UNCTAD code : suggestions on its implementation in Thailand

Veera Puripanyawong

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THE UNCTAD CODE: SUGGESTIONS ON ITS IMPLEMENTATION IN THAILAND

by

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Thailand

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A paper submitted to the Faculty of the World Maritime University in partial satisfaction of the requirements of the GENERAL MARITIME ADMINISTRATION COURSE.

The contents of this paper reflect my own personal views and are not necessarily endorsed by the UNIVERSITY.

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My gratitude also to the professors, especially Mr. Monsef my course tutor who has given me much encouragement and advice in order to complete this project and my course at the university.
INTRODUCTION

The aim of this study is to examine the background and concepts of the international convention that ruling the conduct of liner conferences which has entered into force in October, 1983. But, for many countries including mine, the Code is still an unfamiliar instrument. So, this study, first intended to eliminate suspicions on what the Code really is and how we can make use of it.

Thailand has not ratified this convention. There are many different views regarding whether we should have ratified it. Disputes are on what are the impacts to the national economy if the Code is applied and some doubts whether it can really work.

This study is divided into 3 parts. Part one deals with conference system. It consists of 4 chapters. Chapter I will explain how the situation developed that brought liners to meet and the first conference come to exist. Conferences were found to be a mixture of good and bad. A question has been raised: how should conferences be regulated? Chapter II says about brief history of public investigations and government controls over the system. Two different views of U.K. and U.S. Governments toward conferences are compared. Conferences have an international characteristic. The difference in government attitudes toward the same body, conferences, might arise disputes. A thought which suggests international accepted rules for conferences appeared. Chapter III deals with the question how should conference
be regulated. Some economic aspects of liner shipping that explain why competition solution are not workable in this industry. Some views on 'open', 'closed' conference and rationalization. Chapter IV is concerned with present organisation and practices of conferences. Then part two headed "The UN Code of Conduct for Liner Conference" consists of 2 chapters. Chapter V deals with developments that led to the existence of UN Code; chapter VI deals with some key issues regarding its implementation. Part three: development of national fleets with the Code consists of 3 chapters. Chapter VII the current situation of shipping industry in Thailand. Chapter VIII is about liner shipping and the participation of Thai vessels in conferences. The last chapter, chapter IX is suggestion on the application of the Code in Thailand.

This subject is an exceptionally large one. It has taken a lot of my time to read and to understand before writing it. So, with this limit of time, this study has missed many points which I first intended to include.

It is my hope that it will prove to be a useful guide for the future.
PART ONE

CONFERENCE SYSTEM
CHAPTER I
BACKGROUND TO CONFERENCE SYSTEM.

Shipping conferences are among the earliest cartels in international trade. They are agreements organised by shipping lines operating on the same route/s or between the same range of ports. The basic objectives of a conference are to control competition between the members of the conference and to eliminate outside competition on the route/s.

The competition between the members of the conference is controlled by all the members agreeing to charge uniform rates. To effectively enforce the agreement on rates the members also agree to follow the same rules and regulations for calculating freight charges, payment of freight, acceptable packaging for different commodities, determine the standard percentage of brokerage commissions to be paid by members and the circumstances under which these may be paid.

To further limit competition between the member lines, conference agreements may allocate definite ports of call to different members or restrict the numbers of sailings of each member. The competition for cargo between the member lines is further restricted in some cases by forming one or more pools between the member lines which provide for pooling together cargo and/or freight revenue of all the members of the pool and then periodically sharing it according to agreed percentages.

To fight competition from non-conference lines,
conferences have evolved certain arrangements whereby they try to secure continued and exclusive patronage of the shippers to the conference lines. These are either in the form of positive inducements to shippers to confine their shipments exclusively to the members of the conference or a penalty to shippers who use a casual non-conference shipping opportunity. These are called "loyalty arrangements."

The nature of their organization varies considerably, depending on the market structure of the trade route, the jurisdictions of the countries whose trade they serve. There is no typical conference. Some have been conferences quite literally-informal oral conferences—but many have employed written agreements establishing a permanent body with a chairman or secretary, and containing carefully described rights and obligations of the conference membership. Penalties for violations of the agreement are sometimes stipulated and in such cases the posting of cash or a fulfilment bond is usually required. There might be some arrangements to refer disputes to arbitration included in the agreement.

Shipping conferences have been in existence for some 125 years now and today roughly 350 of them are operating throughout the world with individual membership ranging from two to as many as 40 separate lines.

The conference system has been found to be a mixture of bad and good. As soon as the first conference was founded, criticism arose. The basic arguments in favor of conferences
are that they provide regular, reliable service with stable rates. The main arguments against them are abuse of monopoly power with misallocation of resources, excess capacity with unnecessarily high freight rates, and, particularly, price discrimination. There have been many studies of the system, both by official agencies and academicians. Some findings are for the system, others against. These differences in concepts upon the system could be found for quite a long time in Governments' policy of different countries. Should conferences be let free to restrict competition and enjoy monopoly power? Should Governments apply the concept of counter-balance conference V. shippers or shippers' council and let the industry be self-regulated and make the best benefit from rationalization? Or, should it be under close government's control? But the nature of conferences is international. If one country imposes control over them unilaterally, it would likely arise conflict. This factor supports the idea of having an international convention on the control over liner conference conduct.

In the mid of 19th century, several trends or developments joined and as a result there evolved shipping industry much as it is known and practiced today. One such trend or development was the rapid spread of the Industrial Revolution with its increasing need for foreign (overseas) markets and sources of raw materials. Another was the change from vessels propelled by wind and constructed of wood to vessels propelled by a screw or propeller powered by steam and constructed of
iron or steel. Constructing vessels of iron and steel made possible larger vessels with larger cargo-carrying capacities. Prior to that time, most vessels had been owned or operated by traders or trading companies that owned the cargo being transported (with the cargo being transported from the manufacturing or industrialized countries to be sold at its destination and with the cargoes to be brought back on such vessels purchased at or near the places where the return voyage commenced). The ability to steam continuously at known speeds, without regard to the wind, enabled operators, if desired, to set and follow more certain routes and schedules and arrival and departure times to and from various ports on the routes. With the larger vessels, operators oftentimes had space available to carry cargo other than that which they carried for themselves. With this additional space and with more or less certain schedules of sailing and routes, space could be offered to others who had cargo to be transported to or from the scheduled routes and ports. Many products became transportable overseas for the first time and "shared" ocean transport provided new trading opportunities for a vast number of small and medium sized shippers.

As the market for steamship service rapidly grew, there developed a recognizable split in vessel services between tramp and liner shipping. Tramp shipping evolved rather quickly into a service involving full shipload lots and continued to be controlled by the relatively unrestricted play of market forces. In contrast, liner shipping focused
on the growing demand for the transport of general cargo which tended to move in relatively small lots between a variety of destinations and among numerous shippers and consignees. Liner vessels were thus deployed over fixed geographic routes, attempting to maintain regular times of arrival and departure. Rather than relying on a completely free market determination of transportation rates, liner companies soon began publishing fixed rate sheets (or tariffs) which quoted prices that not only reflected the perceived demand for, and the cost of, the transportation service but also varied depending on the value and stowing characteristics of each type of cargo.

The steamship revolution, with its faster and larger vessels, quickly generated over-capacity in the shipping market-place. A sailboat took an average of 60 to 65 days to get from the U.K. to Australia. This voyage was shortened by about 15 days between 1873 and 1897 with the use of steamships. The opening of the Suez Canal in 1869 also coincided with this period and led to a substantial reduction of duration of the voyages from Europe to India and the Far East. The same amount of cargo that required, at the beginning of the 19th century, four sailboats could be carried on one steamship for half the time by the end of the century. The cargo movement did not keep pace with the fleets' expansion. Rate wars between competing liner companies led to general rate instability and to the virtual collapse of the liner shipping business.
The surviving liner firms, seeing the wisdom of joint arrangements, began to coordinate tonnage and sailings and to maintain rate levels, thereby lowering the risk of the business. Controlling competition amongst themselves and creating a united front to fight other carriers were the initial steps taken by the shipowners. As a result, the first liner conference, the U.K.-Calcutta Conference, was founded by seven British liner companies in 1875 as the first successful shipping conference.\(^2\)

The early years of conference evolution were marred by considerable resistance from major shipper who had grown accustomed to quantity rebates and flexible rates. Early conference rules attempted to apply a principle of equal treatment of shippers by banning preferential rates and rebates. Big shippers looked for other alternatives. They turned to independent carriers who agreed to carry their cargo for lower rates. The conference, in order not to lose good, regular customers, agreed to give discount in exchange of loyalty from the shippers to ship their cargo exclusively on conference vessels. Deferred rebates concept was introduced. Thus, the first loyalty agreement was signed in 1877. Since then, conference has grown very quickly both in number and power.

As conferences, having cartel-like characteristic are able to play to a certain extent role in determination on freight level. Sometimes, they are believed or charged by shippers to play discrimination. Apart from rebates granted to shippers in exchange for the exclusive support,
other defences against the activities of non-conference lines include rate-cutting on specific parcels or certain commodities, and the berthing of additional vessels, namely fighting ships, to blanket the outsider sailings. Conferences have, over the years, fought long and hard to protect their own spheres of interest, the intruder sometimes being a fellow member of an adjacent conference seeking to enlarge his field of operations. Many of these battles, especially those with the true speculative operator, have ended with the outsider being driven from the trade, or perhaps with drawing when easier pickings seemed to be had elsewhere.

In the late 1900's, there were quite a number of mergers and amalgamations of shipowners due to avoiding rate war that facilitated the formation of tighter conferences in the early twentieth century. This concatenation of events naturally aroused suspicions concerning the shipping industry, suspicions which gained support from allegations of discrimination and other monopolistic practices made from time to time by shippers.

There have been many official national inquiries into the working of the system. The earliest was in 1909 (Royal Commission on Shipping Rings) in the U.K. closely followed by one in the USA in 1913 - 14 (Alexander Committee). The most recent inquiry was in the U.K. where the Committee of Inquiry into Shipping (Rochdale Committee) reported in 1970. All reports accepted the necessity of liner conferences.
CHAPTER II

BACKGROUND OF THE REGULATION OF CONFERENCES

In 1906, the British Government started a thorough investigation of the subject and the United States Government in 1912 began a comprehensive study of the situation in American commerce. The Royal Commission on Shipping Rings reported to his Britannic Majesty in 1909, and the Alexander Committee, which was charged by the Committee on Merchant Marine and Fisheries of the House of Representatives of the Congress of the United States to investigate all types of shipping combinations, issued their report in 1914. The consensus of these reports was that shipping conferences were necessary to assure stability of rates, regularity of service, and improved facilities; but that these organizations contained the inherent vice of monopoly power.\(^{(6)}\)

As the name indicates, conferences are organized groups made up of independent and competing shipping lines. Conferences are not registered companies and have no private legal status. The vast majority of shipping conferences are international in scope with member companies operating under different national flags. Most conferences limit their activities to a pair of particular geographical regions, known as a "trade," which usually covers the trade between two or more countries. Some operate in one direction only but a few are round-voyage conferences. Shipping companies may belong to one or several conferences and, although liner companies tend to be either
conference-prone or independent, there are a number of liner firms that operate as conference members in certain trades as independents, or outside the conference, in others\(^7\).

