," whereas subparagraph (a) provides for equal "rights" in trade participation and subparagraph (b) refers to the "right" of third-country lines to acquire a significant part of the respective bilateral trade. If the provision has to be interpreted as a principle then it can hardly impose direct and immediately enforceable obligations upon the parties. If it is regarded as a right, assuming the substance of the right is sufficiently certain to be enforced by its holders, the holders of that right and the addressees of that provision have to be determined.

The wording of the provision entitles national shipping lines to equal participation. The position of the provision in the organization of the chapter on relations among member lines also indicates that the right of equal participation as referred to in article 2(4), is accorded to the national shipping lines engaged in a certain bilateral trade and not to the flag states. Yet, it has to be determined against whom this right could be enforced. According to one interpretation the addressees of the Liner Code are states. They have to ensure that the cargo allocation rules are observed within the conferences. This interpretation can draw upon article 47 of the Liner Code which provides that each Contracting Party shall take such measures as are necessary to implement the Code.

According to an alternative interpretation, the Liner Code aims to regulate the competitive behavior of national shipping lines within conferences. The observance of the cargo allocation rules would be solely in the responsibility of the shipping lines of each conference or of the individual conferences themselves. Thus, the role of conferences and shipping lines in providing for the right of shipping lines to equal trade

161 See Liner Code, supra note 1, at art. 2(4)(b).
162 The Socialist Bloc spokesman requested the UNCTAD Secretariat to address the question of the legality of the EEC reservations. The Secretariat rejected that request and stated that it would not be possible for the Secretariat to take up an adjudicative position on reservations to a convention adopted under the auspices of the United Nations. The legal conclusions had to be made by the Contracting Parties themselves. See UNCTAD REPORT, supra note 154, at 94.
163 See Liner Code, supra note 1, at art. 2(4).
164 Slot, supra note 51, at 340.
165 Id. at 341, 358.
166 Id.
167 See Liner Code, supra note 1, at art. 47.
168 Slot, supra note 51, at 355 (interpretation of Henzeveldt).
169 Id.
participation has been addressed in various Liner Code provisions. Article 2(13) requires that, when no trade participation agreements exist in a conference, members of the conference may require that pooling arrangements be introduced to establish the kind of trade participation provided for in article 2(4). Any such request shall be considered and decided by the conference. According to article 2(14), national shipping lines may require that, within conferences, sailings be so adjusted as to provide for the same rights as these lines would enjoy under article 2(4). The conference shall use its best endeavors to meet such a request. In the event that such a request is not met, the countries on both sides of the trade may take up the matter and make their views known to the parties concerned. If no agreement is reached, the dispute shall be dealt with in accordance with the dispute settlement provisions established under the Liner Code. Moreover, conferences are entitled to use sanctions against its members for non-compliance with conference agreements. They shall also monitor practices which are regarded as breaches of the conference agreement and shall provide effective self-policing machinery to deal with them.

To summarize, conferences exclusively are being addressed to administer and to enforce the right of national shipping lines to equal trade participation. Governmental involvement in internal conference disputes is explicitly limited to a consultative part, which is extremely carefully worded to exclude any direct governmental leverage. This interpretation is supported by the fact that the Liner Code expressly addresses states only in those cases where national governments are indeed meant to be addressed. Thus, article 39 of the Liner Code provides that each Contracting Party shall enforce the decisions rendered in the conciliation process under the Code. At the same time, the provisions on dispute settlement clearly envisage disputes between a shipping line and a conference, but do not foresee a state being a party to a dispute under the Liner Code.

