

Chapter 6

Shipping Nationalism and Government Involvement

From early times, “authorities”—whether local, regional, national or international—have never been far from involvement in one aspect or another of shipping. Sometimes that involvement is for the good; sometimes it is not. Indeed, one of the main themes of this book is to trace the ebb and flow of the involvement of these authorities and to put this involvement in perspective in today’s world against the background of the principle of freedom in shipping.

This chapter and the next look at the ways in which the aspirations of national authorities have created impositions and obstacles for other countries’ shipping interests and then at the conflict between those aspirations and what may be termed the international or multilateral imperative, without which chaos and economic war would ensue. They consider the many different forms of present-day protectionism and its confrontation with policies based on liberalisation.

Later, it is explained how governments have become involved—in some cases heavily—in the important areas of safety, the environment and pollution control, security, liability and management quality. Their involvement in crewing and other labour issues is also covered briefly.

The Backdrop

The end of the Second World War and the dismantling of the different European colonial regimes led to a growth of nationalism in those countries which had previously come under the control and protection of others. Many of those countries saw the creation of a national airline—and, as an extension of that philosophy, of a national shipping line—as a necessary demonstration of their newly found national autonomy and prestige. The “wind of change” in the 1950s and 1960s, to quote the famous phrase of Britain’s then Prime Minister, Harold Macmillan, blew as fiercely in the shipping world as elsewhere. This should not be a surprise. We have already seen protectionist attitudes from early times in different nations: Spain, Portugal,

the Netherlands, France, along with Britain and its Navigation Acts, which for nearly 300 years helped to protect and promote British shipping.

The natural tendency of all nations, including the traditional maritime countries, has been to look at shipping from their own national perspective and to see where they could gain an advantage. In the United States, shipping in the early twentieth century was regarded as an industry to be maintained at any price if it was a benefit for the nation; but not at any price for the sake of shipping itself. Greece and Norway, both major shipping nations and with shipping their largest single industry, saw their greatest benefit in the maintenance of an open-trading, free-enterprise environment. This same philosophy has now come to be held widely by maritime states because it is considered to be to their benefit as both shipping and trading states. It is difficult to see this trend changing with the increasing globalisation of the national and world economies, although the risk is still present with the emergence of regional country groups.

In Germany, Italy and Japan, during the uneasy days prior to the outbreak of the Second World War, shipping was not seen purely in a trading context but as an arm of a nationalistic and expansionist regime. The period following the Cuban crisis in 1962 through to the early 1980s saw the expansion of the Soviet merchant marine as an extension of that country's political aspirations, in order to ensure a presence in various parts of the world, to correct its previous lack of sea power and maritime prestige and to earn hard currency. This, to an extent, was also the policy of other Eastern Bloc countries, which blazed the trail for the developing countries in shipping nationalism.

Some West African countries, India, Sri Lanka, the Philippines and others followed suit, with the result that a number of developing countries built up much bigger merchant fleets than some of the developed states.

This process was actively encouraged following the establishment in 1964 of UNCTAD, which from the start gave special consideration to the problems and interests of developing countries and to the growth of their merchant marines. The 1950s had seen an explosion of nations joining the newly formed United Nations. By the early 1960s, there were up to 50 from Asia, Africa and Latin America. UNCTAD provided a timely platform for many of these countries to express their concerns and grievances. In their minds, shipping had long been the preserve of a handful of developed states, operating under a legal and commercial system which had been designed by them and worked essentially for their benefit.

The pattern of history has begun to repeat itself and the distinctions have become blurred in a number of cases. Many of those states who built up their fleets on the back of protectionism of one sort or another now espouse free-trade principles because, as Britain found in the mid-nineteenth century, protectionism is no longer in their best interests. That is the mood of recent years as demonstrated by the changing nature and direction of UNCTAD and by the growth in importance of the GATT and the WTO.

This chapter explains the principal mechanisms which governments have used to bend economic, commercial and free-trade principles to the benefit of their own national merchant marines. These may be broadly categorised as follows:

- National (unilateral) regulations or requirements
- Subsidies (overt or covert)
- Bilateral, government-to-government, arrangements
- Regional arrangements
- International agreements and conventions.