The first to conduct a public inquiry into the conference system were the British. In 1906, the Royal Commission on Shipping Rings was appointed. In 1909, after three years of thorough investigations, the commission came out with its report. The Commission concluded, in its majority decision, that the conference system, as a whole, does not operate to the detriment of the British economy. A system of checks and balances is inherent in the conference itself, i.e., the internal competition among the member lines. Outside competition from independent carriers and the common actions taken by shippers secure the phenomenon from abusing its powers in an unreasonable manner. The majority did not consider legislation as a solution to control the powers of the conferences. The Commission recommended the formation of shippers' organizations for the purpose of negotiating with conferences as collective representatives of the users of conferences services. The majority further recommend that the Board of Trade should keep conference practices under review by demanding the filing of conference agreements with it and the publication of their tariffs. The minority group demanded more stern action by the authorities to avoid monopoly abuses. The Commission's majority report recognized the advantages of the conference system, i.e., the stability of rates and the regularity of service. The majority concluded that the advantages of the conferences are substan-
tially dependent on the tying arrangements, the deferred rebates, or some other system which is equally as effective. The only method the majority saw as necessary to secure the fairness of these arrangements was the depositing of the agreements with the Board of Trade. Even the minority did not recommend any legislation which might prohibit or restrict tying devices. The minority concluded that the conference system does not necessary supply regular and adequate service, and the stable rate is not such a big advantage because it is usually higher than the competitive rates. However, the minority opinion did not suggest the abolishing of the conference system. The recommendations of the Royal Commission were not implemented in England, probably because of the strong position the shipowners held in that maritime nation. 

In the U.S. in 1912, a few years after UK investigation a Congressional Committee the House of Representatives Merchant Marine and Fisheries Committee, under the chairmanship of Representative Joshua Alexander, undertook the task of inquiring into the modes and practices of shipping conferences. The Alexander Committee (named after its chairman) faced a double problem.

First, the U.S. was not a maritime power; and second, the existence of the antitrust laws, which state that every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal.

The Committee reviewed the advantages and disadvantages
of conference system, concluding that the system should be maintained, but under closer government regulation.

The Committee did not favour the prohibition of conferences because it felt that such an action would involve a 'whole sale disturbance' of the conditions that existed in the shipping industry. It was also concluded that prohibition would deprive shippers of the advantages cited were:

- greater regularity and frequency of service,
- stability and uniformity of rates,
- economy in the cost of service,
- better distribution of sailings,
- maintenance of US and European rates to foreign markets on a parity, and
- equal treatment of shippers through the elimination of secret arrangements and underhanded methods of discrimination.

The disadvantages cited by the Committee included:

- the elimination of competition through the use of fighting ships and unlimited rate cutting,
- excessive and arbitrary rates,
- complete conference domination of shippers,
- conference indifference to the landing of freight in proper condition,
- secrecy of agreements and conferences,
- discriminatory rates between large and small shippers,
- the state of continual dependence that shippers were placed in as a result of the deferred rebate.
The committee felt that termination of conference arrangements would result in either rate wars or consolidation through common ownership. Neither alternative was seen as preferable to the conference system.

In light of the advantages and disadvantages of the conference system, the Committee suggested that the Interstate Commerce Commission shall have jurisdiction over the activities of the shipping conferences operating in the foreign commerce of the U.S. The conference should file their agreements with ICC that will have the authority to cancel, modify, or approve those agreements. The criterion of disapproval should be based upon whether or not the agreements are detrimental to U.S. commerce. The Alexander Committee also recommended that tariffs should be published; that deferred rebates and fighting ship should be outlawed; that the ICC should have the authority to investigate, on its own initiative, matters concerning these subjects; and that if needed, the ICC could order the disbanding of a conference.\(^{12}\)

By not being allowed to cooperate, the shipping companies will engage in constant rate wars. As mergers are restricted in the U.S., shipping companies will rise and fall by the dozen. U.S. economy, in general, and the American shipowners and shippers, in particular, will be hurt. Therefore, the Committee recommended to let the conferences operate and to exempt them from the antitrust laws. As a result of the Committee's recommendations, in September of 1916, the Shipping Act was passed in the U.S. Congress. The Shipping Act encompasses the
major recommendations of the Alexander Report and remains today, as amended, the guiding legislations for ocean freight regulation. The Act provided for acceptance of the conference system with government supervision, but rather than investing the regulatory power in the ICC, Congress created the U.S. Shipping Board, a predecessor of the Federal Maritime Commission. (14)

The U.K. and all other major European maritime nations have a common view, adopted a laissez-faire attitude toward liner conference operations. While, in U.S. it was believed that even though conference were necessary but subject to certain government controls. These different attitudes would cause difficulties because the liner shipping including conference has a characteristic of an international activity over which one nation imposes control would be considered as unilateral actions. Conflicts would be likely to occur. (15) Nevertheless, for over 40 years following enactment of the Shipping Act, there was no relatively restrained conference control over liner trades. Despite U.S. maritime law and regulatory tradition, conferences expanded their control over services and rates. Outside the U.S. they acted independently of government regulation. Even in the U.S. trades the system of deferred rebates flourished, despite its illegality.

In 1958 the U.S. Supreme Court handed down its decision in the Isbrandtsen case. After over a decade of questioning the legality of dual-rate contracts used by conferences, the Supreme Court found that such contracts violated section 14
of the Shipping Act when employed as "predatory devices" are charged a lower freight rate than non-signatories. This system of immediate rebates had been used in place of the deferred rebate, which was outlawed in the U.S. trades by the Shipping Act. (16)

As a result of the Isbrandtsen decision, there was concern that the effective operation of the conference system would be hampered. Consequently, Congress enacted legislation suspending the effect of the Isbrandtsen decision for two years, during which time the dual-rate system would be carefully scrutinized so that an "ultimate solution to the problem could be finally and fully resolved". Congressional concern resulted in two years of hearings on the ocean freight industry. (17)

Immeadiately following the Isbrandtsen case, the House Merchant Marine and Fisheries Committee, under the chairmanship of Herbert C. Boner, conducted an extensive study of steamship conferences and dual-rate contracts. Also in 1959, the "Antitrust" Subcommittee of the House Judiciary Committee chaired by Emanuel Celler began an investigation of monopoly problems in the ocean freight industry. The Bonner Committee made extensive use of the Celler Subcommittee's findings in developing its recommendations. (18)

The findings of the Bonner Committee resulted in the 1961 enactment of Public Law 87-346 which authorized the use of dual-rate contracts, while providing additional safeguards to shippers. This was the first major piece of legislation
amending the regulatory provisions of the Shipping Act since 1916. The Committee had ascertained that the traditional principles of anti-trust could not be applied to the ocean freight industry. It decided that "... it should encourage the continued maintenance of effective conferences and that, within safeguards, it should authorize and direct the FMC to approve exclusive patronage arrangements without which conferences might well become ineffective. The Committee had clearly intended that a strong conference system be ensured through the dual-rate contract." (19)

Following enactment of Public Law 87-346, the Celler Report was published in 1962. This report reflected the subcommittee's view that the national shipping policy as embodied in the Shipping Act of 1916 was fundamentally sound; however, the enforcement of the statutes regulating the industry had been deficient. The Subcommittee found the conference system had changed very little since the Alexander Report. There continued to be flagrant abuses of the conference's privileges, while its strengths increased. Among the abuses found by the Celler Subcommittee were:

- secret rate agreement,
- unapproved divisions of traffic and territories,
- secret rebates,
- conference admission restrictions, and
- discriminatory treatment of shippers.

The Subcommittee noted with respect to conferences, that where anti-trust immunity has been so widely abused it would
have been consistent with Congressional policy to withdraw it. However, the Subcommittee cited three basic reasons for not recommending withdrawal of anti-trust immunity:
- "... existing institutional structures of long and historical standing should not be set aside except as a last resort".
- "... the conference system is an international one that could not be eliminated and might not be improved merely by withdrawal of lines, foreign as well as American, operating in the foreign commerce of the United States".
- "... outright elimination of the conference system in U.S. foreign commerce without enactment of substantial safeguards and authorization of much increased subsidies might well result in inflicting severe hardship upon our American merchant marine and in creating substantial rate instability presently undesired by American shippers".

The Cellar Subcommittee made it abundantly clear that it did not endorse the manner in which conferences had been conducting their operations. The Subcommittee indicated that it was necessary to revise methods for controlling the operations of conferences and for prohibiting abuses which violate conference agreements, to deter violations of the law, to safeguard shippers from unreasonably high conference rates, to protect nations and ports from unjustified discrimination, and to leave the way free for independents to enter the trades.

The legislative revisions to the Commission's responsibilities that were enacted into law in 1961 included the
addition of section 18(b) which required all carriers in the foreign trade to file with the Commission their tariff rates, classification, rules and regulations and any changes thereto. This legislative change initiated the tariff filing requirement that is currently the subject of much debate. It is interesting to note that the Congressional and Executive decisions to require that the Commission ensure that the carrier’s tariffs contain a certain amount of integrity was based on years of investigations which revealed a litany of abuses and discriminatory behaviour.

The increased attention given to shipping regulation in the late 1950s and early 1960s resulted in an increase in the Commission’s responsibilities, apparently because Congress had decided that the regulation of liner shipping had not been rigorous enough to prevent abuses of power. During this same time period, a series of decisions by the courts reduced the scope of anti-trust immunity that the shipping companies had thought they possessed.

These court decisions have become part of the shipping industry lexicon and the mere mention of Svenska, Carnation and Sabre can send chills up the spine of shipping executives. As a result of the Svenska decision, the Commission decided that activities which represented serious anti-trust intrusions required a more substantial anti-trust type justification before they could be approved. The net result of the Carnation and Sabre decisions was that carriers are no longer certain as to whether agreements are vested with total
anti-trust immunity. To a large degree the stricter conditions placed upon conference behaviour reflect the Judiciary Committee's view that conferences should be tolerated but not encouraged. (21)

This development of US legislation gave rise to serious problems of jurisdiction as one country unilaterally attempted to impose its own theories and laws to this international characteristic liner industry. As the Rochdale Committee in U.K. discussed this problem in its report that "the FMC duties have brought it into direct dispute with the government of other countries; they have strongly disputed its alleged powers of jurisdiction in requiring alteration of contracts concluded outside the U.S.A.; perhaps not even with US entities, and the provision of documentary evidence, particularly of a financial nature. They have also objected to the way in which unilateral US decisions could affect their national economic interests, even where no jurisdictional issue were involved. (22)

In 1964, the UK Government took powers enabling it to forbid UK companies to meet certain of the demands of the FMC. The sanctions operating for the FMC are fines under the Shipping Acts and, perhaps of greater consequence, triple damages under the anti-trust Act."

The report further mentioned that "detailed regulations imposed by the Commission are said to have directly damaged UK interests by making heavy demands on management’s time and by reducing flexibility in the provision of shipping
services.

It has also been claimed the requirement that conferences should be 'open' has led to very substantial over-tonnaging of the North Atlantic routes with the USA. As a result of the present system, cargo liners on these routes have been sailing, on average over a period of years, nearly two-thirds empty and are currently said to be sailing half-empty; freight rates are high and rising..."(23)
CHAPTER III

THE ECONOMIC STRUCTURE OF THE LINER INDUSTRY WHICH LEADS TO DESTRUCTIVE COMPETITION.

General structural conditions required for perfect competition to be workable. Those economic attributes which must be present to ensure conformance with the microeconomic textbook model of perfect competition are:

- There must be ease of entry and exit from the industry. Firms must be able to respond to market forces (profits) in their decisions to enter or exit an industry.
- The service offered by vessel operators must be similar or homogeneous.
- There must be a large number of firms in each market. The greater the number of firms, the less impact any one carrier can have on market price.

The most valid economic reason for concluding that competition is not workable in the liner industry is that condition number one - free entry and exit - is not fulfilled. Ocean shipping today is an exceedingly capital intensive industry. Even though, liner operations are, on the average, significantly more expensive than other forms of ocean transport. The reasons are obvious. Liner vessels are more costly to build and operate than most other cargo ships. Liner operations require an expensive infrastructure of terminals, reservation and communication systems, networks of cargo agents, etc. Ships built to serve as liners are
normally designed to be fit in the intended trades according not only to the nature of the commodities transported (whether they can be containerized or not) but also to port infrastructure and the capabilities of the inland transport systems in the countries served. Entering liner shipping means a long term investment. All these conditions make a move of a liner from one trade to another difficult.

Some other factors regarding the economic structure of the liner industry itself not allowed competitive solution to be workable. The cost structure of the liner industry is one of the key factors in understanding why unfettered competition is unworkable.

The ocean liner industry does not qualify as a natural monopoly -such as public utility- because economies of scale are not great enough to lead to a monopoly solution. Internal long run costs do not demonstrate a tendency to decline such that one firm could supply the entire market before all economies of scale are exhausted.