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170 Liner Code, supra note 1, at art. 2(13).
171 Id. at art. 2(14).
172 Id.
173 Id.
174 Id. at art. 23.
175 Id. at art. 4.
176 Id. at art. 5.
177 See Slot, supra note 51, at 334.
178 Id.
179 See generally Liner Code, supra note 1.
180 See Liner Code, supra note 1, at art. 39.
181 Id. at art. 23(1). The Code has been described as an instrument of democratic self-regulation which is administered by the parties that are affected by it, i.e. liner conferences, shipping lines, shippers, etc. Shah, supra note 4, at 92.
The fact that states are excluded from the conciliation process reinforces the notion that they do not play a role in the decision making process on substantive issues arising under the Liner Code. Their role is restricted to providing the procedural means under national law to give effect to the conciliation rulings. The provision of article 47, which requires states to take the necessary national steps to implement the Liner Code, has to be viewed in a similar manner. This obligation is not a substantive one which allows states to determine the rights and obligations of conferences, but is merely a procedural one to make available to shipping lines and conferences the self-executing provisions of the Liner Code. Since states, and neither shipping lines nor conferences, are the Contracting Parties of the Liner Code, the rights and obligations of national shipping lines and conferences could not be accorded to them in the absence of such implementation. A substantive alteration of the Liner Code by administrative action of states is thereby excluded. Yet the role of national judiciaries and their possible impact on the Liner Code through judgments remains to be considered.

Municipal courts could become involved in two different ways. First, national shipping lines might desire to initiate court proceedings instead of entering the conciliation process under the Liner Code. This option to initiate proceedings remains open even if an unfavorable settlement has already been reached under the Liner Code. This question is addressed in article 23(3) of the Liner Code which provides that conciliation proceedings shall have precedence over remedies available under national law. If a party seeks remedies under national law without invoking the conciliation procedures under the Liner Code, then those proceedings shall be stayed in the national court upon request of the respondent and the court shall refer them to the Code's procedures of dispute settlement. Since this provision is part of the law of the land of those countries having ratified the Liner Code or acceded to it, and having implemented it through legislation, national courts are bound by these provisions.

A second issue in which national court decisions might have an impact on the Liner Code arises where states do not conform to their obligations in articles 39 and 47 to enforce conciliation decisions and take the necessary steps to implement the Code. Since states cannot be parties to a dispute under the conciliation procedures of the Liner Code, these issues would have to be settled by national courts. Yet these decisions

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182 See Liner Code, supra note 1, at art. 23(2).
183 Id. at art. 47.
184 Id. at art. 23(3).
185 Id. at art. 39(1).
186 Id. at art. 23(1).
187 See supra notes 177-81 and accompanying text.
would not be given on substantive issues of the Liner Code, but on the procedural obligations undertaken by states under the Code. The substantive provisions on rights and obligations of national shipping lines and conferences are not subject to interpretation by national courts.\(^\text{188}\) While it may be concluded that the Liner Code addresses in particular shipping lines and conferences, it has to be acknowledged that states are the actual signatories and Contracting Parties of the treaty. Consequently, it has to be assumed that states have to comply with the provisions in good faith and to accept the Liner Code as a standard for governmental action in that area. In particular, Contracting States must be expected not to implement legislation or administrative action contrary to the Liner Code.\(^\text{189}\)

To summarize, the discussion of the Liner Code leads to the following standards on cargo reservation:

1. The principle or right of equal participation with significant third-country line participation in bilateral trade concerns primarily the trade with developing countries. The universal application of the 40-40-20 formula has been rejected by the EEC and Soviet Bloc countries insofar as this provision might apply to their internal trades.\(^\text{190}\)

2. The Liner Code does not place direct obligations on states as to legislative or administrative implementation of cargo reservation schemes.\(^\text{191}\)

3. Contracting States, however, are expected to comply in good faith with the Liner Code regarding future legislation and administrative action notwithstanding the reservations made.\(^\text{192}\)

5. The General Agreement on Tariffs and Trade

Another instrument which could provide evidence as to a standard regarding cargo reservation under international law is the General Agreement on Tariffs and Trade (GATT).\(^\text{193}\) Its provisions on most favored nation treatment,\(^\text{194}\) non-discrimination and the elimination of quantitative restrictions\(^\text{195}\) might be relevant in this context. The GATT, however, is clearly designed to cover only the trade in goods and not the

\(^{188}\) See supra notes 182-83 and accompanying text.