Any governmental action under one or more of these heads, which is protectionist or restrictive, tends to erode free competition in terms of price, cargo availability and the ability to trade and to limit the freedom of exporters and importers to choose their service-provider.

The next chapter describes some of the specific issues which are of importance today and how some individual countries or country groupings have responded to these mechanisms. It also touches on some of the current initiatives at regional and international level to bring together the thinking of governments in this area.

National Regulations or Requirements

Given that all forms of national or unilateral regulation under this head are for the purpose of protecting and promoting the national merchant marine, they are restrictive on others and examples of what may be called “anti-freedom”. There are many categories. Historically, they have included:

Denial of Access to National Shipping Markets

- National (unilateral) legislation, which reserves all or part of a nation’s export or import cargoes to national-flag ships.
- Other forms of discrimination in favour of the national flag—through the use of a freight booking centre or bureau which allocates cargoes on a preferential basis; or through the inclusion of clauses in import licences, or letters of credit, which give preference to the national carrier.
- Cabotage, whereby a country’s domestic (coastal or inter-island) trade is reserved to ships flying the national flag.
- Boycotts, whereby ships are debarred from operating in a certain region or trade, for political or economic reasons.
- Domination of the national-flag carrier by a requirement that all goods exported are sold on *cif* (cost, insurance and freight) terms; and that all goods imported are purchased on *fob* (free on board) terms.
- Other administrative provisions which have the effect of debarring non-national lines from participating in the trade.
- Requirements that military, strategic, aid or other government cargoes are carried by national-flag carriers.

- Unwritten pressures or campaigns to ship by the national flag, whether government-sponsored or as a result of national sentiments.

Restrictions on Operations by Non-nationals

- Restrictions on the allocation of berths or anchorages through priority treatment for the national flag.
- Requirements that national-flag vessels be given priority use of loading or discharging equipment, port or navigational equipment or other aids.
- Restrictions on the acquisition or importation of spare parts.
- Requirements that excessive (and expensive) ship-repairs are carried out locally in order to support national interests.

Restrictions on the Freedom of Non-nationals (Shore-Side)

- Difficulties or prohibitions for non-nationals wishing to establish branch offices or agencies.
- Restrictions on the operation of inland haulage.
- Impediments in obtaining necessary licences, work permits or visas for non-nationals.
- Restrictions on inward investment or on the repatriation of profits.
- Requirements that national agents, firms or organisations be used in preference to non-national interests.

Extra-Territorial Application of National Laws

- Attempts to extend purely national or regional legislative requirements, for example, US or EU antitrust concepts, into other jurisdictions on the basis of the “effects” doctrine.
- Endeavours to extend to shipowners and shippers of other nations national requirements as to the terms and conditions upon which trade between them is done.
- Unilateral requirements that national laws on practical, operational issues which go beyond the accepted international standards (for example, concerning safety, stability, fire protection, pollution control, and health standards) apply equally to foreign vessels entering national ports or otherwise coming within national jurisdiction.

Restrictions on the Charges for Shipping Services

- Restrictions or pressures on the level of freight rates or the amount or frequency of rate increases, or other interference with commercial pricing policies.
- Powers to disallow freight rates or rate increases on the basis of national criteria such as the “interests of the commerce” of that country.

Subsidies and Other Forms of Assistance

Within this category fall various forms of assistance to shipowners and also to shipbuilders as well as those which, although directed to shipbuilders, are in fact disguised assistance for shipowners.

Shipping

- Investment subsidies, designed to encourage national carriers to invest in new or second-hand tonnage, whether or not the ships have been built at home.
- Construction subsidies based on the principle of putting the national carrier, building a new ship at home, on equal terms with its foreign competitor building either at home or abroad.
- Taxation arrangements designed to assist investment by national carriers.
- More beneficial credit arrangements for national owners building in their own country than for foreigners building in the same yard or yards. These facilities may be provided either by governments, yards, or banks and finance houses.
- Operating subsidies designed to put national carriers on an equal footing with their international competitors, on the argument that national operating costs are, for various reasons, higher.
- Income tax and/or social security alleviations designed to encourage the training and employment of national crews.
- Politically motivated arrangements, some of them covert, for providing national shipowners with an advantage. Although not subsidies in the true sense, they have similar effect.