**High Ratio of Fixed and Constant Costs.**

While the capital intensity is not high enough to lead to the natural monopoly solution in the liner industry, capital costs and, therefore, fixed costs are becoming a larger proportion of total costs. In addition, most other costs are constant in the short run produces that a short run average cost declines rapidly as output (capacity utilization) is expanded.

The reason that liner operators have such a large
proportion of their costs which are constant is because of the nature of the common carrier service these operators offer. Liner operators offer a schedule of services and rates which are fixed in the short run. Liner operators, therefore, are susceptible to the risks inherent in a fluctuating market for their services.

Table

<table>
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<th>25</th>
<th>50</th>
<th>70</th>
<th>85</th>
<th>100</th>
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<tbody>
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<td>Average Cost Per Container</td>
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<td>$1240</td>
<td>$958</td>
<td>$843</td>
<td>$747</td>
</tr>
</tbody>
</table>


Having a large portion of costs being constant, average and marginal cost per unit of output decline rapidly results in:

- forcing carriers to place a high premium on full utilization since few costs are spared if a vessel is 50% rather than 100% full.
- A carrier that realized a load factor of 50% would have to charge a shipper $1240 per container (see table) to break even, i.e., cover expenses. If this same carrier could achieve a load factor of 100%, a charge of $747 per container would be sufficient.
- Liner operators incline to use marginal cost pricing, if necessary, to obtain cargo.
Since variable or marginal costs account for only around 20 percent of total costs, marginal-cost pricing must be destructive.

**Elasticity of Demand**

It is commonly agreed that the demand for ocean transportation is inelastic. Thus, a reduction in rates of 10 percent, for example, will lead to a less than 10 percent increase in quantity shipped, and total revenue will decline rather than increase. The demand for liner transportation services is a derived demand. Therefore, to calculate the price elasticity of demand, for transportation, one must multiply the ratio of the freight rate to the value of the commodity by the elasticities of demand and supply for the commodity.

The conclusion that demand for transportation is inelastic should not be confused with the notion of cross elasticity. That is, if one carrier reduced its rates below the rest, and offered a similar service, that individual carrier would experience a surge in demand and his demand schedule would appear highly elastic. The rest of the group which was experiencing a loss in its market share, would have no choice and in the classic oligopolistic reaction, they would match the reduction possibly precipitating a rate war.

All above factors and the circumstance that rapid exit from the industry is not possible ultimately results in a breakdown of competitive solution.
How should liner shipping be regulated?

Let's refer back to the Rochdale's report. The report concludes that "the 'open' conference appears least likely to serve the interests of shippers. It is also least likely to serve that of shipowner "..."closed' conferences without rationalised sailing schedules may have attractions for shipowners and may, in some cases, provide a better service for shippers than would be available in the absence of restrictions." and "The 'closed' conference with fully rationalised sailings appears to us most likely to serve the best interests of both shippers and shipowners."

UNCTAD also suggested that a government that seeks to reduce the level of freight rates has basically two options. It can either encourage competition by non-conference liner operators in the expectation that they will undercut conference rates, or it can press shipowners and shippers to rationalize and so aim to reduce rates by reducing the overall cost of service. The principles underlying these alternatives are fundamentally different: increased competition by non-conference liner services will make the overall liner trade less rational and may make it more costly (by increasing over-tonnaging, duplication of sailings, and fragmentation of the overall cargo movement), while rationalization will inevitably involve increased restrictions on competition, since it cannot be implemented satisfactorily unless shippers adhere to their conference loyalty agreements.

UNCTAD further comments that the introductions of a rationalization scheme can be expected to lead to a direct reduction in the costs of a liner service.

The same document points out that conferences in general are incapable of rationalizing their services because they are unable to match their fleet size to the available cargo volume. And it does suggest that rationalization, implying closed conferences and strong loyalty agreements, combined with an efficient organization of shippers, meaning an effective use of the shippers' combined bargaining strength, under certain conditions "may be much more effective than the traditional form of competition."

We can see later that the principle of having 'closed conference' with full rationalization is fully applied in the Code.

In U.S. there have been many academicians and government officers supporting this principle. This reflected in the current regulatory thinking in the USA. Current thinking on how liner shipping should be regulated is best understood by examining the contents of a recently proposed bill in the U.S. Congress. Although it may be subjected to further modification, the embodiment of current congressional thinking is found in HR 1878 - the Shipping Act of 1983. It also reflects a restatement of support for rationalization agreements. (25)
CONFERENCE ORGANIZATION AND PRACTICES

As mentioned before, Shipping Conferences are not legal entities. The members are not partners of any kind, they do not integrate their services, they do not merge together. The relationship among the members is contractual either in a written or an oral gentlemen form of agreement.

Conference headquarters and secretariat

The chairman of the conference, in some cases, is an independent figure not affiliated with the members. Sometimes, the chairmanship rotates among the members. The main function of the chairman is to direct and coordinate the conference’s rate-making. Very rarely is the coordinator given decision-making power regarding conference policies. His opinions can be influential, but the decisions are made by the vote of all the conference members. The basis of voting is usually one member one vote.

The decision-making procedures vary from conference to conference and from subject to subject. In most of the conferences admission of new members is only decided by unanimous vote. In cases of rate changes, some conferences are satisfied with a simple majority vote; whereas others require a two-thirds or a three-quarters majority vote.

Some conferences establish committees to whom they delegate powers in specific areas with decision-making authority.
Decisions regarding conference activities and policies, many times, require a unanimous vote. This might impair the adequacy of conferences tend to authorize selected committees, from their members, with decision-making powers to handle routine matters, and to leave to the full quorum only policy matters. Sometimes the conference's chairman will be delegated power enabling him to reach a quick solution. Other committee may be established to do some works, such as observe the cargoes' movements trend on the route and react accordingly by adjusting the rates and contracting with the shippers.

The conferences' general assemblies meet, normally, on prescheduled dates such as once a month or at bimonthly conventions. If there are urgent cases ad hoc meetings might be held.

A non-active member, i.e., one who declines to fulfill his sailing requirements, might lose his vote and eventually his membership in the conference. A conference will dissolve if the members cannot reach an agreement on major issues like shares of trade, sailing schedules, and freight rates.

Normally, conferences' members are equal under the contracts. However, there are some cases in which the members are not equal, where some members have fewer rights than others. These 'second class' participants are the associate members. Their sailing rights are limited and they are not allowed to vote in conference meetings.

In some trades liners have obligations as a common
carrier. In other trades there is no such obligation, but nevertheless a general expectation that having advertised a sailing and calls at particular ports a liner will accept all cargo offering on that route on a "first come - first served" basis, whether the cargo is attractive or not to the shipowner, easy or difficult to handle, provided suitable space is available and the terms are mutually satisfactory, except for certain goods which may affect the safety of ship or cause damage to other cargoes.

Some characteristics of conference agreements.

The conference agreement is a compromise between the shipping companies operating on a given route. There are no rules as to what is the ideal agreement for the regulation of different route conditions. In many conferences, there is not a single agreement but a set of mutually inter-related agreements between the member lines.

The duration of the agreement is usually not specified in the contract. The very first conference that was established in 1875 still exists.

A conference agreement may cover all or some of the following matters:

a. the sphere of the conference, i.e. the range of ports which come within the purview of the agreement;

b. types of membership, e.g. full (or regular) members and associate members, their rights and obligations, terms and conditions of membership, viz. admission fee, security deposit, faithful performance bond;
c. rules regarding admission, withdrawal, suspension and expulsion of a member;
d. rules regarding conference meetings, voting procedure;
e. Conference secretariat, the officers and their duties;
f. obligation of the member lines in rate matters and in the operation of conference services;
g. practices of member lines which are prohibited under the conference agreement;
h. self-policing provisions - investigation of and penalties against malpractices of the member lines;
i. appointment of committees;
j. arbitration of disputes between members, and
k. participation in other agreements.

Pooling agreements.

Pools are a natural conference adjunct in as much as they serve primarily to limit service competition while the uniform rate limits price competition.

Pooling can take various forms ranging from agreements to control the number of sailings of each pool member to a system in which the actual cargo carried as revenue earned by each member line is controlled. In addition to the allocation of sailings, the conference lines may also pool cargo and/or revenue. A cargo pool usually relates to a specific commodity or group of commodities and under the pool each member is entitled to carry a specified percentage share of the freight tons of the item/s concerned carried by all members of the pool. Sometimes, only cargo pools are not enough to limit
internal competition. A wide variety of cargoes move in most conference trades, with a wide disparity in the freight rates on the various commodities, with the result that the members may compete with each other for high-rate cargoes. The formation of a revenue pool eliminates competition for the more profitable cargoes and, at the same time, ensures that the less attractive cargoes also handled.

In a revenue pool the total freight revenue of all the participants in the pool is shared according to agreed percentages. Usually the revenue paid into the pool is either a fixed percentage of total revenue, or total revenue minus a fixed amount per ton carried. The revenue shares of different pool members are normally matched by corresponding obligations to carry more or less the same percentage of cargo as their share of the pool. In practice, therefore, in a majority of cases the pooling agreements cover both cargo and revenue.

A number of pools are designed primarily for rationalization purposes. They are regarded by the conferences as "self-imposed restrictions" agreed between member lines to provide the proper number of sailings to handle the expected cargo movement. Restrictions on sailings are accepted voluntarily by conference members in order to avoid overtonnaging and duplication of sailings.

Pooling agreements include provisions regarding:-(27)

1. coverage:
   - carriers
   - ports or coastal range
commodities
- separate pools by commodity group.

2. operational requirements:
- minimum number of sailings.

3. pool shares:
- basis
- renegotiation period.

4. contribution rates (revenue pools) may or may not include:
- bunker, currency adjustments
- taxes
- ad valorem charges
- container rental
- port differentials
- deductions/additions for non pier-to-pier container rates or free-in, free-out, free-in-and-out rates.

5. penalties:
- forfeiture for under carriage.

6. pool transfers:
- frequency of settling accounts.

Pools covering a particular trade route can be either "blanket" regional pools (i.e. covering all points within a coastal range) or port-specific pools. Pools generally apply to the trade between specified ports only. Some conference ports may cover non-pool ports. Different pools may exist for different sections of the trade covered by the conference. Some conference members operating in a particular
section may operate outside the pool covering that section. This situation usually arises where a carrier has access to cargoes that others do not (through cargo preference of a country to its national lines for example). (28)

Pooling arrangements do not necessarily cover the whole trade. Certain commodities are, however, still considered unsuitable as to include in the pool. For example, hazardous cargo would be exempted as would be bulk cargo such as wheat, metal ores and sugar, and those special stowage/handling cargoes.

Some pools require that members meet extraordinary cargo movement requests. Associate membership in a pool is sometimes granted whereby the associate member receives more than some small fraction (say 2.5%) of total gross pool revenues, then the excess (less carrying allowances) is due to the pool account. Pool shares can be fixed for a specified period and subject to regular negotiation or can be changed only upon petition of an (unsatisfied) pool member.

Sailings can be allocated in the form of berthing rights. Some pools also stipulate an even spread of sailings over the period. If a member carries less than the minimum amount he will not be compensated unless he can prove that force majeure prevented him from filling his quota. Thus, allocation can take place based on the share of sailings made, capacity provided, tonnage carried, revenues earned, or some combination of these. The most typical arrangement is a
combined cargo/revenue pool, which allocates revenue but provides adjustments to encourage a similar split of tonnage carried.

Ultimately, the members of a pool are interested in their net revenues, or earnings, from providing liner services. It is in trying to approximate this division that the terms of pooling agreements become too complex. The costs of carriage of various commodities differ.

Revenue from various commodities vary according to the tariffs schedule. Serving different ports changes carrier costs. The pool must also take care to avoid arrangements which might provide incentives to members to use the lines outside the pool. (30)

Administration of pools (31)

The administration of the pool itself is usually conducted through a pool committee of the member or their agents. This body typically keeps track of cargo movement and vessel scheduling, and monitors members' performance. The conference secretary is sometimes the pool secretary. When many ports are covered by a pooling agreement, there will often be several pool committees.