\(^{189}\) Grewlich, Mögliche Lösungen Schiffscharakteristik der Gegensätze im Nord-Sud und Ost-West Verhältnis durch den UNCTAD-Kodex für Linienkonferenzen, 26 RECHT DER INTERNATIONALEN WIRTSCHAFT 402 (1980).

\(^{190}\) See supra notes 145-50 and accompanying text.

\(^{191}\) See supra notes 168-81 and accompanying text.

\(^{192}\) See Liner Code, supra note 1, at art. 39.


\(^{194}\) 55 U.N.T.S. at 196.

\(^{195}\) Id. at 224, 228.
conduct of international service industries such as shipping. Although an analogous application of these rules might be considered, it has to be recognized that such an analogy can be drawn only in cases where there is an unintentional gap in the regulatory framework. The reach of a treaty cannot be extended to cases which are neither covered by its language nor by the intent of the Contracting States. In the case of GATT, the preparatory work shows that one of the reasons not to apply the GATT rules to shipping was the existence of the Intergovernmental Maritime Consultative Organization (IMCO), although the importance of shipping for the trade in goods was fully recognized.

6. General Principles of International Law

Finally, it has been suggested that general principles of international law might contain a standard on the legality of flag discrimination. In particular, the principles of freedom of the high seas, of free commercial intercourse, and a general principle of non-discrimination have been advocated from time to time. Within the limited framework of this paper, it might suffice to state the prevailing opinion that freedom of the high seas cannot be translated into a principle of freedom of maritime transport and that under international law there is neither a legal principle of free commercial intercourse nor a general principle of non-discrimination.

IV. CARGO RESERVATION IN U.S. LAW AND PRACTICE

The United States has consistently rejected the idea of commercial cargo reservation and has opposed strongly the Liner Code standard.

197 Id. at 528-29; see also Slot, supra note 51, at 343. Nonetheless, discussions are being held on whether the GATT should be amended to cover the trade in services. This issue is being raised in particular by the United States. At present, however, there has been no progress in increasing the role of GATT in this field. Dos, The GATT Ministerial Meeting 1982, 18 J. WORLD TRADE L. 14 (1984).
198 For a brief reference to these principles, see Slot, supra note 51, at 335-37.
199 Id. With regard to free commercial intercourse it has been pointed out that commerce is not an exercise of a fundamental right but simply the reflection of the fact that it is in the national interest of states to trade. This, in turn, is a condition for the development of international law. However, the ultimate content of the rules depends on factors other than the existence of a condition for the creation of these rules. See L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE 321 (8th ed. 1955). With respect to a general principle of non-discrimination, see W. KEWENIG, supra note 86, at 197.
In the following discussion U.S. maritime policy on cargo reservation will be analyzed.

Cargo reservation rules have been codified in various forms under U.S. law. A first landmark was set with the Military Transportation Act of 1904 which gave preference to U.S. flag ships in the transportation of supplies to Army and Navy bases overseas.\(^{201}\) Cabotage legislation followed which reserved the trade between points in the United States to vessels built and documented in the United States.\(^{202}\) Public Resolution 17 of 1934 was the next major decision on cargo reservation providing that, when loans were made to foster the export of agricultural products and other goods, such commodities should be carried exclusively on U.S. flag ships.\(^{203}\) The most significant piece of cargo reservation, however, is the Cargo Preference Act of 1954 which requires that at least 50 percent of all government generated cargo is to be carried on U.S. flag vessels if available at fair and reasonable rates.\(^{204}\) The United States Maritime Administration (MARAD) is responsible for overseeing compliance with these laws and also administers promotional policies in the form of direct and indirect subsidies to the shipping industry.\(^{205}\) This reflects the U.S. policy which has always regarded cargo reservation as a promotional device for the development of the national shipping industry.\(^{206}\) Yet, such promotion often has been adhered to reluctantly because of the ideological notion that such measures interfere with the functioning of the free market mechanism.\(^{207}\)