It is probably the norm rather than the exception for governments to try to assist their shipping through taxation measures, although shipowners in any one country are often heard to complain that the taxation advantages elsewhere are greater. It is a fact that international shipping markets are generally low-cost and low-tax. Many higher-cost countries try to match or offset those conditions for their national operators. It is often difficult to quantify the benefits as between different countries in what is a constantly changing situation.

Depending on the country in question, some measures may be tied to operations under the national flag; others may apply to investment or employment relating to ships owned and operated from the country regardless of where the ship is registered.

Shipbuilding

Historically, governments have sought to aid and bolster up their shipbuilding yards through a wide variety of methods. Although these frequently have a knock-on effect which benefits shipowners indirectly in terms of the price and financing arrangements, they should be distinguished clearly from subsidies or other assistance to the national shipping industry. These aids have the primary aim of assisting the national interest in terms of manufacturing and they benefit any shipowners, whatever their nationality, purchasing a vessel from those yards.

It is a fact of the world maritime scene that, in most countries, shipbuilding has traditionally had a political importance, because it can be labour-intensive and thus means votes. Shipping has tended to have less influence in political terms because it commands fewer votes concentrated in particular areas. Such political leverage as it has stems from other factors, which include its importance to the national economy and skills-base, defence and strategic considerations, and—in some cases—the need to show the flag internationally.

Among the wide range of methods national governments have used to provide assistance to their shipyards come the following:

- Straight financial grants or other financial assistance;
- Government-sponsored schemes for selling ships at non-commercial prices to others for political reasons;
- Schemes for building ships for stock;
- The promotion of scrapping or “scrap and build” schemes, both of which provide, or may provide, employment for shipyards.

The main international forum engaged in the overview of competition-distorting government support in world shipbuilding since the 1960s has been the OECD Working Party on Shipbuilding (WP6).

Most of the measures described above were outlawed by the OECD agreement on shipbuilding subsidies (“Agreement respecting normal competitive conditions in the commercial shipbuilding and repair industry”), which was adopted in 1994. This provided a set of binding, legally enforceable disciplines addressing both subsidies and injurious pricing practices. Specifically, it required all parties to eliminate all existing support measures or practices which “constitute obstacles to normal competitive conditions” in the industry and not to introduce any new ones. It also contained a ban on “injurious pricing”—i.e. the selling of ships to the nationals of another party to the agreement at less than the normal value of the vessel—and allowed the imposition of equalising charges to remedy any material harm caused.

The agreement was concluded after many years of highly sensitive negotiations between the authorities of the USA, the EU, Japan, and other OECD member states. Some other major shipbuilding nations then outside the OECD membership (such as Korea) were also involved. However, one of the main protagonists of the agreement during the early stages of its negotiation, the USA—under pressure from some of its hitherto highly subsidised national shipyards—has never ratified it; as a result, it has never come into force.

In 2002 the signatories to the agreement reached the view that the agreement was most unlikely ever to come into force and the OECD Council created a Special Negotiating Group (SNG) to undertake detailed negotiations on a new world-wide agreement. In contrast to the composition of the negotiations leading to the 1994 agreement, the SNG was directed to invite all non-OECD economies with significant shipbuilding industries to participate in the negotiations on an equal footing with OECD member countries. Eventually, Brazil, China, Croatia, Malta, the Philippines, Romania, the Russian Federation, Chinese Taipei (Taiwan) and Ukraine participated in the negotiations—bringing the proportion of world shipbuilding capacity represented to around 95 %.

