Chapter 7
Demise of Protectionism and Rise of Liberalisation

Although protectionist practices are less prevalent today, they often remain in the statute books and are still an impediment to world trade; and new instances continue to arise from time to time. At a time of economic downturn and uncertainty such as the world is experiencing today, the danger and fear of a resurgence of protectionism remains very real, as local economies try to gain or maintain an involvement in commerce and create or safeguard local employment.

There are encouraging signs, in that states and economies across the world are working together more frequently and effectively to discuss and find solutions to key issues in the global economy—including through the G20 (the group of the major industrialised nations spanning both developed and developing countries, together with their national bank governors and the World Bank, which has over the last 10 years sought to promote global economic co-operation). In their communiqué following a meeting in September 2009, the G20 leaders committed themselves to stand together to fight against protectionism. Specifically, they promised to keep markets open and free and refrain from imposing barriers to trade in goods and services. They expressed their determination to seek an ambitious and balanced solution during 2010 to the Doha Development Round in the WTO negotiations (see below).

This is therefore very much a current issue, whether active or just under the surface.

Until the late 1970s, protectionism in shipping—in the many forms listed in the last chapter—was widespread. Although, in terms of the overall volumes transported, most liner cargoes were carried between the countries which were members of the OECD at that time (which generally espoused liberal principles), there was a feeling in many parts of the world that, if a country generated cargo, it had in some way a "right" to carry it, or at least to control its carriage. This sense was common among many of the developing countries, driven by the understandable wish partly to exercise greater autonomy over their own affairs, partly to try to find sources of commercial income, and partly also to have a symbol of national and economic prestige.

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The same applied to bulk cargoes, albeit to a lesser degree.

At that time, for the developing countries, shipping was a public matter. They drew no great distinction between commerce and government. Shipping was seen as necessary to safeguard trade and earn foreign currency. In UNCTAD, within the "Group of 77", they argued in favour of government regulation based on a concept of international shipping as a public utility (and not a profit-making commercial service), in which they should have adequate participation. This could only be achieved by governments laying down rules about, for example, the activities of liner conferences and the share of the trade companies should carry. The socialist bloc nations ("Group D") tended to side with the developing nations.

This contrasted with the general approach of the countries from the developed or Western world, namely the OECD countries represented in "Group B". For them, commerce and shipping had long been regarded as private for commercial interests and as an area that should not be subject to undue government interference or regulation. Access to international markets should by and large be free and not subject to any form of discriminatory treatment.

This is not to say that all the Group B countries pursued totally liberal policies at that time. A number of them reserved government cargoes (often broadly defined), development aid cargoes, or cargoes said to be of "strategic" importance (which could include oil or even water) wholly or partly to ships under their national flag. Restrictions were applied by some in bilateral trades with former or existing colonies, or on their domestic shipping routes (cabotage), or both.

In the "Common Measure of Understanding" which resulted from the first UNCTAD conference in 1964, one of the main elements was that the growth and development of the merchant marines of developing countries should be based "on sound economic criteria". In the minds of the Group B countries, this meant that no special preferences should be given to them. History was to show other aspirations, as, in the short term, there was a rash of promotional and discriminatory measures in developing countries—cargo reservation, cargo-sharing, subsidy in its various forms, and other preferential treatment.

One product of this trend was the heavy emphasis, in the UNCTAD debates leading up to the adoption of the UN Liner Code, on the issue of the "cargo generator's rights" on particular routes. The Common Measure of Understanding and the UN Liner Code are discussed in greater detail in the chapters on competition policy.

Protectionism Today

There is nowadays a different balance. With the emergence of China in particular as one of the world's major trading partners and the rise of intra-Asian trade, intra-OECD-country trade is no longer dominant. Over the last 30 years, the world's nations—East and West, North and South—have developed a greater understanding of each other's problems and there is now a greater realism in all countries, coupled with a wide acceptance of free-market principles. Many countries in South

America, Asia, Eastern Europe and North Africa no longer have—or at least apply—discriminatory practices against other countries' shipping, although some still retain "sharing" arrangements between neighbouring countries (e.g. in South America).

There has always been a distinction between the formal regulations in a particular country and its practical capability to put them into effect. For example, a country which has no significant merchant fleet may nevertheless retain a formal national policy which reserves 50 % or even 100 % of its imports/exports to a weak or non-existent national shipping line. In some circumstances, this type of anomaly persists today. But generally, the problem of protectionism is nowadays of a different degree. It turns more frequently on the creation of administrative and bureaucratic obstacles with a cost impact, rather than fundamental positions of policy.

The most common examples in international shipping have been:

- *Cargo reservation to national-flag ships*. Usually of 40 % or 50 % of all trade in and out of the country concerned. In some cases, this may result from an incorrect interpretation of the UN Liner Code's conference 40-40-20 cargo-sharing provisions. Again, such a provision may not necessarily be applied in practice, but its existence has been used as a pretext for charging for cargo reservation "clearances" or "waiver rights".
- *Central freight bureaux or booking offices*. Originally set up by a number of countries (mostly in East and West Africa) in order to implement their cargo reservation policies, these were responsible for allocating cargoes to national-flag ships, granting waivers for shipments to be carried by foreign ships, and imposing penalties for non-compliance. Although they do not exist in the same form today, arrangements may still remain for "tracking" import and export cargoes, operated on behalf of government-sponsored "shippers" councils' by an agent in the port of loading, who oversees and approves the transport movement against payment required, prior to the loading of the cargo.
- *Discriminatory charging arrangements*. These are also less common today, but may still apply in some countries to freight or other taxes, use of port facilities, pilotage, tonnage dues or other cargo-handling activities.
- *Restrictions on landside activities*. These may apply to the use of existing infrastructure or the ability for foreign companies to set up their own local handling, inland agency or haulage arrangements.
- *Administrative obstacles*. These may include delays in the remittance of freight revenues and cumbersome licensing requirements for local offices.
- *Restrictions on or preferential treatment for the carriage of government cargoes*. These may also relate to development aid or "strategic" cargoes.