The major manifestations of cargo sharing in U.S. maritime policy can be attributed to bilateral agreements. These agreements fall within two categories: public governmental and private equal access agreements.\(^{208}\) The former are concluded between the United States and another state for the purpose of allocating the carriage of their mutual trade to national flag ships.\(^{209}\) Typically, these agreements specify the rights and obligations of national shipping lines. Such agreements have been

\(^{203}\) This resolution was originally enacted as Joint Resolution of March 26, 1934, ch. 90, 48 Stat. 500 and has been codified in 46 U.S.C. § 1241-1 (1982). The resolution covers mainly loans by the Export-Import Bank. See I. Heine, supra note 39, at 7.
\(^{207}\) Id.
\(^{208}\) Slot, supra note 51, at 338-39.
\(^{209}\) Id.
reached with the People’s Republic of China, the Soviet Union, Brazil, and Argentina. The U.S.-U.S.S.R. agreement recognizes the interests of the parties in giving their national flag vessels the opportunity to equally participate in the trade between the two countries; including the trade in government-controlled cargo. One of the U.S. objectives in concluding this agreement was to counter the Soviet Union's practice of routing her cargoes to state-owned and controlled national flag ships.

Another form of bilateral agreement is the non-governmental equal access agreements. These are concluded between U.S. carriers and foreign national shipping lines and usually provide the parties with access to reserved cargo in return for the pooling of revenues from that trade. Such agreements are subject to the limitations of sections 5 and 10 of the Shipping Act of 1984 and the Sherman Act of 1890. Pursuant to section 6 of the Shipping Act, such equal access and pooling agreements become effective on the 45th day after filing, unless they are found in violation of section 5 and in particular sections 10(1) and (3).

Both public governmental and private equal access agreements are created by pressure from the U.S. trading partners. The economic arguments around bilateralism resemble those raised with regard to cargo sharing under the Liner Code. In essence it is argued that bilateral agreements distort international trade through uneconomic transportation, whereas supporters of bilaterals refer to those restrictive cargo reservation laws of foreign countries which would, in the absence of cargo sharing agreements, exclude U.S. carriers from the respective trades.

Bilateralism in U.S. trade is illustrated best with the case of Argen-

215 I. HEINE, supra note 39, at 23.
216 Slot, supra note 51, at 338-39.
219 See supra note 73 and accompanying text.
220 L. JUDA, supra note 206, at 93-94.
221 Id.
By law 18.250, promulgated on June 10, 1969, the Argentine government established a system of national cargo preference. This law reserved to the national line Empresa Lineas Maritimas Argentinas, S.A. (ELMA) the carriage of all imports destined for government agencies or financed by the state banking system. Law 19.877 of 1972, however, broadened access for foreign carriers to such reserved cargo, provided that the foreign carrier agreed to pool the revenues allowing the Argentine national line a 50 percent share. These laws were supplemented in 1972 by Law 20.447, which claimed the right for Argentine vessels to carry 50 percent of all Argentine foreign trade. U.S. shipping lines were seriously affected by these measures, and a number of U.S. shippers protested the situation to MARAD. Subsequently, Prudential-Grace Lines, Inc., a U.S. carrier, entered into an equal access agreement with ELMA which gave both parties equal access to controlled cargo and provided for the pooling of revenues. The agreement was filed with the Federal Maritime Commission (FMC) for approval under section 15 of the Shipping Act of 1916. Westfal-Larsen & Co. AS, a Norwegian cross-trader in the U.S.-Argentina trade, filed a protest with the FMC contending that the agreement eliminated third-flag carriers and consequently would violate section 15 of the Shipping Act of 1916.

Initially, the agreement was approved as a customary measure to alleviate the effects of discriminatory foreign laws and its anti-competitive features were held to be overcome by its potential for avoiding conflict between the governments involved. The decision was later reversed on the grounds that the agreement constituted an unnecessarily broad way to cope with foreign discriminatory laws and that the matter would be served better with a multilateral agreement providing for third-flag carriers.