The negotiations were “paused” in September 2005 for an unspecified period, in order to allow the parties to reflect on their positions, to talk to each other and to observe developments in the market. The intention was to resume the negotiations when the environment for success had improved. In the meantime, pending their resumption and in an endeavour to maintain interest and stimulate momentum, the OECD’s Working Party on Shipbuilding organised a number of workshops together with non-OECD countries and industry which allowed an informal stock-taking of the global industry. It began a series of reports on the industries in both OECD and non-OECD economies, with the full participation of the countries in question. The situation in China and Vietnam was examined and the reports for both countries were issued in 2008.

Despite these efforts and lengthy endeavours to restart the negotiations, the differences between some of the participants could not be overcome and the OECD Council terminated the negotiations in December 2010. Nevertheless, the Working Party on Shipbuilding continues its work in accordance with its original mandate.

Bilateral Government-to-Government Arrangements

There is nothing wrong in principle with bilateral agreements which may well serve a good purpose in establishing an agreed approach to key shipping matters. By its nature, most shipping takes place between two or more countries and therefore a mutual understanding on practical issues affecting the interface between the two countries may be necessary. Ideally this should be done on a multilateral, world-wide basis as far as possible, but in some cases that understanding may be best

achieved on a bilateral basis. Whether they are restrictive or non-restrictive depends entirely on the provisions in the particular agreements.

Instinctively, shipping people shy away from bilateralism because they see parallels with air transport where the world's airlines are governed as to landing rights and terms and conditions of their services by a whole network of bilateral, government-to-government agreements.

For shipping, with its vastly more complex patterns of trading, its completely different sectors, and by and large its open-market, free-trade philosophy, such a system would be quite impractical, wasteful of resources and inefficient. Yet, to a limited extent, bilateral agreements between governments do exist, especially as regards regular liner services. Their nature may be either protectionist or defensive. Bilateral agreements often also govern certain administrative aspects of shipping such as consular matters or travel of crew members to or from their ship, which do not affect the market.

Protectionist agreements are designed to promote the national fleet. They no longer seem to be as prominent or as active as they were in the 1970s and 1980s though they may still persist today, particularly in longstanding arrangements. In the past these sought to divide the shipping market between the two countries on some agreed basis. Various formulae were designed to keep carriers from other nations, i.e., cross-traders, completely out of the trade or to limit their share. The split could therefore be 50/50; or 40/40 allowing a 20 % share for cross-traders or 33/33/33. Whatever their nature, they are all restrictions on the principle of the freedom of shipping.

Defensive agreements may be found where one state seeks unilaterally to reserve to its national flag a substantial proportion of its trade with another state, or to impose other restrictions. In such a case, a bilateral agreement may be the only way for that other nation to defend its carriers and enable them to trade effectively.

Examples have been found at various times in different parts of the world. Typical examples in earlier times included the trades between a number of South American states and the USA, the former approaching them from the standpoint of promoting their national interests, the latter in order to defend the interests of its national lines. The most recent US agreements were concluded with Brazil in 2005 ensuring equal treatment in maritime-related services and facilities including shipping taxes, and equal access for each country's national-flag carriers to the other country's government-controlled cargo; and with Vietnam in 2007 allowing US carriers to open wholly-owned subsidiaries in that country, in the face of government monopoly positions in its growing maritime trade. Currently the US has only a few agreements; the others are with China (2003) and Russia (2001), as well as an exchange of letters on port services with Japan (2007) that also has the effect of an agreement.

Other examples of defensive bilaterals were in the relations of individual EU member states and other countries with state-trading countries, particularly the former Soviet Union and, more recently, China. However, these have been overtaken in recent years by the growing number of EU agreements, which do

not contain cargo-sharing provisions, and by the entry of a number of the former Eastern Bloc countries into EU membership.

Regional Arrangements

In the same way as individual governments seek to promote, protect or defend their national shipping interests, so may several governments join together for the same purpose in a regional context.

The European Union's common shipping policy is particularly illustrative of the way governments, on a regional basis, may attempt to promote and protect their joint shipping and trading interests. The EU governments have, since December 1986, adopted a common approach to their maritime external affairs, also based on free-market principles. The interesting point is that the EU has shown a readiness to use its collective governmental muscle to defend the liberal principles on which its shipping policy is based.