It is interesting that, in some of the countries mentioned (particularly in West Africa), there have been moves towards greater liberalisation in recent years, following pressure from the World Bank in the interest of securing efficient transport chains for the carriage of world trade. This approach has been supported by the EU.

Trade Defence Instruments

National

Individual countries that consider themselves essentially free-trading have long had defensive legislation designed to protect their national trade and shipping interests from harm caused by other countries' protectionist measures.

United States

The United States grants wide-ranging powers to the Federal Maritime Commission (FMC) to respond to "general or specific conditions unfavorable to shipping in the foreign trade", whether in any particular trade or upon any particular route or in commerce generally of the US, under section 19 of the Merchant Marine Act 1920. These were supplemented in the Shipping Act of 1984 by a provision for action against a shipping line or a foreign government which has "unduly impaired access of a vessel documented under the laws of the United States to ocean trade between foreign ports". They were further expanded in the Foreign Shipping Practices Act 1988 in regard to laws or actions of foreign governments or carriers that create conditions which "adversely affect the operations of US carriers in US oceanborne trade and do not exist for foreign carriers" from the country concerned in the US. Again, under both these Acts, the FMC is charged with investigating and taking the necessary action.

Remedies against the shipping interests of another country may include limiting sailings to/from the US ports, limiting the amount or type of cargo carried, suspending their antitrust immunity (where applicable), suspending any preferential arrangements that may apply, the imposition of a fee of up to US$1 million per voyage, or any other necessary and appropriate action.

The US attaches considerable value to the strength and autonomy that these national countermeasures secure and they have been used successfully on several occasions against a wide range of countries.

During 1997, they were activated to put pressure on the Japanese government to eliminate exclusionary licensing requirements and to restrain the Japan Harbour Transportation Association (JHTA) (a non-governmental body) which was imposing burdensome prior-notification requirements and other trading hindrances on US and other shipping companies. The FMC found that JHTA practices created unfavourable conditions and that the Japanese Ministry of Transport established licensing requirements that were discriminatory and protectionist in effect and bore ultimate responsibility for the actions of the JHTA, which operated under its regulatory authority. In response, the FMC assessed heavy fees on Japanese carriers visiting US ports. After high-level negotiations, the two governments signed a Memorandum of Consultation committing the Japanese government to introduce reforms, which it did in 1999. The FMC suspended the sanctions and ordered US

and Japanese shipping companies to issue periodic reports. This last requirement ended in 2011.

The US action was an example of the latitude allowed by the US legislation and contrasted with the reaction of the EU, which was to seek discussions within the multilateral, WTO disputes procedure.

Japan

As another example of national powers, Japan has a law providing for Special Measures against the Unfavourable Treatment of Japanese Oceangoing Ship-operators by Foreign Governments and Others. When Japanese carriers face less favourable treatment than the carriers of the country in question (for example, through cargo reservation, imposing unreasonable fees on Japanese vessels, or any other measures which affect the competitiveness of the Japanese carriers) and suffer harm as a result, the Minister of Land, Infrastructure and Transport may take countermeasures. Following an amendment in 1999, the Minister is bound to warn the foreign carriers of his intention and to give an opportunity for the position to be rectified within 6 months. The countermeasures must not go beyond what is necessary to correct the situation, but may include the denial of the right of the foreign carriers' ships to enter Japanese ports and restrictions on the loading and unloading of cargo. Failure to observe these orders can result in imprisonment or a fine up to 5 million Yen (currently about US$65,000).

The European Union

In Europe, the governments which are members of the EU have a co-ordinated approach to countermeasures.

The Treaty on the Functioning of the European Union (TFEU) provides for the development of a common transport policy. However, under Article 100, the Council has authority to decide whether, and to what extent, sea and air transport should be included. For a number of years, no endeavour was made to formulate any common shipping policy. Such steps as were taken were *ad hoc* in relation to a specific situation. However, by the early 1980s, there was a strong mood in favour of developing a common policy, particularly covering three key aspects: the Community's external relations with third countries; the question of free access to shipping trade between the Member States (within the internal market, which was only then being established in a practical way); and competition policy (which is dealt with in detail in the next chapters).

Four important regulations were adopted in 1986. Throughout their lengthy and often difficult gestation, the industry's views were co-ordinated by the European Community Shipowners' Associations (ECSA).

All the regulations applied to shipping companies established in the EU operating their ships under any flag, unless otherwise stated. The one on the competition rules went further, applying also to non-EU lines trading to the EU. Special provision was made to cover the particular position of Greek nationals and Greek-controlled companies operating, for example, out of New York or any other non-EU country, if their ships were registered in Greece in accordance with Greek legislation. Such owners also benefited from the regulations.

Two of the regulations are relevant here.

Regulation 4055/86 Applying the Principle of Freedom to Provide Services to Maritime Transport Between Member States and Between Member States and Third Countries

The effect was to remove any remaining restrictions on the international carriage of cargoes both in intra-EU trade and in the bilateral trades between individual Member States and third countries.