In response to this situation the United States reached agreement with Argentina in a Memorandum of Understanding which recognized the desire of both states to have their national flag vessels carry a sub-

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223 See 20 F.M.C. 267 (1977-78).
224 Id.
225 Id.
226 Id. at 269.
227 L. JUDA, supra note 206, at 98, 99.
231 Id. at 257-59.
substantial portion of their mutual trade. Pursuant to this Memorandum several equal access and pooling agreements were established which provided for equal participation of the U.S. and Argentine national lines in their mutual trade, while leaving no more than 20 percent to third flag vessels.

V. CONCLUSION: A STANDARD UNDER INTERNATIONAL AND U.S. LAW AND PRACTICE

The discussion of the various international treaties leads to the conclusion that there is at present no legally binding standard on cargo reservation in the form of a treaty obligation. Nevertheless, the principle of equal participation and non-discrimination can be derived from these agreements. They reflect a state of opinion that regards cargo reservation schemes in the trade with developing countries as acceptable, provided that such agreements do not restrict third parties unduly and leave them a significant, probably at least 20 percent, trade share.

In U.S. practice a similar argument can be distilled from the rulings of the FMC. The consideration of cross-trading lines played a significant role in the approval of equal access agreements which are in force with developing country shipping lines. Yet, a difference is certainly constituted by the fact that U.S. maritime policy is more or less forced into the acceptance of highly restrictive bilateral agreements by legislation in developing countries. Thus, virtually all of the Argentine-bound goods have been designated government impelled cargo.

While U.S. maritime policy supports the reservation of government generated and funded cargo, it opposes cargo sharing of commercially generated cargo. Indeed, the reservation of government impelled cargo can be technically justified with the argument that the government as a shipper is free to choose the carrier of its preference, e.g. the national shipping line. This argumentation however, neglects that in the socialist states of Eastern Europe and many developing countries virtually all international trade transactions involve governmental entities, and therefore the reservation of government impelled cargo tends to enhance the proliferation of cargo reservation rather than to protect free competition in privately generated cargo. This distinction in U.S. maritime policy

232 See supra note 213.
233 L. JUDA, supra note 206, at 99.
234 See Liner Code, supra note 1, at art. 2(4)(b).
235 See supra notes 222-33 and accompanying text.
236 See supra notes 209-33 and accompanying text.
237 Id.
238 See L. JUDA, supra note 206, at 99.
239 Id. at 49.
is in fact not a significant argument against the Liner Code cargo allocation formula.

Actually, the problem has been addressed in article 2(17) of the Liner Code which provides for the application of the cargo sharing provision to all cargoes regardless of their origin or the use for which they are intended, the only exception being the transport of military equipment for national defense purposes.\(^{240}\) In that sense, the Liner Code appears more liberal than the U.S. position in granting cross-traders access also to government impelled cargo and in subjecting governmental trade to an international standard.

With the Liner Code in force, many more countries can be expected to implement cargo reservation laws forcing the United States into bilateral agreements. Eventually, the United States will find itself enmeshed in a network of bilateral agreements which, at times, may be more restrictive than the Liner Code formula, to which the United States has not become a party.\(^{241}\)

Although there have been a limited number of cases in which the FMC rejected equal access agreements and opposed unduly restrictive foreign laws with punitive measures or the threat thereof,\(^{242}\) bilateralism seems to be the most favored U.S. position on the issue.\(^{243}\) One of the reasons for the U.S. position is to gain more influence over individual trades through a case-by-case approach rather than under the Liner Code which provides for a general standard with mutually agreed exceptions.\(^{244}\) Nonetheless, the Argentine case reveals that exactly the kind of

\(^{240}\) See Liner Code, supra note 1, at art. 2(17).