Fixing the pool shares is a critical part of the administration of the pool. Where two or more lines of the same flag are members of a pool, the shares are first fixed on the basis of flag groups, then between members within each flag group, shares may be allocated among others, on the basis of:
- negotiations between pool members,
- commercial and other requirements of the trade,
- past performance of each member,
- future potential of each member,
- capacity of a line to compete as an outsider if agreement cannot be reached, and
- national aspirations of different members.

**Conference freight rate and tariff**

Every member of a conference has to charge his services according to uniform rates as in the tariff. This is supplemented by rules covering matters such as calculation and correction of freight charges. In working out the freight charges on any commodity between the ports served by the conference the tariff refer to by the members of the conference and their agents.

There is no set pattern for a conference tariff, but, they usually cover some of the following:

1. rules and regulations covering matters such as calculation of freight charges, payment of freight;
2. commodity rates or class rates section;
3. additional charges for ports other than basis ports which are covered direct;
4. additional charges for ports covered with transhipment; and
5. index of commodities.

Until recently the tariffs were regarded as confidential by most of the conferences operating outside the jurisdiction of the *US* Shipping Act. Shippers had no idea of the gene-
eral structure of rates in the tariff.

Conference rates are basically of two types: class rates and commodity rates. The cargo is listed in tariffs according to either class group or individual products accordingly. There are tariffs according with as few as five classes while others have up to fifty or more classes. Rates are per class. Commodity rates catalogue the commodities in detail, quoting freight rates for each commodity. These tariffs can have up to as many as seven or eight thousand items depending on the quality of products carried on the conference's vessels. Both kinds of tariffs have a NOS (not otherwise specified) rate for cargo not quoted in them. This NOS rate applies to a wide variety of goods that cannot be classified under a specific description or class in the tariff. The NOS rate will usually be relatively high when there are demands from shippers for fixing specific rates for those new cargoes. Conferences would consider their regularity and significant quantities of those cargoes to be shipped. The conference prescribes that the rates are calculated according to weight or measurement of commodity, whichever produces the greater revenue. Some tariffs include ad valorem charges for certain products. Usually the tariff contains provisions dealing with packing conditions and other characteristics of special cargo features such as special weights, exceptional lengths, and unusual susceptibility to various conditions. Additional fees are then charged accordingly.
The conference generally lay down a certain minimum freight charge per bill of lading, whatever the item carried and however small the consignment.

Normally, all commodities described in the tariff are accompanied by fixed freight to be charged for their carriage. However, at times there are some commodities with open rates where the tariff does not quote a price for their transportation. In cases like this, the conference members are free to set their own rates. Open rates are usually declared in times of competition with outsiders for the transportation of a specific product only. The open rates will usually be attached to bulk cargo that unusually moves on conference vessels.

**Increase in freight rates**

Most of the freight rate increases are general, across the board, increases. The shipowners are unable to price the carriage of an individual product according to exact costs. For this reason, changes in costs have to be spread over all the commodities carried and the increase is therefore general. The reason for rate increases may be because of increases in costs of operation. There is no strict rule as to what is the level of cost increase that justifies a rate increase.

The general rate increase has not equivalent impact on different commodities since the rise in freight is not related to the price of the specific product. Some shippers can absorb the increase while others offset it the same way
as shipowners do, by imposing it on the consumer or, by endeavouring to increase productivity or by obtaining government subsidies. Those shippers, who ship low value cargoes, are badly hurt by any rate increases. The addition to the products' prices harms their competitiveness.

Most of exemption resulted from bargaining power of shippers and government interventions and the conference consideration of the result of the increase of the rate that might reduce volume of cargoes to be shipped.

Only the US has a statutory requirement to publish thirty days in advance an intention to increase freight rates. Decreases in rates may become effective upon their publication and filing with the commission.

The introduction of containers in the mid-1960s and the increasing popularity of their usage might pave the way for a new system of rate charging. Although cargo is carried in these big boxes, prices of transportation are still based on the old tariffs. Sticking to the old system is justified from the point of view that containers only ease the cargo handling process while the cost construction of the ship's operation, in principle, does not change.

After containerization has been introduced, there was an idea of applying a single rate to every container calculated to weight only. It could bring about far-reaching changes in world trade. If this single rate was applied in a worldwide scale, final prices of the vast
majority of goods moving will be changed, either upwards or downwards. Rates will hike on low value goods moving in big quantities. Cheap goods and semi-manufactured products that are now transported for low rates, because of the change, might be driven out of the international market.

**Averaging freight rates**

The averaging of freight rates is made in various forms. Since the ship carries an assortment of products and the cost of carriage has to be spread among them, the rate for each commodity incorporates a form of averaging. Dividing a tariff into very few classes of cargo perpetuates the averaging because products of a variety of size and weight will be charged a similar rate. The more detailed the tariff is, the less averaging is done; though, still, the rate is not fixed individually for each item on the basis of its transportation characteristics.

Carrying the additional tons above the amount that secures earnings plus costs' coverage is actually cheaper; yet, the extra tons are normally charged the same rates as the cargo loaded first. Because the mix of cargo cannot be quoted, low value goods are charged lower rates than high value products. The result is an average price that enables the shipowner to operate his vessel. Low value goods' freight rates do not cover, normally, the costs of their transportation. The loss has to be offset by charging the high value goods, or the goods with an inelastic demand, higher rates. If the subsidising commodities will be taken away by their shippers
from the conference, a rate increase will have to be introduced. The chances of securing full loads in the back haul of a journey are not always feasible. Therefore, the shippers in one direction subsidize their colleagues from the other end of the route.

The fact that a tariff quotes identical rates for a range of ports also indicates that prices are averaged, and somewhere along the route one shipper bears a proportionately larger part of the rate than another.

Loyalty Arrangements.

This is one of the tools used by conferences to fight competition and to secure steady flow of cargo. Loyalty to the conference is solicited by offering to shippers a positive reward for loyalty and/or inflicting penalties for disloyalty. The inducement to utilize conference lines' vessels exclusively is either in the form of a deferred payment for a portion of the freight charges paid if the shipper fulfils certain conditions of loyalty to the conference lines during a prescribed intervening period or of initially charging to those shippers who sign a loyalty with conference rates lower than those charged to others who have not signed the contract. These refer to deferred rebate and dual rate contract accordingly. Other arrangements for charging lower rates to loyal shippers are less common and are usually designed for individual cases. Loyalty arrangement in one form or another exist in most of the trades covered by conferences, except those where there
is no outside competition in the conference's area of operation, nor an immediate possibility of such competition emerging. Even in the trades where loyalty arrangements exist, there are usually ports or cargoes which are outside the scope of those arrangements thus ports to which the conference does not wish to give a regular and adequate service are not included in the list of "conference ports" for the purpose of loyalty arrangements.

Items which are outside the purview of the loyalty arrangements are quoted at net rates. Also open rate commodities are beyond the scope of the arrangements.

Under the deferred rebate system, a shipper who utilizes exclusively the vessels of the member lines of the conference for carriage of cargoes between the ports covered by the conference, and considered by the conference as conference ports for the purpose of assessing his loyalty to the conference, is entitled to receive a rebate of a certain percentage of his total freight payments. The rebate is computed for a designated period (shipment period), usually three to six months, but is paid after a period (deferment period) of the same length following the shipment period, on the condition that the shipper has given his exclusive support to the conference lines, both during the shipment period and the deferment period.

The conferences sometimes tighten their hold over the shippers by increasing the percentage of deferred rebate (and simultaneously increasing the tariff rates,
so as not to lower the net rates below the previous level) and/or by increasing the length of the shipment/deferment period. Normally, the conferences do not provide shippers with an opportunity to leave the conference, not even by giving advance notice, without losing the accumulated rebates due to them from the conference.

Another device to tie the shippers is to offer them lower rates if they sign a contract to provide exclusive patronage to the conference lines. Lower rates to contract shippers are offered under the 'dual rate' system and also under the immediate rebate system. Only the dual rate system is allowed in the conferences operating in the overseas trades of the USA in which deferred rebates are proscribed. According to the US legislation, the differential between the contract and non-contract rates cannot exceed 15% of non-contract rates.

Contract rates are offered as an alternative to the deferred rebate system by many other conferences. Where shippers are given a choice between the two systems, the percentage of immediate rebate which is offered is less, generally one-half or one percent less, than the percentage of deferred rebate.

The fundamental differences between the deferred rebate system and the contract/non-contract rates system are given below :-
<table>
<thead>
<tr>
<th>Deferred rebate system</th>
<th>Dual rate system</th>
</tr>
</thead>
<tbody>
<tr>
<td>- an offer from the conference - no contractual arrangement involved.</td>
<td>- a contractual arrangement between the conference lines and the shipper.</td>
</tr>
<tr>
<td>- shippers receive rebates from the conference as a reward for their loyalty but without contractual rights.</td>
<td>- contract shippers are charged lower rates vis-a-vis non-contract shippers as a right under the contract.</td>
</tr>
<tr>
<td>- a shipper is obliged to be loyal both during the shipment period and the deferment period.</td>
<td>- a shipper is obliged to be loyal only during the contract period.</td>
</tr>
<tr>
<td>- terms and conditions can be varied by the conference unilaterally.</td>
<td>- any revision in the terms of the contract needs to be by consent of both parties.</td>
</tr>
<tr>
<td>- the onus of proving loyalty rests with the shipper.</td>
<td>- the onus of proving disloyalty is on the conference.</td>
</tr>
<tr>
<td>- penalty - forfeiture of accumulated rebates.</td>
<td>- penalty - 'liquidated damages' based on the shipment made on a non-conference vessel and suspension/cancellation of the contractual agreement.</td>
</tr>
</tbody>
</table>
- no provision enabling the shipper to withdraw his support to the conference by giving advance notice and still receive the accumulated rebates due to him.

- conference does not undertake any contractual obligations towards the shippers as a part of the deferred rebates scheme.

- provision for terminating the contractual arrangement by either side on due notice - notice period usually being 90 days.

- conference undertakes certain obligations towards contract shippers, viz.
  i. a general obligation to provide a service adequate to meet the ordinary requirements of the trade;
  ii. to give advance notice of rate changes (generally 90 days);
  iii. to give permission to use a non-conference is unable to provide space within a reasonable time.
foot notes
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4. Daniel Marx, JR., Ibid.
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9. Ibid,
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PART TWO

THE UN CODE OF CONDUCT
CHAPTER V

DEVELOPMENTS THAT LED TO THE EXISTENCE OF UN CODE

In March 1963, when the Governments of the West European Maritime powers and Japan met in London and agreed that the conference system was indispensable as a mean of enabling shipowners to provide shippers with regular and efficient services at stable rates; they adopted a resolution which recommended institutional negotiation between shippings' councils and conferences. These developments encouraged the formation of European Shipper Council and CENSA which represent the interests of European shippers and European shipowners accordingly. (2)

The Rochdale Committee 1967-70

In July 1967, the U.K. government set up the Committee of Inquiry into Shipping with the Rt Hon the Viscount Rochdale as chairman. The Committee's terms of reference were broad: "To review... the organization and structure of the United Kingdom shipping industry, its methods of operation and any other factors which affect its efficiency and competitiveness...." The Committee's report, published in 1970 "...concluded that as a condition of shipowners, whether UK or foreign, continuing to benefit from the operation of restrictive agreements relating to trade to and from the UK, members of conferences should collectively accept a published code of conference practice." The Rochdale Committee was,
infact, the first official body to suggest the need for a code, although some academic writers had proposed this a num-
bers of years previously.