The regulation provided a clear legal commitment on Member States not to enter into new cargo-sharing arrangements with third countries and, where they existed, to dismantle them within a prescribed timetable. The liberalisation within the EU was implemented over a 6-year transitional period, with the abolition of restrictions in intra-EU trading for national-flag vessels (i.e. registered in the Member States) by the end of 1989; the abolition of restrictions in trades with third countries, also for national-flag vessels only, by the end of 1991; and the abolition of all trading restrictions for "other ships" operated by EU nationals under any flag or registry by the end of 1992. The latter date was deliberately timed to coincide with the formal establishment of the Single Market.

Progress on this particular regulation was difficult. Some of the restrictions were long-standing and deeply embedded in the national policies of the individual Member States concerned. They argued that some protection was necessary for strategic, defence or purely trading reasons; opponents argued that such restrictions should be eliminated quickly, or over a period of not too many years.

The question of the "beneficiary" from Community policy was also contentious. A number of Member States held strongly to the view that a ship should have to be registered in the EU to derive advantage from EU policies. The majority recognised that the world was changing and that, increasingly, it was the fact of ownership (rather than registration) that was important in commercial, trading, and wider economic terms. This view prevailed and the whole of the 1986 package of four regulations is predicated on this approach. Hence, in this regulation, the transition period ends with a definitive opening-up to EU-owned ships under all registers.

Subsequent analyses by the European Commission of the impact of this regulation show that, while its implementation was initially slow, this liberalisation has been successful. Almost all of the unilateral restrictions and of the offensive elements in bilateral agreements have now been removed.

Regulation 4058/86 Concerning Co-ordinated Action to Safeguard Free Access to Cargoes in Ocean Trades

This regulation provided a framework for co-ordinated joint resistance to discriminatory practices by third countries which restricted, or threatened to restrict, free access by EU shipping companies to liner, bulk or passenger services in trades to and from the EU. It laid down a carefully orchestrated, step-by-step procedure to be applied in the event of such action—first, through diplomatic representations and then, if necessary, through the use of specific countermeasures. These include, separately or in combination, requirements to obtain a permit to load or unload cargoes, and the imposition of quotas or special taxes.

The regulation—and indeed the whole 1986 package—was a clear demonstration of the EU's determination to ensure free and non-discriminatory access to cargoes for EU shipowners and to secure fair competition on a commercial basis in the trades to, from and within the EU. The Community had begun the process in 1977 with a decision which set up a consultation procedure between affected Member States on developments in relations between the Member States and third countries on shipping matters and on shipping questions dealt with in international organisations. Regulation 4058/86 accordingly elaborated and expanded on that earlier policy.

This regulation has been a useful and effective part of the EU's armoury in the development of its maritime external relations activity, although the fact that the initiative must come from the member states has been a limiting factor, since it means that other economic concerns of individual member states may reduce the willingness to take action. The regulation nonetheless led to the European Commission, on behalf of the member states, taking an active approach in third-country relations and international trade discussions. The shipping industry has been happy to see a planned and visible purpose in this area of EU policy, which is clear and evident to other countries.

Unfair Pricing Practices

While the last section dealt essentially with problems relating to access to trades and discriminatory treatment, powers were also taken, for example in the US and in the EU, to respond to unfair pricing practices or the "dumping" of freight rates. These were directed at carriers in the liner sector whose assets are owned, controlled or heavily subsidised by the government of the flag state and which engage in non-commercial pricing to the detriment of other nations' economic interests. The nature of these instruments was that they are vague and imprecise, leaving considerable scope for subjective interpretation.

United States

In addition to the broad powers already described, so-called "controlled carriers" are subject to section 9 of the Shipping Act of 1984. This debars rates or charges which are "unjust or unreasonable", defined as resulting or being likely to result "in the carriage or handling of cargo at rates or charges that are below a just and reasonable level". The assessment of this is at the discretion of the Federal Maritime Commission and the burden of proof is on the controlled carrier.

Factors that have to be taken into account include:

- Whether the rates are below a level that is fully compensatory, based either on the carrier's actual costs or, if not available or trusted, on constructive costs (i.e. based on those of another carrier, other than a controlled carrier, operating similar vessels and equipment in the same or a similar trade).
- Whether the rates are similar to those of other carriers in the same trade.
- Whether they are required to ensure the movement of particular cargo, or to maintain the necessary continuity or level of service, in the trade.

If the FMC so determines, it may disapprove the rates.

The provision does not apply where there is a bilateral agreement between the state in question and the US providing for most-favoured-nation or national treatment. The Ocean Shipping Reform Act of 1998 amended the Shipping Act of 1984 to eliminate the former exemption from the Controlled Carrier Act for carriers of countries that have subscribed to the shipping statement in the OECD Code of Liberalisation of Current Invisible Operations (see later in this chapter.) The Ocean Shipping Reform Act of 1998 also amended Section 19 of the Merchant Marine Act, 1920 explicitly to identify pricing practices as one of the possible factors creating unfavourable conditions in the US foreign trade, which the Federal Maritime Commission has the authority to adjust or meet with rules and regulations affecting foreign shipping.

European Union

The EU position is governed by the third of the 1986 regulations—Regulation 4057/86. This laid down the procedure to be followed in the event of third-country liner shipowners engaging in unfair pricing practices which cause, or threaten to cause, serious disruption of the freight pattern on a particular trade route to, from, or within the Community and consequently harm either to EU shipowners engaged on that route or to Community interests in general.