In contrast, for at least a quarter of a century until fairly recently, the South American countries together pursued restrictive policies in an endeavour to promote their merchant marines. Until the breakdown of communism in the late 1980s, all the centrally-controlled economy states in the Eastern Bloc (COMECON) banded together in the same way. Much the same happened in West Africa in the 1970s and 1980s where a few countries established a series of ministerial meetings in order to co-ordinate their shipping policies for the benefit of their common trading and shipping interests and adopted openly protectionist policies based on cargo reservation. Now, under the aegis of the more liberal Maritime Organisation of West and Central Africa for Maritime Transport (MOWCA), which has 25 state members, the trend is more towards liberalisation with member states becoming signatories to the General Agreement on Trade in Services (GATS) and focusing their energies more on expanding private-sector participation, developing coastal shipping networks and strengthening maritime education and training institutions.

International Intergovernmental Arrangements

While government involvement in the commercial aspects of shipping has long been widespread at national levels, and to a lesser extent at regional levels, it is only during the second half of the twentieth century that governments began to intervene in these aspects on a fully international basis. Groups of like-minded states such as the Consultative Shipping Group or the OECD have exchanged views and acted in a co-ordinated way on these issues. They are wider than regional groupings, but are not fully international. Both of these groupings have been concerned with promoting an open competitive environment.

In the case of the OECD, this is changing. On the one hand, new members have joined in recent years from Eastern Europe, the Far East and Central America. The OECD, has its own Code covering the invisible service interests—such as shipping, insurance, banking, and tourism—which is again directed to the maintenance of open competition. Unfortunately, the United States maintains a different position on the key aspect of the Code as it applies to the shipping sector, insisting on its own freedom of action. In addition, for a period of about 10 years during the 1990s, the OECD was very active—in the absence of progress within the GATT/WTO discussions—carrying the liberal message to different regional groups of countries in a similar way to what it was trying to do in shipbuilding.

On the other hand, the OECD is no longer involved in this area, having disbanded its Maritime Transport Committee in 2005.

The following are some examples of global involvement through international initiatives:

- The agreement in 1993 on trade in services, within the General Agreement on Tariffs and Trade. The basic GATT principles of liberalisation apply to shipping in principle, but there has been no agreement yet on how they should be implemented.
- An extensive range of labour conventions and recommendations, adopted within the International Labour Organisation over the last 90 years, on matters relating to the employment of seafarers. These are unusual in that they are agreed on a tripartite basis, since governments, employers and employees all vote at ILO conferences. As mentioned earlier, most of these have now been revised and subsumed in a major new consolidated instrument, the Maritime Labour Convention, adopted in February 2006. This is expected to be widely supported.
- The United Nations Convention on Conditions for Registration of Ships, 1986, sponsored by UNCTAD, which sought to define the elements necessary to establish a genuine link between a state and the ships flying its flag in the areas of manning, management, control and ownership. This Convention has not entered into force and is unlikely ever to do so.
- The United Nations Convention on the International Multimodal Transport of Goods, 1980, another UNCTAD-sponsored Convention, which laid down the terms and conditions applicable to the international carriage of goods under the responsibility of a single transport operator, when more than one mode of transport is used. This Convention, too, has not entered into force and may well be overtaken by the newly adopted UNCITRAL-sponsored instrument, the United Nations Convention on Carriage of Goods Wholly or Partly by Sea, 2009, known as the “Rotterdam Rules”.
- The United Nations Convention on a Code of Conduct for Liner Conferences, 1974, generally referred to as the “UN Liner Code” was also sponsored by UNCTAD. It covered a number of aspects previously considered purely commercial matters, such as conference market shares, pricing policy, relationships between lines and their customers, the shippers, and membership criteria for

liner conferences. This Convention entered into force in October 1983, but rapidly became overtaken by events and is now ineffectual in practical terms.

- The general provisions of early UN plans to the effect that developing nations should have greater participation in shipping, to the extent of at least 20 %.

In all these ways, governments, through their political and bureaucratic machinery, have been drawn into the discussion of shipping issues of an economic and commercial nature.