The report of the Committee returned to the matter again in the chapter 'Role of government', and recommended that the UK government "should encourage the rapid adoption of a code of conduct by conferences, and...should initiate discussion of the possible content of an international treaty embodying a code of shipping conduct." The Committee also wrote that it had "...reached the conclusion that a multi-
lateral intergovernmental agreement on shipping will increasingly be seen as desirable by all concerned with the future efficiency and prosperity of shipping. The type of agreement we have in mind would be one which established an agreed code of principles within which governments should develop their national shipping policies." Finally, in the chapter 'Summary of recommendations' it was stated that "Members of conferences covering trade to and from the UK should collectively accept a published code of conference practice, which should contain provisions relating to the admission of new members, the publication of tariffs, the provision of information about revenues and costs to representatives of the Government and of shippers, and conclusion with the Govern-
ment and shippers."

There was another development initiated by developing countries during this period of time. Within the UN, parti-
cularly within the Economic Commission for Asia and the Far
East (now the Economic and Social Commission for Asia and the Pacific), developing countries had begun to express their concern about the effects of conference practices, and in 1960 even in the OEEC (now OECD) hard words were spoken against the system.

UNCTAD, 1964 - 1971

The first occasion on which shipping questions were discussed in a truly representative international forum; this was the United Nations Conference on Trade and Development held in Geneva in 1964. In the area of shipping, the Conference adopted two Recommendations. The first stated that objective "to promote understanding and cooperation in the field of shipping." The second Recommendation, A Common Measure of Understanding on Shipping Questions, dealt directly with shipping conferences and stated that "the Liner Conference system is necessary in order to secure stable rates and regular services." The Recommendation stressed the need for cooperation and proposed to establish consultation machinery with adequate procedures for hearing and remedying complaints by the formation of shippers' councils or other suitable bodies on a national and regional basis." The Recommendation suggested including in consultations the following matters: publication of conference tariffs and regulation, prior notice on surcharges and rate increases, loyalty agreements, conference representation in Developing countries, adequacy of service, improvement and promotion of Developing countries' trades, and
rationalization of routes, sailings, and freight. The Common Measure also dealt with port improvements and acceptance of DCs' carriers to conferences.

After the creation of UNCTAD as a part of the permanent machinery of the UN, a Committee on Shipping was established. Its programme of work contained a sub item concerned with conference practices and adequacy of shipping services, and it was noted that it might be desirable for the secretariat "to deal with some of these questions in more specialized studies."

The report by the secretariat, the Liner Conference System, was finished in time for the fourth session of the Committee in 1970. The report of the debate in the Committee notes that, since conferences were monopolistic and restricted competition, conference practices should be subject to government regulation. One representative noted "that conferences by definition represented a denial of free competition and consequently had to be regulated by the governmental authorities of the countries whose trade they served." Even some representatives of developed countries "maintained that experience in their countries suggested that certain abuses of the conference system could be prevented by government regulation."

The resolution adopted by the Committee "Agrees that further improvements in the liner conference system are necessary and would be in the common interests of shippers and shipowners." It was decided to transmit the secretariat
study to the UNCTAD Working Group on International Shipping Legislation (WGSL).

The WGSL considered the study at its second session in February 1971. There were sharply divergent views expressed at the meeting: in general, the developed countries considered that, before the matter was discussed further at the technical level, it should be referred back to the Committee for discussion of the policy issues involved; the developing and socialist countries considered that the matter was urgent particularly in view of the decisions adopted by CSP. meeting in Tokyo, Japan (see below), held in the same month as the WGSL. The developing countries in particular stressed that, since they had not been invited participate in the formulation of the self-regulatory Code of conduct which it had been decided should be produced, UNCTAD needed to press ahead with its own work without delay. A resolution to consider the subject of conference practices at the third session of the WGSL and expressing "the hope that its work on conference practices will lead to the formulation of internationally acceptable appropriate rules of conduct for Liner Conference" was adopted. In answer to the request made at this second session of the WGSL, the UNCTAD secretariat produced at the end of 1971 a further report, the Regulation of Liner Conferences. As its title implies, the report considered various methods of regulating conferences, and concluded that the only method which would meet the criteria developed in the report itself was an international convention with provision for local and inter-
national arbitration for the settlement of disputes. It went on to examine the various deficiencies in current conference practices, drawing the material from the previous secretariat report, and to present solutions to rectify these deficiencies. The solutions formed, in themselves, a code (indeed the last chapter was called "Rules of conduct (code) for liner conferences"). These provisions were the origin of the Code of Conduct, and the form and structure suggested in the Regulation of Liner Conferences can still be seen clearly in the Code.

**CSP Meeting in Japan**

At the initiative of the UK government, CSP met in Tokyo on 2 and 3 February 1971. Twelve countries were present and in the communique issued after the meeting they "...confirmed their view that the liner conference system played an essential role, and that it should continue to function by self regulation to the greatest possible extent." They agreed, however, that "...the time had come to determine what further developments were needed in connection with liner conferences." They then resolved that:

a) it was essential that conferences should not only observe but also be seen to observe certain principles of fair practice;

b) they should promote the acceptance by conference of a published code of practice, which should take due account of the criticisms against conferences;

*CSP - (The Consultative Shipping Group) is a group consist of the Western European and Japan ministers responsible for maritime transport.*
c) they should aim initially at acceptance of the code by conferences serving the trade of their countries while bearing in mind the ultimate objective that such a code should receive worldwide endorsement.

The governments present at the meeting requested their shipowners jointly to elaborate the details of a code of practice and to present them to the governments for further consideration before 31 December 1971. The request for code of practice was believed to be intended particularly to meet the demands of developing countries. And the reason for the limiting the time for the draft was an attempt to be ready before the next UNCTAD meeting. The recommendation of the ministers contained a great deal which followed the Rochdale proposals.

As a result the code developed by European and Japanese shipowners and shippers was dated 3 November 1971. It was known as CENSA Code.

UNCTAD 1972 - 74

UNCTAD III The two streams came together at UNCTAD III held in Santiago, Chile, in April and May 1972. By now all countries accepted both the necessity for, and the inevitability of, a code of conduct. But the overall agreement could not be reached; however Resolution 66 (III) was adopted. The Resolution stated that there was an urgent need for adopting and implementing a universally-acceptable code of conduct for liner conferences and requested the General Assembly to convene a conference of plenipotentiaries as early as possible.
in 1973 to adopt such a code. The draft code produced by the developing countries (the Santiago draft), was amended to the resolution.

Acting upon the Resolution, the UN General Assembly adopted Resolution 3035 (XXXVII) which inter alia established a 48 member preparatory committee which met for two sessions in January and June 1973 to prepare a text for submission to the Conference of Plenipotentiaries. At the end of the second session of the preparatory Committee a proposed text of a code of conduct emerged. There was widespread agreement on the headings to be included, as indeed there had been at Santiago, but the differences on a number of fundamental issues remained as wide as they had ever been. The proposed text submitted to the Conference, therefore, contained alternative texts for a large number of the provisions. Indeed, it would be fair to say that the work of the Preparatory Committee had been largely to array the alternatives rather than to resolve differences.

The Conference of Plenipotentiaries was scheduled to meet from 12 November to 14 December. However, it was not possible to complete the work in the period and accordingly one day was added to the first part of the Conference and a second part was scheduled from 11 to 29 March 1974, eventually extended to 6 April. When the final vote was taken 72 countries voted in favour of the Code, seven against it and five abstained.
CHAPTER VI

SOME KEY ISSUES REGARDING ITS IMPLEMENTATION.

1. The structure of the Code.

The Code is in the form of a Convention annexed to the final Act of the Conference of Plenipotentiaries. A second annex to the Final Act contained three resolutions in that the terms of the Convention are binding on states ratifying it once it enters into force, whereas resolutions are operative once they are adopted, but are never binding on the countries which have voted for them.

The Code itself starts off with a statement of Objectives and Principles. This is followed by seven chapters divided into two parts. Part One consists of five chapters and contains the substance of the Code. Part Two contains two chapters concerned with the implementation of the substance of Part One.

Part One begins with the definition of certain important terms used in the Code, including such matters as a liner conference, a national shipping line and a third-country shipping line. The next chapter, "Relations among member lines," deals with membership of conferences, sanctions on conference members, self-policing and the availability of conference agreements. The articles of this chapter are highly controversial and constitute the main stumbling block to support for the Code from European countries. Chapter III deals with "Relations with shippers," and has articles
covering loyalty arrangements, the granting of dispensation to use non-conference vessels, the availability of tariffs and related conditions, annual reports, and very importantly, consultation machinery. One common element in all the various proposals for a code is the importance attached to consultation as a means of both avoiding and resolving disputes between conferences and shippers. In general, Chapter III is shown by the fact that most of the articles and paragraphs were adopted without objection by the Conference.

Chapter IV deals with freight rate questions. It starts with criteria for freight rate determination, while subsequent articles deal with different questions related to freight rates. This chapter is the one most likely to give rise to disputes in the operation of the Code, not from any inadequacies in its provisions or drafting, although parts of article 14 in particular are rather obscure, but simply from the fact that freight rate questions are the cause of virtually all of the friction which occurs between conferences and shippers. It needs to be noted that none of the paragraphs of chapter IV contain the mandatory "shall" without qualification and that full provision is made for the parties concerned to agree on other criteria, procedures and time limits. Indeed, since in the end almost everything is permissible it is difficult to understand the controversy which the various articles raised.

Chapter IV is headed "Other matters" and is, in fact, something of a ragbag. There is an article on fighting ships,
another on adequacy of service, articles on the head office of a conference and on representation, and finally an article providing that conference agreements of whatever type shall conform to the applicable requirements of the Code.

The final chapter is headed "Final clauses." This provides, under the article on Implementation that "Each Contracting Party shall take such legislative or other measures as may be necessary to implement the present Convention" (Article 47). A further article deals with signature, ratification, acceptance, approval and accession and is followed by one on the conditions for entry into force.

The first annex to the Convention contains model of procedure for international mandatory conciliation: these "...shall be considered as model rules for the guidance of conciliators..." who may... use, supplement or amend the rules... or formulate their own rules of procedure...." (Article 45 paragraph 2). Clearly, nothing could be more flexible.

Annex II contains three resolutions adopted by the Conference. The first relates to the completion of the work of the conference and was necessitated by its failure to complete its work in one session as scheduled. The second resolution concerns non-conference shipping lines and attempts to preserve the position of non-conference operators and the choice of shippers between conference and non-conference lines. The third resolution deals with local conciliation, proposals for which were dropped by developing countries,
presumably because there was insufficient time to negotiate them. This resolution "Requests the first Review Conference ....to give priority consideration to the subject of local conciliation...."

2. Objectives and principles.

The Code states the fundamental objectives and basic principles as following:

a. The objective to facilitate the orderly expansion of world sea-borne trade;

b. The objective to stimulate the development of regular and efficient liner services adequate to the requirements of trade concerned;

c. The objective to ensure a balance of interests between suppliers and users of liner shipping services;

d. The principle that conference practices should not involve any discrimination against the shipowners, shippers or the foreign trade of any country;

e. The principle that conferences hold meaningful consultations with shippers' organisations, shippers' representatives and shippers on matters of common interest, with upon request, the participation of appropriate authorities;

f. The principle that conferences should make available to interested parties pertinent information about their activities which are relevant to those parties and should publish meaningful information on their activities.

However, it should be noted and emphasized that the objectives
of the Code can be found not only here in the preamble to
the Code, but also the points of view expressed by delegates,
particularly at the closing session of the conference of
plenipotentiaries. However, the below statements are summary
of the answers to the question: Why was the Code needed?\(^{(4)}\)

a. remove from the conferences the power arbitrarily to decide
on the admission of new lines and thus whether or not
shipping lines could operate in particular trades;

b. provide that the allocation of cargoes within conferences
should take place on an internationally agreed basis
rather than through the private arrangements by which
shares were traditionally determined;

c. bring into open the levels of conference freight rates and
the processes of conference decision taking;

d. restrict the powers of cartels formed lines, usually foreign
to the country concerned, to take unilateral decisions on
matters vitally affecting the trade development of these
countries; and

e. establish an independent tribunal to which parties with
complaints about the operation of the system could have
recourse.