An "unfair" pricing practice was defined as a rate lower than the "normal" rate charged for at least 6 months previously and only made possible as a result of some "non-commercial" advantage granted by a non-Community state (for example, state-ownership, subsidy or other form of government assistance). A "normal

freight rate" was not easy to define but had the same broad meaning as a "just and reasonable" rate under the US Shipping Act—a comparable rate charged for a comparable service, derived from actual or constructive costs.

To understand the origins of these provisions, it is necessary to look back to the most prominent state-trading nation during the years which preceded them—the then USSR—and to the Cuba crisis in 1962. This had changed the Soviet Union's whole attitude towards merchant shipping and led it to pay far more attention to the development of its own merchant fleet. In the eyes of the Western maritime nations, it began a period of aggressive expansion not justified in trading terms and supported by practices which had political as well as commercial objectives. In particular, there seemed to be a clear strategic desire to support a Soviet presence in certain sensitive areas of the world such as the Horn of Africa and Central America.

This expansion was felt mainly in the liner trades where the Soviet lines, working outside the conferences, were beginning to draw off cargo from the established lines. The latter were by then well embarked on the changeover to containerisation and anxious that their cargo base should not be eroded. In order to win cargo, the Soviet lines drove down the freight rates to such an extent that the rate structure on which the conferences depended was severely threatened. The lines in the Far Eastern Freight Conference—UK/Continent to and from the Far East—were also concerned about the way the competition from the Trans-Siberian Railway was increasingly making inroads as a result of equal or lesser transit times at rates which bettered those of the conference.

The Soviet interests denied excessive expansion. They argued that their rates were commercial, in their terms, and that they had to make a profit like any other shipping line. There was no argument on that point. The difference was, however, that in addition to any wider political or strategic purpose, they were operating within a central-economy, state-trading regime. This had two effects. First, the contribution of hard currency income-earners was particularly valuable to that regime. Second, there was a significant cross-subsidy between different economic activities. For example, the Soviet companies had their vessels provided by the state; this meant that they had no financing costs and that they did not have to insure them other than for P&I purposes.

The base-line from which they operated was therefore quite different from that of the Western lines. This is also relevant today to an understanding of relations with other state-trading regimes, to the extent that similar circumstances apply.

Various attempts were made to resolve this issue during the late 1970s, but there was little progress until the early 1980s, when attempts were made by five nations (France, Belgium, the Netherlands, the then Federal Republic of Germany and the United Kingdom) to reach an agreement with the Soviet Union. Two meetings were held, centred around the possibility of a better understanding leading on the one hand to the Soviet lines playing the game according to normal commercial rules and on the other hand perhaps to some form of conference membership for Soviet lines in three principal trades (from Europe to, respectively, Central America, East Africa and the Far East) where they had established a strong and, from the Western standpoint, destabilising presence. When these ended in failure, the Western

nations pursued a tough line and indeed introduced monitoring of Soviet carryings and rates charged in the trades in question. The concerns of the five-nation group were instrumental in ensuring that, when the package of four regulations was developed in the EU, one of them dealt with unfair pricing. As evidenced in discussions within individual national bilateral joint commissions with the Soviet Union at that time, it was clear that the Soviet Union was concerned at the possibility of legislation of this nature.

Ironically, when Regulation 4057/86 was applied for the first time, it was not against a Soviet carrier, but against Hyundai Merchant Marine of Korea. This involved a complaint lodged in 1988 by ECSA on behalf of the EU conference lines in the Europe/Australia trade (supported by the one EU non-conference line) that Hyundai, a non-conference competitor, was:

- Benefiting from non-commercial advantages, through direct subsidies and substantial writing-off and re-financing of debt from the Korean government, as well as from the Korean government's policy of cargo protection;
- Engaging in unfair pricing practices by charging unrealistically low rates in the southbound trade and thereby dragging down the rates on the route to uneconomic levels; and
- Causing significant injury both to the EU lines involved (through loss of revenue and threat of loss of market share) and to the EU's wider economic interest, in the form of likely reduction in the service offered and loss of jobs.

After an in-depth investigation the Commission, through its transport directorate, decided that Hyundai was undercutting the "normal freight rate" by US$450 per TEU (20-foot equivalent unit container), or about 26 %, and imposed a corresponding "redressive" duty on containers lifted by Hyundai in EU ports. Shortly afterwards, the Korean Line suspended its service, but its ships continued to be traded on charter by a new French company, which also used the same agents, ports and schedules. However, the Commission considered the new service to be too closely connected with Hyundai and effectively extended the duties to the containers it carried. In due course, the French line severed its connections with Hyundai and agreed both to pay outstanding duties and to raise its rates over a period. The redressive duties on Hyundai were reviewed after 5 years and removed, since the problem had disappeared.

From the standpoint of ECSA and the EU lines, the outcome was a success because it resulted in liner rates returning to a more economic level and demonstrated the outward effectiveness of the regulation. It was a clear warning (a "spear on the wall") against state-supported shipping activity combined with substantial undercutting of rates.

After that case had shown the regulation to be effective, preparations were begun to invoke it in the West Indies trade against the Soviet Baltic Shipping Company. However, this was not followed through, since by that time the threat that had existed previously was already fading away and a much more commercial approach to shipping was emerging in the Soviet Union. Shortly afterwards were to be seen

the beginnings of the break-up of the USSR and the retreat of its international shipping presence, both politically and commercially.