\(^{241}\) For an early analysis of how these agreements are compelled by foreign governments through unilateral cargo reservation laws see Hearn, supra note 204, at 492. For a brief description of Brazilian shipping laws, see Saraiva, Brazilian International Shipping Policy, 4 LAW. OF THE AMERICAS 28 (1972). See also Statement of Richard J. Daschbach, then Chairman of the FMC, J. Com., Aug. 6, 1980, at 4, col. 1: "We must address the fact that there will be a de facto implementation of many of the Code's provisions in U.S. commerce. The challenge we are confronting is whether we can accommodate the policies of our trading partners." (For example, in bilateral agreements.) See also the steady development of bilateral agreements in the Peruvian trade, Agreement No. 10041, 38 Fed. Reg. 7148 (1973); Agreement No. 10044, 38 Fed. Reg. 8087 (1973); Agreement No. 10041-4, 42 Fed. Reg. 13149 (1977); Agreement No. 10044-3, 42 Fed. Reg. 11041 (1977).

\(^{242}\) Section 19 of the Merchant Marine Act, 46 U.S.C. § 876(l)(b) (1982) authorizes the FMC to make rules and regulations to adjust or meet conditions unfavorable to shipping in the foreign trade which arise or result from foreign laws.

Thus far the FMC has imposed an equalization fee on cargo carried by Guatemalan carriers. 42 Fed. Reg. 62914, 62917-18 (1977). This fee was suspended after the Guatemalan law had been repealed. 43 Fed. Reg. 3361 (1978). See also 47 Fed. Reg. 55969 (1982) for the threat of action against Venezuela, which led to a Memorandum of Understanding, 48 Fed. Reg. 4357 (1983). Under the terms of that agreement Venezuelan and U.S. carriers share government impelled cargo while acknowledging that the participation of cross-traders is desirable.


\(^{244}\) Lopatin, supra note 243, at 376.
cargo reservation provided by the Liner Code has been practiced in U.S. trade for some time.\textsuperscript{245} Thus an overwhelming state practice can be assessed regarding the acceptability of cargo sharing in trade with developing countries. This practice, however, appears to be one of fact rather than law. In other words, there is no evidence that cargo sharing is practiced as a matter of law.\textsuperscript{246} A normative character can be neither derived from the rules and principles laid down in the mentioned international treaties, nor can it be held that state practice has developed into customary international law without a corresponding \textit{opinio juris}. Yet the continuous practice of cargo sharing with developing countries might enhance the expectation of such behavior developing into international law. A universally applied cargo reservation principle, including the trade between the developed states, is not carried by any state practice and cannot be expected to develop in the foreseeable future.\textsuperscript{247}

Given this state of the law, U.S. maritime policy should pursue a route which maximizes U.S. influence in liner shipping. Although bilateral agreements provide considerable influence over particular trades, it should not be neglected that worldwide liner shipping will be governed by the Liner Code as it was accepted by the OECD member states, except the U.S., and by the developing countries. As has been pointed out, the Liner Code provides a flexible regime for liner shipping which will be shaped through the continuous process of practice and interpretation.\textsuperscript{248} Taking into account the possibility of wide ranging reservations, such as made by the EEC countries, U.S. maritime policy should not consider cargo reservation under the Liner Code as a major obstacle for accession to the Code.\textsuperscript{249}

\textsuperscript{245} Supported by Lopatin, \textit{id.}

\textsuperscript{246} \textit{L. Juda, supra} note 206, at 159.

\textsuperscript{247} \textit{Id.}

\textsuperscript{248} \textit{Id.}

\textsuperscript{249} It is not overlooked that various problems of compatibility between other parts of the Liner Code and U.S. law remain, a major one being the organization of shipper councils provided for by the Liner Code as a counterbalance to liner conferences, whereas the U.S. prefers a system of conferences under strict antitrust supervision to alleviate the shippers' dependence on the conferences and to maintain competition. \textit{See} H.R. No. 98-53, \textit{supra} note 71, at 20, 21; \textit{L. Juda, supra} note 206, at 159 for a U.S. policy position which should provide the basis for U.S. acceptance of the Liner Code.