And also the principles Governing the Code can be
viewed from another angle: \(^{(5)}\)

1. Fundamentally, the Liner Code seeks to enable developing
countries to achieve their aspirations in the field of
liner shipping within the broad framework of a largely
self-regulating system of liner conferences with the
minimum level of government intervention.
The system of international mandatory conciliation for the settlement of disputes itself has also been drafted in a manner as to be compatible with the pervading spirit of the code which is to find mutually acceptable solutions to problems through amicable means.

2. Basing itself largely on the principle of a self-regulating system of liner conferences, the code provides through its Articles a set of principles relating to:
   a. membership of liner conferences
   b. cargo sharing arrangements within conferences
   c. internal rules of conferences
   d. relations between shippers and conferences including consultation machinery
   e. freight rates and surcharges
   f. dispute settlement machinery

   These provisions, while seeking to find solutions to the legitimate grievances of developing countries, whether in their efforts to develop their liner fleets or in their efforts to obtain for their shippers a fair deal from conferences, have drawn upon the best of conference practices and should present no difficulty in their practical application. In fact, in their relations with shippers many conferences have already for sometime been gearing themselves to the provisions of the Code. Similarly the principles of cargo sharing enumerated in the Code today have general acceptance in conference circles.

3. A feature which runs through the Code in all its clauses is its flexibility. With regard to virtually all the
fundamental clauses such as cargo sharing, period between freight rate increases, settlement of disputes etc. there is provision for adopting alternative solutions by mutual agreement.

4. Another significant element of the Code is the role assigned to the "appropriate authorities" of Government. While accepting that Governments have a right to participate in certain matters such as consultations between shippers and conferences, the role envisaged for "appropriate authorities" is essentially a low profound one - a consultative role more than a decision making one.

5. While the Code is essentially an instrument which applies to liner conferences, the authors of the Code accepted the right of outsiders to operate in competition with Conferences. This fact is illustrated by Resolution Number 2 on the subject of Non-Conference Shipping Liner adopted by the Conference of Plenipotentiaries at the time the Code itself was adopted in April 1974. This resolution while reiterating that the Code was prepared with a view to improving the liner conference system, and that the Code is applicable to liner conferences and their external relations, states explicitly that nothing in the Code shall be construed so as to deny shippers the option of using non-conference lines, subject to any loyalty agreements where they exist and as long as outside lines operate on the basis of "fair competition on a commercial basis."
3. **Character of the Code**

1. The Code accepts the diversity existing within the conference system, therefore, when coming to the application. It is a question of finding the particular mean appropriate for applying its principles to the specific conference.

2. The Code was designed to right old wrongs, which are not necessarily the same as the current wrongs which need righting.

   It is important to bear in mind in assessing the Code in relation to current shipping practices, namely, that it was designed to right old wrongs and, in doing so, was based on a Secretariat report completed in 1969 and, thus, basically referring to the system current in about 1965. To that extent the Code was out date when it was adopted.

3. The speed with which the Code was adopted has resulted in some ambiguities of wording which will require careful interpretation in application.

   In 1971, the preparation of the Code of Conduct did commence, and in just three years the Code was adopted. Some of the difficulties regarding its application stem from this haste to bring the instrument to fruition.

4. The Code is flexible. It rarely imposes, and very rarely hectores by the use of the word "shall", and then only
in connection with principles to observe, rather than with practices to adopt. This is a strength because it does not tie the hands of parties to world liner services. If in a particular trade the parties agree to follow practices other than those suggested in the Code, they will be acting absolutely in accordance with the Code so long as the agreement was not imposed by the stronger party on the weaker.

5. In the absence of any record of the debates, interpretation must take into account every piece of interpretative material, even if not juridically sound. One other problem which will arise in the application of the Code is that there are no official records of the debates. It was decided very early in the proceedings leading to the conference of Plenipotentiaries that the debates should not take place in public session, which meant that no record was made of the discussions. With most national laws and international agreements there is either a full record of the debates or an agreed set of minutes. Without these, there will be no officially agreed or accepted way of knowing what the intentions of delegates were and so no guidance, other than the text of the Code itself.

4. The scope of Application of the Code

1. The preamble to the Code underlines its applicability to liner conferences in 7 of the 9 paragraphs contained in that section; thus it seems that the Code applies to
liner conferences, but not to lines or trades which are not organised in a conference. Similarly Chapter 1 defines "goods carried by the conference" as any "cargo transported by shipping lines members of a conference in accordance with the conference agreement." This wording, too, indicates that only cargo transported as enumerated will be subject to the order of the Code, consequently, the Code does not apply to shipping lines that are not members of a conference or to cargoes carried by members lines other than in accordance with the conference agreement. This conclusion is a controversial one. At the time when the Code was drafted, conferences were identified with liner trade. Conferences played a dominant role, carrying 90 percent of liner cargoes. But now conferences are carrying just half of the trade. So another interpretation try to base on the intentions of the drafters of the Code that the Code be applied to almost the whole part of liner trade. The use of expressions such as "trade" and "conference services" being almost interchangeable during those debates before/after the Code was adopted.

2. Article 2 deals with the participation of various shipping lines. Article 2(17) widens and delineates the scope of cargo to which the Code is applicable by stating that the provisions of the 16 previous subsections of this article, which deals with the manner of regulating participation in the trade, concern "all goods
regardless of their origins, their destination or the use for which they are intended, with the exception of military equipment for national defence purposes. This indicated that the Code applies to all goods carried conferences irrespective of whether the goods originate in the country in which the loading port is situated or whether they are destined to the country in which the discharging port is situated.

3. The Code applies to what are now called "self-regulated" conferences, i.e., conferences which do not serve US-type regulated liner trades, since clearly Conferences which are publicly regulated comprehensively inwards and outwards inconsistently with the provisions of the Code would fall outside the scope of the Code for so long as non-contracting party states overtly reject it, and do not permit its provisions to apply within their claimed national jurisdictions. By the same token a State might not be a Contracting Party, yet acquiesce in the functioning of the Code within its jurisdiction. Some one-third of all conferences serve US liner trades which are regulated inwards and outwards by statute law and regulation. The Code would thus prima facie only apply to the remaining two-thirds of the world's conferences for so long as the USA or other non-contracting state party does not accept or acquiesce in the operation of the Code within its claimed jurisdiction. Liner Conferences trading with such countries would continue
4. Another question which may be of considerable importance is the application of the Code to cargoes covered by bilateral trade agreements. While no clear provision of the Code refers to this matter, the COMECON countries, which have already adhered to the Code, have done so with the reservation that cargo covered by bilateral or inter-government agreements is specifically excluded. This attitude was fore-shadowed by an authoritative commentator on the Code shortly after it had been accepted; who wrote: "In light of the statements made to the Diplomatic Conference it is plain that such agreements would prima facie be exempt from the Code."

5. The Council of the European Communities, in May 1979, adopted a resolution which sets out the common position of EEC countries to the Code and also a model reservation which EEC countries will make in adopting the Code. Under this reservation:

- Article 2 of the Code dealing with the principles of participation in trade (cargo sharing, berthing/sailing schedules etc.)
- Article 3 dealing with conference decision making procedure; and
- Article 14 clause 9 specifying a minimum period of 15 months for the interval between general freight rate increases; are excluded from application to intra EEC trade and also to trades between EEC states and other...
OECD countries, subject to reciprocal agreements.

The implications of this reservation are:

(a) EEC shipping lines will be treated on a common footing with regard to cargo sharing rights irrespective of specific nationality, insofar as all intra EEC conference trades are concerned. In short, for the purposes of the Code, the EEC could be deemed to be a single country insofar as intra EEC conference trades are concerned. This principle would cover trades with OECD countries which sign reciprocal agreements with the EEC.

(b) Shippers in intra EEC trades and EEC/OECD trades which are the subject of reciprocal agreement will not have the right to a 15 month minimum freeze period between freight rate increases.

(c) The EEC reservation does not however negate the rights accruing under the Code to extra EEC third flag countries to participate in intra EEC trades.

6. By and large the Code will be effective in respect of:

- conference trades between developing countries and developed market economy countries which are Contracting Parties.

- conferences trades between developing countries which are Contracting Parties.

The immediate practical impact will no doubt be on conference trades between developed market economy and developing countries. In the long run, however, as the trade between developing countries increases, the Code will naturally
become more important as an instrument which regulates shipping relations between developing countries according to the principle of equality of nations.

5. The Main Provisions and its Application (9)

a). Membership in Conferences.

Membership of lines in conferences is dealt with in Article 1 of Chapter 2. Membership in a conference had once been a basic prerogative of the shipping lines forming that body; now under the Code, it is to be regulated in accordance with principles to be established by an international convention, rather than the consensus of the members.

The Code distinguishes between national shipping lines, which are defined in Chapter 1 as "a vessel-operating carrier which has its head office of management and its effective control in that country, and is recognized as such by an appropriate authority of that country or under the law of the country" and shipping lines which are not national lines and which are referred to as "third-country shipping lines".

A national line has an automatic right to a full member in a conference which serves the foreign trade of his country. Paragraph 2 of Article 1 entitles a national shipping line seeking admission to a conference to include the use of chartered tonnage as evidence of its ability and intention to provide regular services. Third-country shipping lines, on the other hand, must not only own vessels but also overcome the hurdles of a subjective analy-
sis of the need for the admission of such a line, the guidelines for which examination are defined in Article 1(3). Lip service is paid to the principle that decisions on membership application are not to be taken in an arbitrary manner; an obligation is imposed on the conference to give in writing the grounds for a refusal (Article 1(4)). The conference is also instructed to take into account the views put forward by shippers' organization of the countries whose trade is carried by the conference (Article 1(5)). The assumption is that such organizations will, in general, encourage competition, in so far as it is possible within the confines of a conference, by favoring the admission of additional lines.

Attention should be drawn to one of the criteria provided for the admission of non-national lines. Article 1(3)(d) states that one criterion is "current participation of the shipping line in trade on the same route or routes outside the framework of a conference". The primary intention in maintaining outsiders is to check conferences' efficiency and to give an option to shippers to ship their goods with outsiders if needed.

The assumption that the Code foresees and tolerates the continued existence of outsider services is further strengthened by the fact that Article 7 devotes considerable space to loyalty arrangements to be set up between the conference and the shippers. And, it was presumed that loyalty arrangements will go on to be an
effective device to fight competition from outsiders.


Article 2 of the Code is headed "Participation in trade". The provisions of this article have been the most controversial. Article 2(4) states that, unless otherwise mutually agreed, the following principle regarding the right of lines to participate in the trade carried must be observed:

- 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 the mutual foreign trade and carried by the conference;

- third-country shipping lines, if any, shall have the right to acquire a significant part, such as 20%, in the freight and volume of traffic generated by that trade.

The two paragraphs above were well known as 40-40-20 formula.

Article 2(5) makes provision for a case in which there is no national shipping line in one of the countries concerned; that country's share shall be distributed among the individual member lines in proportion to their respective share.

Article 2(6) makes another case when one of the national shipping lines decide not to carry its full share.
of trade.

Article 2(7) for the unlikely event when the national shipping lines of two countries do not participate in the trade between those countries which are covered by a conference.

The Code regards all national shipping lines existing in one country and serving a particular trade as a block, entitled to the same percentage of the trade as the group of national shipping lines of the other country. The dividing up of the piece of the cake allocated to that group among its participant members is left to "mutual agreement", which presumably means the customary commercial process that lines now apply when distributing shares in a conference trade. The division of shares among third-country shipping lines appears to be left to commercial negotiations among those lines more by implication than by express provisions.

The code displays a marked preference for pooling arrangements to form the basic cargo-sharing provisions. As Article 2(2) states: "When a conference operates a pool, all shipping lines member of the conference shall have the right to participate in the pool....". Article 2(4), as already cited, lay down the principle for determining the share of individual member lines. The pooling theme is continued in Article 2(13): "Where no pooling, berthing, sailing or other trade participation agreements exist in a conference, either group of national shipping lines, members of the conference, may require that pooling
The alternative to pooling arrangements forseen by the articles in an adjustment of sailings, designed to provide substantially the same rights to participants in the trade as they would have enjoyed had there been a pool.