Cabotage

The reservation of national coastal and inter-island shipping services—or "cabotage"—is still widespread in both developing and developed countries. A key distinction that needs to be made in any consideration of cabotage is whether the cargoes in question are genuinely domestic cargoes or are trans-shipped international cargoes which are being carried between two ports in the country of origin or destination. This is particularly relevant for containerised cargoes.

Where the coastline is short or there is little domestic transport volume, cabotage may not have a significant impact. But where there is a substantial internal trade or where restrictions impinge on the onward movement of international cargoes, the impact may be substantial.

One prominent example of a country with a long tradition of applying cabotage restrictions is the US, where the Jones Act (Merchant Marine Act 1920) restricts the carriage of cargoes between the US mainland and say Hawaii or Alaska and even the trans-shipment of containers in international trade. Coastal cargoes are required to be carried in ships which are not just registered, but also owned, built and crewed in the US.

Many countries that adopt otherwise liberal policies in terms of market access in international trades find extending that philosophy to the domestic trade a step too far. This was the experience of the EU, which left it out of its first shipping policy package in 1986, returning to it only later. As we have seen, Regulation 4055/86 was forward-looking and trenchant when dealing with the trade between Member States. The cabotage issue proved long, difficult and complex, involving as it did the defence and national interests of several EU countries including France, Greece, Italy, Spain and Portugal. An uneasy compromise was reached in 1992 with the adoption of Regulation 3577/92/EEC, under which existing restrictions would be phased out for EU-based carriers progressively over a period of 12 years. Although the restrictions on coastal cargo movements along the mainland were abolished almost immediately, temporary exceptions were enacted for "strategic cargoes" (mainly oil and water) until January 1997 and for inter-island traffic in some cases until January 1999 (in Greece, extended for regular passenger ferry services to 2004).

Two particular points of principle remain:

- The liberalisation extends only to ships registered in the EU Member States. It does not open up national cabotage trades within the EU in any way to non-EU companies. While that may be understandable in a regulation essentially orientated towards the internal market, the liberalisation does not even open up these trades to the same beneficiaries as Regulation 4055/86—i.e. to all ships

operated by shipping companies established in the EU states, including those under non-EU flags. It is extraordinary that, within the same internal market, two inconsistent regimes still apply. This is an anomaly which persists today and it is disappointing that it has not been addressed during one of the regular reviews required by the regulation.
- Crewing restrictions persist on foreign ships involved in island cabotage trades. Breaking a cardinal principle of international law that the flag state should have jurisdiction over operational matters on board its registered ships, here foreign ships may still be required to apply the local state's requirements.

While the whole issue of cabotage liberalisation was considered sensitive, not least because of the social implications in some of the countries concerned, studies undertaken for the Commission indicate that there have been no severe consequences to date. Indeed, at one point this fact led the Commission to propose a further relaxation of the crewing restrictions, but this was overruled by the Mediterranean member states at the time.

The experience of many countries which operate cabotage restrictions is that they can encourage high domestic freight costs and old and inefficient fleets—and can therefore be unhelpful to the local economy. For these reasons, there are pressures from time to time in a number of countries, such as Australia, Brazil, and the US, to relax their restrictions. From the viewpoint of the freedom of the seas, cabotage restrictions, however understandable, are objectionable, not just because of their protectionist impact on domestic markets but because of the cross-subsidy which they can provide for companies which also trade internationally.

International Activity and Legislation

There are four main reference points for the pursuit of these issues, which go wider than regional groupings.

US/CSG Dialogue

Despite their deep-seated philosophical differences, the United States on the one hand and the governments of the Consultative Shipping Group (currently comprising 13 EU member states, Norway, Canada, Japan and—recently joined—Republic of Korea and Singapore) on the other, began in the early 1980s to try to reach a better understanding and *modus vivendi* on a range of issues. At the start, a large number of debating papers were exchanged between the two parties, each side probing the foundations and consistency of the other's policy stance. This was

followed by meetings of senior shipping officials and became known as the US/CSG Dialogue.

The basis of the Dialogue was the common desire to safeguard and promote competition in all sectors of shipping and to maximise the amount of cargo subject to competitive access. The formal framework of consultation under the agreement required co-ordinated action on the following:

- Joint methods of resisting protectionist measures
- Means to improve competition in shipping and
- Means to overcome restrictive commercial practices which inhibit or restrict trade, especially those that give rise to restrictive shipping policies by third countries

Among other things, it was agreed—whether or not the UN Liner Code applied to their trades—to avoid the introduction of new governmental measures and to resist measures by other countries which restricted the access of their own shipping to international cargoes. Over the years, a number of joint diplomatic representations (démarches) have been made by the US and the CSG countries with regard to third countries.

The other important aspect was the agreement of both parties to co-operate and consult closely on the application of existing "regulatory" (i.e. competition or antitrust) arrangements and on their future development.

The Dialogue continues today, with its secretariat now held by the Danish maritime authority, and covers a wide range of topical issues.

Organisation for Economic Co-operation and Development (OECD)

Brief mention has already been made above of the OECD's Code of Liberalisation of Current Invisible Operations (CLIO). Its purpose, as indeed that of the companion OECD Code of Liberalisation of Capital Movements, is to enable residents in the different member countries to do business with each other as freely as with other residents in their own country. The invisibles code was adopted in 1961 and covers a wide range of service sectors, including banking, insurance, tourism and transport. Shipping is governed by Note 1 to Annex A of the code, which commits OECD member governments to abolishing any national restrictions on the provision of maritime transport services between their countries.

In 1987, culminating some years of work by the Maritime Transport Committee, the OECD Council adopted a recommendation setting out 13 "Common Principles of Shipping Policy for Member Countries" together with detailed guidelines for liner shipping. These principles remain in place today. They are all designed to complement the obligations arising under the invisibles code and to roll back

protectionist policies in the shipping sector by way of example and by the use of collective power.

Among other commitments, the OECD member governments emphasised the importance of CLIO for shipping and that the "principle of free circulation of shipping in international trade in free and fair competition . . . forms a guarantee of adequate and economic world shipping services and of maximum economic benefit for shipowners, shippers and consumers". They agreed to:

- Refrain from introducing new or additional measures restricting competitive access to international trade and cargoes.
- Oppose actively restrictive regimes operating in other countries.
- Consult with the other governments, in the event of their being subjected to pressure from a non-OECD country to accept cargo-sharing, or cargo-reservation measures, with a view to defending the aims and principles set out and to exploring the possibility of a co-ordinated response.
- Make available and use countervailing powers in the event that any problems with the non-OECD country cannot be resolved through diplomatic processes.
- Ensure that their domestic policies and measures were consistent with the OECD Code of Liberalisation.
- Safeguard open and fair competition, and avoid conflicts of law, in the application of competition policy to liner shipping.

This policy is wholly compatible with the philosophy underlying the US/CSG Dialogue. Of note is the fact that the recommendation does not apply to the sensitive area of cabotage.

The OECD, having established its policy clearly, then proceeded to take it in a practical way to other groups of countries which historically had not shared the same liberal philosophy. It did this both in the criteria that it applied when admitting new countries to membership and in direct discussions at international level.

This was significant, because during the mid-1990s several Eastern European countries were admitted into membership (including the Czech Republic, Hungary and Poland, all of which have since become EU member states), as were Mexico and Korea. It is probably not a coincidence that Korea during this time abandoned its waiver system for liner cargoes and removed its last restrictions on the carriage of bulk cargoes.

Further, since the early 1990s, and echoing OECD actions on the wider economic front, the Maritime Transport Committee held a number of rounds of discussions with the then New Independent States of the former Soviet Union (NIS) and the Central and Eastern European Countries (CEECs), with the People's Republic of China, with the Dynamic Asian Economies of the Far East (DAEs), and with Latin American countries.

The first—with the Eastern European countries—quickly produced an Understanding on Common Shipping Principles in 1993. This followed closely the philosophy of the OECD's 1987 recommendation, with all parties affirming their commitment to a freely competitive environment in international shipping, to the progressive elimination of any current discriminatory treatment, to fair market

pricing, and above all to continued consultation on any problems of implementation and on further developments in their shipping policies.

The discussions with the Asian non-member states (Hong Kong, then Korea, Malaysia, Singapore, Taiwan and Thailand) proceeded more cautiously, but were also positive. Informal consultations in 1991 were followed by informal workshops in Yokohama in 1994, and by a further session in Paris in 1996. For the latter, the parties were also joined by three South American countries (Argentina, Brazil and Chile) in a grouping re-named the Dynamic Non-Member Economies (DNMEs).

In 2003 and 2004, workshops were organised covering a wide range of subjects (e.g. security) which brought together the OECD Governments with all the "Non-Member Economies" involved. Overall, these actions were effective in encouraging the non-OECD countries to pursue more free-market policies in shipping and in helping those countries already tending in that direction to consolidate their progress along that path.

2004 also saw deeper questioning of the role and value of the OECD's Maritime Transport Committee against the backdrop of ongoing cost reviews across the organisation as a whole. It was clear that it had lost its way. Opinions were divided—both between governments and within the industry associations—as to the practical value of its deliberations. This view was particularly felt by those who had found the way in which the organisation had approached the competition policy issue in the early 2000s either untenable or damaging. Others still retained the belief that there was a need for governments to have a truly international (as opposed to regional) forum in which to be able to exchange views and experiences on maritime trade policy issues.

In 2006, a formal decision was taken by the OECD Council to cease funding this dedicated activity and it was disbanded.

While the existing instruments remain in place, it is clear that—without the constant monitoring and renewal that comes from an active and specialist body—their impact will inevitably diminish in time. Some miss its earlier key contributions in international debates particularly in UNCTAD and in the contacts with the Non-Member Economies. This will be particularly true for as long as the WTO is unable to make progress in underpinning a liberal approach to access to trade in shipping. Others have been pleased to see an end to their dissatisfaction with the OECD's maritime activity . . .

In practical terms, its role in shipping has now been superseded by the actions of the EU, and by the Consultative Shipping Group and its dialogue with the USA.

UNCTAD

Although, as we have seen, UNCTAD played a key role in allowing protectionist attitudes to find their expression at an international level, its significance for shipping issues is nowadays much diminished. The eighth session of UNCTAD, held in Cartagena, Colombia in 1992, confirmed the shift. It took place against the

background of a rapidly changing world, a general feeling within the UN family that economies and rationalisation were necessary and a new readiness on the part of the UNCTAD secretariat to work with private sector interests.

Shipping as such did not feature on the agenda for UNCTAD VIII but came within the discussion on the services sector. What was significant, not only for shipping but world trade and development as a whole, was that there was a new mood of recognition of the importance of free-market principles not just for the developed world but also for the developing nations. This marked a historic change in the direction of UNCTAD, with consequential reforms to its machinery. All of its existing committees, other than those on preferences and restrictive practices, were suspended. This included the Committee on Shipping which had existed since the first meeting of UNCTAD in 1964.