Article 2(2) above put an end to the situation in which they are first and second class members in a conference.

In a passage in this article of particularly obscure drafting, the groups of national shipping lines of the country at each end are given a majority vote in enforcing such a decision within the conference. A strict time limit of a period not exceeding six months from the receipt of the request is set for setting up a pool or appropriate alternative arrangements. In the event of disagreement between the national shipping lines of the countries concerned, what is in effect and appeal to the appropriate authorities of these countries to bring their weight to bear in the matter is contained in Article 2(14). As a last resort, disputes on this matter are to be dealt with in accordance with the conciliation procedure of the Code.

Some problems regarding the application of cargo sharing.

There are disputes arising regarding the scope of application of cargo sharing. There are two different interpretations as following:

1. Applying the cargo sharing provisions to the conference market share of the trade;
2. Applying the cargo sharing provisions to the total liner trade.
One important point in all of this is that when the Code was adopted outsiders were relatively unimportant. Today, they may carry as much as 30% overall.

Those who are in favour of the first interpretation are mainly the traditional maritime countries, especially those with strong traditional cross-trading operations. And also, shippers from many countries who fear that if the cargo sharing is applied to the total liner trade, there will be no alternative for them other than to ship their goods with conference vessels. The primary criteria of the code that independent lines be maintained to check the efficiency of conference operation will be eliminated. And, the problem will arise that who will control the checking and maintaining the record of loadings of outsiders normally in respect of cargo sharing, in those conferences where the system was installed, the conferences, usually through a special pool secretariat, was responsible for three distinct tasks, namely:
- To fix the share in the traffic of each member;
- To maintain a record of the loadings of each member;
- To operate a system whereby over-carriers compensated under-carriers.

Clearly that any cargo sharing system must be administered. The conference should occupy itself with the task. Indeed, if cargo carried outside the conference is to be subject to the cargo sharing rules, the conference cannot do the job.

But if we let free outsiders to compete with confere-
rence and allocates the cargo share from cargoes carried by conferences. We might find soon that many conferences will dissolve. And, future liner services will be dominated by strong outsiders with advanced and modern vessels. In contrast with conferences, national shipping lines of developing countries are weakening.

c). Freight rates.

Chapter four of the Code convention, entitled "Freight rates", contains articles 12-17 inclusive. Articles 12 and 14 of which can regarded as the crucial ones and thus warrant emphasis. Article 12, named "Criteria for freight rate determination" sets forth four criteria for the purpose of determining freight rates. It stipulates that "in arriving at a decision on questions of tariff policy..., the following points shall, unless otherwise provided, be taken into account", then it specifies the first criterion declaring that:

"Freight rates shall be fixed at as low a level as is feasible from the commercial point of view, and shall permit a reasonable profit for shipowners;"

The second criterion is as follows:

"The cost of operations of conferences shall, as a rule, be evaluated for the round voyage of ships, with the outward and inward directions considered as a single whole. Where applicable, the outward and inward voyage should be considered separately,";
The third criterion by stating that:

"the freight rates should take into account, among other factors, the nature of cargoes, the inter-relationship between weight and cargo measurement, as well as value of cargoes";

The fourth criterion relating to fixing promotional freight rates and/or special freight rates for specific goods, conference shall take into account the conditions of trade for those goods of the countries particularly developing and land-locked countries.

Some of these criterion seem to be mandatory as we can see from the uses of the word "shall" but always there is an escape clause as in this case "unless otherwise provided" is used. One point which is not clear is the Code is silent on the person or persons by whom the otherwise alternative criteria can be provided. Nevertheless, there should be no problem as it can be safely interpreted that the alternative criteria to be provided by shippers and conferences through the consultative process.

Another observation is that the part of the first criterion requiring freight rates to be fixed at as low as commercially possible and to permit a reasonable profit. In a general sense, this criterion is clear and coincides with the Code's objective to facilitate the orderly expansion of world sea-borne trade, although quantification may give problems, particularly of expressions such as "as low
as possible " and " reasonable", How to determine them?

The Round Voyage Concept

At first we should know why was the round voyage concept introduced into the Code? It was introduced into the Code in order to insure that shippers could take into account the allocation of costs between the different rates of the journey and that freight rates on one leg are not fixed in isolation from those on the other. There is evidence that where consultation is weaker in a developing country at one end of a trade than in a developed country at the other end of that trade, freight rate increases tend to be larger in the outward than in the inward trade of that developing country. This is another reasonable question to be discussed but again the question is, how far it is practicable?

It is concerned with the calculation of the operational costs of a conference. The criterion states that the cost " be evaluated for the round voyage of ships, with the outward and inward directions considered as a single whole". The Code does not furnish any indication concerning the circumstances under which the two voyages could be separated for making the calculations of the voyage costs.

There are difficulties in evaluating costs under this concept. There are certain problems in costing arising from the nature of liner operations.
Certain costs can be attributed directly to the cargo carried, and so are easy to handle; cargo handling costs are a clear example. Other costs can be directly attributed to the voyage, for example, fuel costs, stores consumed, since these costs would have been avoided had the voyage not been made. Finally, there are the costs which are common to the organization but cannot, except arbitrarily, be attributed to specific activities; the most important of these are capital costs. Then we come to the allocation of cost among voyages. There are three problems: The first is to determine how much of the general overheads each voyage should bear. The second is to determine how the direct costs of each voyage, including its overhead share, are to be allocated between the constituent parts of the voyage. The criterion of the Code basically addresses itself to the second problem. Thus, in their consultations, all parties would be concerned with the allocation of the attributed voyage costs over the various legs of the voyage, as well as with the allocation of "leg" costs over cargo items, which, in the past, has been their sole concern. However, the first problem cannot be ignored and the distribution of general overheads is a rich source of potential conflict, particularly with capital costs of between 40 and 50 percent of annual costs for container and ro-ro shipping, compared with 20 to 30 percent of conventional liners. What have been mentioned above would be more difficult if it involved many ships belonging to many companies in a conference. Those ships are not the same and are switched between trades
in response to variations in the demand for tonnage and a number of ports in different countries are served.

In some actual cases, the shippers' council and the conference together chose groups of representative ships and used only this costs to determine the overall situation.

The various problems which are involved do not destroy the usefulness of the round voyage concept; but their solution inevitably introduces arbitrary elements into the costing. The question of how indirect costs are allocated between the constituent sections of a voyage is one of determinants in the level of freight rates to be charged on each of these. The greater the arbitrary element, the less the cost figures used to justify the level of freight rates represent reality.

There are more than one group of shippers from different countries at both end of the trade involved. The consultations regarding freight rates for the outward trip and for the return trip, do not take place at the same time, nor at the same place, while the shippers are not the same at two consultations. The common element is the conference, which immediately increases the power of the conference relative to that of the shippers. It is very possible that the presentation of "an aggregated analysis of data regarding relevant costs and revenues which in the opinion of the conference necessitate an increase in freight rates" Article 14 (3) would reinforce the power of the conference because it obliges the shippers themselves to propose the
division of the costs between the two voyages, something for which they are not well qualified. It is for this reason that we have insisted on the conference itself making the proposed division even if, in a normal situation, any division of costs, of whatever type, bears arbitrary elements.

**Conference Tariffs and Classification of Tariff Rates**

It is worthwhile to look briefly at Article 13, which states in part that "Conference Tariffs should be drawn up simply and clearly; containing as few classes/categories as possible..." and in order to facilitate statistical compilation and analysis. The corresponding appropriate code number of the item should be indicated in accordance with the Standard International Trade Classification, the Brussels Tariff Nomenclature or any other nomenclature that may be internationally adopted.

There is no problem with this and it would be useful to have commodities tied to the Brussels nomenclature, or the Standard International Trade Classification (SITC), or other international nomenclature. This would help to make tariffs easier to understand. The adoption of the same system for the tariffs and the cargo manifests by the port and by the customs would not only facilitate statistical collection but also reduce problems of accidental improper declarations at the customs. Further it will simplify international trade movements and shippers-shipowners negotiations. And finally the BTN makes it easier to classify commodities and thus assists in eliminating the use of the arbitrary NOS rates.
General Freight - Rate INCREASES

Article 14 concerning the process of general freight rate increases. Let's explain by dividing it into 2 main parts:

1. Notification of intention. Article 14 (1) when a Conference has intention to increase general freight rate, the Code requires that the Conference shall give advance notice of not less than 150 days or otherwise agreed period to those interested parties of its intention to effect a general increase in freight rates. The notice shall indicate the extent of the increases, the date of effect and the reasons supporting the proposed increase.

Those interested parties are shippers' organizations or representatives of shippers and/or shippers and where so required, to appropriate authorities of the countries whose trade is served by the Conference.

2. Consultation. Article 14 (2) the next step is for consultations to be held at the request of those interested parties described above to be made within an agreed period of time after receipt of the notice and "consultations shall commence within a stipulated period not exceeding 30 days or as previously agreed between the parties concerned."

Before going on, we should note that three problems of application already arise, namely:

- that a single shipper, even if he is of a minor status, or only occasionally sending cargoes, has the power to request consultations even in the face of a refusal from all other
parties "prescribed in this Code";

- the period of time allowed to the shippers is not stipulated in the Code; and

- it seems that the 30 days term does not enter into force until after the expiration of the non-stipulated term; however, the text as regards this question is not clear.

As regards the third problem, common sense indicates that the two terms should be consecutive and that the second one does not include the first. But the article does not support common sense because it reads: "if no agreement is reached within 30 days of the giving of notice in accordance with article 14(1)...the matter shall be submitted immediately to international mandatory conciliation, in accordance with chapter VI, Article 14 (5). Therefore the 30 days period appears to contain everything.

Paragraph 3 of the article speaks about a "report from independent accountants of repute." the preparation of which "any of the parties " has the right to request "in an effort to expedite consultations ". The Conference can submit, if it so wishes, such a report without awaiting the request of anyone. The report should be submitted to the participants "where practicable, reasonably before the consultations." At this point, it sound strange that how can one ever imagine that a report which is made in order to expedite the consultations and which does not reach its destination in sufficient time prior to the starting of consultations to enable the shippers to study it " be accepted
as one of the bases of consultation?" There is no question of "if possible."

And a 30 day term given to undertake the following actions is sound insufficient:

- the receipt of the request by the conference;
- the given of an assignment to the accountants with all necessary information;
- the preparation of the report;
- the sending of the report to the conference;
- the study of the report by the conference;
- the sending of the report to all designated parties; and
- study of the report by the shippers.

And to undertake the study of the report, we should expect on event that the shippers use other accountants, equally capable, in order to explain the report elaborated by the first. Because, in accounting, there always be many points which are arbitrary and are established on a basis of hypothesis which are unlikely to be explained in the report.

One of the most controversial provisions of the Code in the matter of freight rates is the 15 month freight rate freeze, "subject always to the rules regarding surcharge and regarding adjustment in freight rates consequent upon divided into two parts, namely, 150 days notice period plus 10 months between the date when one general freight rate increase becomes effective and the day of notice of the next general
Those provisions received quite a list of criticisms. One of them is "the Code mandates rate increases every fifteen months a naive attempt to control and stabilize costs. . . . However, economic realities will induce exactly the opposite effects. Carriers will most assuredly post hefty increases on schedules every fifteen months, both in anticipation of high costs in the future and to compensate for what they perceive to have been a shortfall in the prior term."

A question might be raised here is will the conditions for general freight rate increases lead to greater use of surcharges, increases for particular clauses of cargo, and/or substantial rate increases which seek to affect unknown future costs increases every 15 months?

d). Relation with shippers

The third chapter of the Code Convention is entitled "Relations with shippers." Article 7 deals with loyalty arrangements, Article 7(1) requires that these "arrangements shall be based on the contract system or any other system which is also lawful."

Given that the original intention was that with the Code the deferred rebate system should be abolished as a form of loyalty tie. If a country has ratified the Code and want to outlaw the deferred rebates. It would be advisable to make the matter clear in the implementing legislation since normally anything not declared unlawful is lawful.
phrase the Code, the legislation might read: The shipping lines members of a conference are entitled to institute and maintain loyalty arrangements with shippers based on the contract system."