Nowadays, shipping no longer has a separate identity within UNCTAD and indeed, as mentioned earlier, the former shipping division was disbanded by the mid-1990s. Shipping-related activities that have remained are in the areas of training, development co-operation, and business facilitation.

World Trade Organization

The decline in the role of UNCTAD in this area coincided with the rise of the role of the General Agreement on Tariffs and Trade (GATT) and of the World Trade Organisation (WTO).

The General Agreement on Trade in Services (GATS), which was one of the main achievements of the Uruguay Round (1986–1993), set out a range of disciplines covering services drawing on the GATT principles already applicable to trade in goods. It comprised a framework of general rules, supplemented by "annexes" which qualified those rules for certain individual service sectors (for example, financial services, telecommunications and air transport—none was agreed for maritime transport) and by country-specific "schedules" under which each contracting government set out any limitations on its commitments to the general rules.

The basic principles contained in the framework include:

- ***National treatment (NT)***: whereby each government commits to treat service providers from other countries in the same way as its own.
- ***Most-favoured-nation treatment (MFN)***: whereby each government commits to treating all foreign providers equally, but not necessarily in the same way as its own.
- ***Transparency***: all relevant national laws must be published and openly available.
- ***Progressive liberalisation***: the Agreement provides for a further round of negotiations aimed at liberalisation within 5 years. Specifically, any MFN

exemptions recorded in individual-country schedules must be reviewed within 5 years and are in principle only valid for a maximum of 10 years.

There was a strong insistence by governments that no service sectors should be excluded from the GATS, for fear of the number of excluded sectors growing uncontrollably. Hence the compromise of the annexes. Some of these effectively excluded the heart of their sector, for example the annex on air services which excluded traffic rights and related matters. When the Uruguay Round was concluded, only three sectors were left open, with separate, sector-specific negotiations continuing. Two were already covered by annexes and have since been resolved: telecommunications and financial services. The other was maritime transport services, which was not covered by an annex but was carved out and made subject to a "standstill".

Over the earlier years, the international shipping industry—through its representative organisations including ECSA and CENSA—had called for any action on shipping to be clearly based on the concepts of "standstill" (i.e. no further restrictive measures of any kind) and of early and effective "rollback" i.e., the removal of existing restrictions within a fixed time-table. Received wisdom was that, while the first was a possibility (assuming anyone considered that it would happen in practice), the second was not achievable at this stage of the negotiations. The industry therefore took the view that, although it supported the basic principles of the GATS, shipping stood to lose more than it stood to gain from allowing its relatively liberal regime to be the subject of regulation through the GATT mechanism. This was considered unwieldy and to favour the lowest common denominator.

Moreover, this was the one international body dealing with maritime affairs that did not allow shipping industry representatives to participate, even as observers. Scepticism led the shipping industry to fear that its interests would be in some way traded off against the interests of one or other sector, which might be more high-profile or considered more important. There was also little control, in its eyes, over the schedules of individual countries and the fear was that protectionist measures which had been confined to individual countries (and were often not implemented in practice) would have to be recorded in the schedules and would thereby be given a new and more harmful life.

Although they appreciated the dangers, this view was not shared by all the EU governments, nor indeed by all the EU shipowners' associations. The EU, through the European Commission, made its position very clear through schedules which contained no limitations except a technical one relating to the Brussels Package, explained in a later chapter.

At that stage, the US—both government and industry—was negative, but not necessarily acting from the same motivation. It refused for a long time to put any formal position down on the table and, when it did, made no commitments in regard to the ocean leg of maritime transport, i.e., "blue water", confining itself to access to port facilities and landside activities. There are two views. The US side argued again that it could achieve greater and more effective liberalisation through the existing US countermeasures legislation. It is important to note here that adherence

to the GATT or the GATS means that individual countries forgo their ability to invoke their unilateral measures in favour of the multilateral disputes procedure. The US is understandably sensitive to this possibility. In 1997, the then Chairman of the Federal Maritime Commission said in a speech that: "The Commission's authority to move unilaterally to counteract the laws and actions of foreign governments is unique. Obviously, this is an important authority and the Commission is judicious in its use. Had the US agreed to include maritime services in the World Trade Organization, the Commission would have lost this authority and not been able to take these actions."

More cynical observers, however, were suspicious that there may have been ulterior motives connected with the desire not to become embroiled in a process which, at a later stage (although not then, since both were excluded from the scope of the negotiations), might place the spotlight on the USA's own restrictive measures, for example concerning government cargoes and cabotage.

Whichever view one takes, there is no doubt that the unwillingness of one of the world's largest trading powers to take a leading role has had a material impact on the development of these negotiations.

However, since the early 1990s, the history of the services negotiations generally and the maritime negotiations in specific has been "stop and start". There has been repeated build-up of pressure from the main interested parties for progress—at last—towards some text or structure that might stand a chance of attracting agreement, only to be followed by frustration and disappointment. Progress in the general negotiations has been bedevilled mainly by deep-rooted policy differences between the EU, the USA, and the developing world on the approach to agriculture and its relationship to non-tariff barriers to trade and sectoral subsidies. Summit after summit has tried to break the deadlock, each time apparently with greater momentum and hope than before but ultimately without success. There is now, in shipping policy terms, a very embedded sense of déjà-vu and cynical observers of the maritime dimension will not be optimistic that any positive outcome can be achieved.

The most that one can conclude today is that the principles governing trade in maritime transport services are contained, as for all services, in the GATS. However, no detail has yet been agreed and the most that has been achieved is the collective definition by WTO members in 2005 of sectoral and modal objectives for negotiations on maritime transport and the request by a number of liberal WTO members, led by Japan, that 24 other WTO members participate in plurilateral discussions and offer liberalisation commitments on the basis of the so-called "Maritime Model Schedule". Progress since then has been uncertain and this action remains a long way short of actual commitments.

Other Aspects

Also relevant to the question of freedom and protectionism are subsidies and fiscal or other treatment designed to improve the position of a particular national fleet whether in regard to investment or employment or for some other benefit. This is a broad and potentially very complex area which has given rise to mixed emotions and judgements over the years.

When developed countries have raised the subject of protectionism over the years, the developing countries have tended in turn to accuse them of distorting competition through subsidy programmes. The truth is that all kinds of countries and governments operate with subsidies and favourable taxation arrangements. Often they are complicated and concealed by the fact that one country's normal tax regime is another's subsidy. Certainly, the ability to grant subsidies or to relieve part of its economic and business earning power of standard taxation is dependent on the government in question having sufficient wealth to afford them, since they can be expensive.

Governments that are otherwise oriented towards the free market justify favourable treatment of this nature on the grounds that they need to help their operators match the lower taxation or costs levels in competitor countries. Others adopt a more Keynesian approach on the basis that the measures sustain themselves through the additional economic contribution and employment that they bring to the national economy. The latter theory is not as popular now as it once was, although it does apply in some cases.

These themes underlie actions which have been taken over the years in the US and in Europe, as well as elsewhere. In Europe, for example, following the 1986 regulations, a debate ensued on the development of so-called "positive measures" which could enable EU fleets to be more competitive in world shipping markets; in other terms, on a positive industrial policy. The focus has been mostly on enabling the employers of EU seafarers to reduce their costs closer to those of lower-cost crews from say the Far East or Eastern Europe. There were two imperatives for the European Commission, as guardian of EU policies: first, to promote the fleets of Member States and the employment of their nationals and, second, to control government support measures by the application of the EU's "state aid" policy.

Additional complexity arises from the fact that the Commission has responsibility under EU law for sector-specific measures, direct and indirect, which are considered to be state aid, while general taxation or fiscal treatment is the jealously guarded competence of individual member governments.

In July 1997, EU guidelines were published by the European Commission on state aid in the maritime transport sector. Although essentially an internal EU initiative, they took as their yardstick the competitive position in international shipping markets and reflected the Commission's view that "support measures may nevertheless be required for the present to maintain and develop the Community's shipping sector . . . In principle, operating aid should be exceptional, temporary and degressive. In the case of maritime transport, however, the problem

of competitiveness of the EU fleet on the world market is a structural one, deriving in large part from external factors". As a result, the guidelines set out effectively to enable individual Member States to create a tax-free environment for their shipping, subject to a number of constraints.

The guidelines debarred net direct subsidies. However, they allowed the Member States to make available to shipping companies a range of fiscal allowances (such as accelerated depreciation and tax-free reserves) and explicitly permitted the application of tax regimes based on the tonnage of the fleet operated by the shipping company, rather than its actual earnings or profits. With the aim of reducing the costs and burdens of EU operators and seafarers towards levels in line with world norms, income tax and social security contribution alleviations were allowed, with the objective of safeguarding and expanding the employment of EU seafarers. Training assistance was also addressed.

The Commission's guidelines were reissued in 2004 and reaffirmed the same positive approach, although a number of additional constraints on member state actions were introduced. These focused mainly on the required demonstration—in order to justify the exceptional treatment under the EU's state aid policy—of the economic benefit to the EU, for example through stricter monitoring processes and through tightening up some linkages to member state flags. Within the EU, the guidelines are deemed to have been a success combining encouragement with the imposition of practical constraints. Although there have been issues surrounding the consistency of their application, overall, industry shares that view.

The guidelines will remain in place until or unless they are changed. They are the subject of a review at the time of writing.

The issue is live elsewhere too. For example, in the 1990s, the US disbanded two systems of direct subsidy—the Construction and Operating Differential Subsidy schemes—which were designed to offset the higher costs of building ships and employing seafarers in the US. On the other hand, in addition to the cargo preference measures which have already been mentioned, it introduced during 1996 an extensive direct subsidy scheme for the operators of a substantial number of designated ships under US registry, ostensibly for defence reasons. This still continues and the Maritime Security Act of 2003 authorized expenditure under the Maritime Security Programme up to 2015. In 2012, the annual cost was US$186 million spread over 60 US-flag ships.

This chapter has dealt with the issue of freedom of access to markets. The area is grey, in the sense that the difference between freedom and protection is often one of degree rather than substance. This is true of the question of subsidies and other assistance, but also of protectionism generally. While the European Union's four regulations in 1986 had as their basic objective the preservation of an essentially open, commercial and competitive regime, at least one of them (4057/86) and possibly another (4058/86) could be regarded as protectionist. But they must be seen in the context of defending EU shipping against restrictions or unfair practices by other countries. In contrast, Regulation 4055/86 (applying the principle of freedom to provide services within the EU) was a true expression of liberal

principles in so far as it sought, consistent with the general thrust of EU policy, to break down internal barriers.

The so-called "competition" regulation (4056/86) has presented a dilemma like all legislation establishing antitrust immunity for liner conferences. On the one hand, it sought to control conferences and to preserve them from process under the standard prohibition of cartel and monopoly activity. On the other, its aim was to preserve a system which did distort competition to an extent, yet which was for decades regarded generally as necessary for the carriage and service of world trade. However, in recent years, this whole area has faced fundamental changes and is the subject of the next chapters.