In practices nowadays, relatively few conferences operate loyalty systems. It is resulted from the emergence of strong outsiders that make loyalty arrangements ineffective. Those outsiders provided regular and reliable services with lower freight rates which means immediate discount without entering contracts. Anyway it might be that conferences attempt to reinstitute loyalty systems. Conferences, if denied the right to use loyalty systems, would be left powerless. Thus, it seems appropriate that conferences should retain the power to establish loyalty systems, but to provide that "the form and terms ... are matters for consultation between the conference and shippers' organization or representatives of shippers and appropriate authorities" (see Article 7 (1).

Article 8 headed "Dispensation"

Dispensation has always been a thorny problem and will continue to be. The Code requires that conferences shall examine and give a decision quickly the request by dispensation. And if the dispensation is withheld, the conference shall give reasons in writing. Clearly, what is quickly for the shipowner may not be quick enough for the shipper. At the same time, shippers cannot expect understanding from the conference if their own request is
frivolous or dubious; it is alleged that shippers sometimes hold back shipments so that they miss a conference sailing and then ask for dispensation to ship on an advertised non-conference vessel.

Article 11 dealt with Consultation Machinery.

It institutionalizes the machinery of consultations and leaves no escape to either conferences or shippers as it makes it mandatory or compulsory when it states:

"there shall be consultations on matters of common interest between a conference, shippers' organizations, representatives of shippers.... these consultations shall take place whenever requested by any of the above-mentioned parties",

and that:

"consultations shall be held before final decisions are taken",

and further:

"appropriate authorities shall have the right, upon request, to participate fully in the consultations, but this does not mean that they play a decision-making role"

Article 11(2) lists matters that may be the subject of consultation:

a) Changes in general tariff conditions and related regulations;

b) Changes in the general level of tariff rates and rates for major commodities;

c) Promotional and/or special freight rates;
d) - Imposition of, and related changes in, surcharges;
e) - Loyalty arrangements, their establishment or changes in their form and general conditions;
f) - Changes in the tariff classification of ports;
g) - Procedure for the supply of necessary information by shippers concerning the expected volume and nature of their cargoes; and
h) - Presentation of cargo for shipment and the requirements regarding notice of cargo availability.

Article 11(3) says that "to the extent that they fall within the scope of activities of a conference, the following matters may also be the subject of consultation:

a) - Operation of cargo inspection services;
b) - Changes in the pattern of services;
c) - Effects of the introduction of new technology in the carriage of cargo, in particular unitization, with consequent reduction of conventional service or loss of direct services; and

d) - Adequacy and quality of shipping services, including the impact of pooling berthing or sailing arrangements on the availability of shipping services and freight rates at which shipping services are provided; changes in the areas served and in the regularity of calls by conference vessels.

The two last items c) and d) are particularly important and relevant to many developing countries' trades where such trades are served as by-products of other trades.
A case comes to mind here is the containerization of conference services in such trades which both left a number of shippers dissatisfied because on account of the very nature of their cargoes they would still have to rely on conventional services, and increased the overall cost of transportation of the cargoes which lends themselves to containerization.

One problem within consultations is the big shippers and the small shippers may have widely different point of view on some issues. This may arise from genuinely different interests which need to be taken into account—for example, small shippers generally fill the need for much greater service frequency than large shippers. But the different points of view may arise from ignorance and the fact that the small shippers are generally less well informed than the large shippers and are likely to have a shorter time horizon. Then the point cannot be ignored that large shippers are frequently able to make their own arrangements with the shipping lines and the conferences and then may be perfectly willing to stand aside and allow the conference to recoup from the small shippers what it has given away to large shippers.

Even though this article attempts to protect shippers through requiring a consultative machinery before decision are made, it is not without problems or weaknesses which must be dealt with when putting the Code into operation, particularly in developing countries. Since effective
consultations are not possible unless all parties are equally informed, and given the fact that shippers' councils in developing countries, if existing at all, generally lack the necessary financial resources and manpower support to effectively prepare themselves for negotiations with conferences.

e). Provision and Machinery for Settlement of Disputes.

Part 2, Chapter VI of the Code devotes for "provisions and machinery for settlement of disputes". The Code provide for the settlement of disputes that may arise out the implementation of the Code through a process of international mandatory conciliation. The principles and procedures to be observed in this regard are spelled out in 23 articles, from Article 23 to Article 45.

In normal English usage, conciliation is a process by which a third party attempts to bring the disputants to agreement. The conciliator does not make an award or a recommendation. In a successful conciliation the role of the conciliator is normally invisible. In arbitration, on the other hand, the arbitrators, after listening to both sides in a dispute and collecting and weighting such further evidence as they see fit, which would usually included evidence concerning the practices of the trade, produce a ruling. In advance of the arbitration proceedings both parties agree that, having accepted to go to arbitration and on the identity of the arbitrator or of the arbitration panel, they will accept the award.
International mandatory conciliation is neither of these things. It is like arbitration in that a decision is given; it is like conciliation in that there is no prior commitment to acceptance. The parties agree on the appointment of the conciliator or of the panel of conciliators, a recommendation is made and then the parties either accept it or reject it. Thus, not only is a new concept in jurisprudence introduced, but a new meaning is given to a well-established word referring to a well-established practice.

The process provided in the Code for the settlement of a dispute on a major question is consultation, normal conciliation, international mandatory conciliation. "The parties to a dispute shall first attempt to settle it by an exchange of views or direct negotiations..." (see Article 23 (3)); clearly, consultation is included in the exchange of views or direct negotiations, but the provision is properly wider. In fact the Code provisions encourage recourse to all possible avenues of settlement before embarking on international mandatory conciliation, which is to be seen as a last resort.

At first, let's look at the parties whose disputes fall into the scope of the application. The Code's dispute settlement machinery applies to disputes between:

a) A conference and a shipping line;
b) Shipping lines which are members of a conference;
c) A conference or a shipping line which is a member thereof, and a shippers' organization or shippers, and
d) Two or more conferences;
and the matters regarding which disputes could be referred to international mandatory conciliation are:
1: refusal of admission of a national shipping line to a conference serving the foreign trade of the country of that shipping line;
2: refusal of admission of a third country shipping line to a conference;
3: expulsion from a conference;
4: inconsistency of a conference agreement with the Code;
5: a general freight rate increase;
6: surcharges;
7: changes in freight rates or the composition of a currency adjustment factor due to exchange rate changes;
8: participation in trade;
9: the form and terms of proposed loyalty agreements.

The principle of the Code's international mandatory conciliation:

1. International mandatory conciliation, under the Code, is applicable principally to dispute between parties belonging to different nationalities. Parties of the same nationality are expected to settle their differences through recourse to national law, unless this creates serious difficulties in the fulfilment of the provisions of the Code.

2. The basic feature of the Code's dispute settlement regime is that it is a system of mandatory conciliation and not
one of arbitration, the purpose of conciliation being to reach an amicable settlement of the dispute through recommendations formulated by independent conciliators. Conciliators are to be drawn from an international panel of experts, each contracting party having the right to nominate a total of 12 persons to the panel.

3. Article 25 provides that where conciliation proceedings have been initiated such proceedings shall have precedence over national law. However, recommendations of conciliators are not binding in that any party to a dispute has the right, by giving reasons, to accept or reject a recommendation made by conciliators. The party refusing to accept a recommendation would then be free to seek redress by other means including access to national law as appropriate.

4. Where parties to a dispute have accepted a recommendation by conciliators, the Contracting Parties concerned are expected to enforce such recommendations except where a court or other competent authority of the country where enforcement is sought found that:
   - any party which accepted the recommendation was under some legal incapacity at the time of acceptance;
   - fraud or coercion has been used in the making of the recommendation;
   - the recommendation is contrary to public policy in the country of enforcement, or
   - the composition of the conciliators, or conciliation
procedure, was not in accordance with the provisions of the Code.

5. The Code also provides for parties to a dispute to resolve such a dispute through mutually agreed procedures other than the Code’s international mandatory conciliation procedure. The use of such alternative means of solving disputes is not permitted in the case of disputes relating to freight rate increases, surcharges and currency adjustment factors if national legislation rules or regulations prevent shippers from having this freedom of choice.

The major weakness of the conciliation system set out in the Code is the ability of either party to reject its results if they wish to do so, and the absence of any effective sanction against the party which does so reject the recommendation. This new concept has never been functioning. And, it is believed that it will never be allowed to come into effect, because the EEC regulation excludes use of the procedures of IMC in trades between members states and other OECD countries. Limited the use of the system results in ineffectiveness. Additionally, most of the limited trade is with developed countries, members of the OECD. Will conference members which have rejected the system in one part of their operations be willing to accept it in other trades?
Government in the application of the Code

In chapter I of the Code, a definition of an "appropriate authority" is given. The Code definition of an appropriate authority is: "Either a government or a body designated by a government or by a national legislation to perform any of the functions ascribed to such authority by the provisions of this Code." Or to put it more simply, an appropriate authority is a body designated to do those things under the Code which the Code says it can or should do. Thus the definition says nothing about the status of such a body, nor of its precise relation to the government which designated it.

What can Appropriate authorities do? The preamble to the Code contains three basis principles, of which one is the principle that conferences should hold "meaningful" consultations, in which appropriate authorities could participate upon request.

Certain attributes of appropriate authorities are found in the definitions contained in chapter I. According to these definitions, an appropriate authority could:

- recognise a national shipping line; and
- recognise, if it so desires, a shippers' organization.

Turning to the body of the Code we find the following provisions concerning the role of appropriate authorities, namely:

- appropriate authorities can request that their views on the admission of a new member to a conference be taken
into account; (Article 1(5))

- appropriate authorities of the countries at both ends of the trade may, if they so wish, take up the matters of a disagreement between their groups of national shipping lines on the question of pooling and make their views known; (Article 2(14)), however, that one appropriate authority cannot act on its own in such a matter;

- conferences shall provide machinery for reporting, on request, to appropriate authorities on action taken in connection with malpractices, etc; (Article 5(1)(c))

- conferences shall make available to appropriate authorities, on request, copies of the conference agreements and other related documents; (Article 6)

- appropriate authorities "shall have the right, upon request, to participate fully in consultations, but this does not mean they play a decision-making role." (Article 11(1)); and

- appropriate authorities have the right to request information and notice of intended action by conferences; (Article 10; 14(1); 15(4); 19(2))

Article 14 seems to provide, by non-exclusion, that appropriate authorities may request consultations in connection with a general freight rate increase and may request the submission of a report from independent accountants. In the Article 14(2) say "at the request of any of the parties prescribed for this purpose in this Code... consultations shall commence..." The interpretation that appropri-
ate authorities, not being specifically excluded, are included among the bodies entitled to demand consultation is debatable.

In Article 16 concerning surcharges and Article 17 concerning currency changes, it is "parties directly affected" who are to be notified of any intended action and who can participate in consultations, which seems by implication not to include appropriate authorities. However, since these are matters which may, according to Article 11, be the subject of consultations, it seems that appropriate authorities must be notified, if they so wish, and may, also if they so wish, participate in the consultations.

The Code and technology changes

When the Code was drafted in 1973-1974 liner conferences were in a more dominant position than they are today. Liner Conferences were viewed by developing countries at that time of powerful cartels which were capable of dictating the terms of cargo carriage. At the same time they were able to restrain the possible growth of local national fleets through control over conference membership, the use of loyalty agreements with shippers, and through their existing strength experience, and trade network.

Much has changed since 1973-1974. Strong, well-financed non-conference lines have emerged and taken a substantial amount of cargo away from conference lines. In 1974, times were such that in most liner-traffics the conferences covered roughly 90 percent of the trade, whilst today outsider participation of between 20% to 50% in quite a number of trades
is often the case.

With in these 10 years, the oil price has exploded and world economy has to face one of the worst recessions ever experienced. World recession has reduced world trade and the demand for shipping services so that liner shipping, though to a lesser extent than is the case with bulk shipping, is marked by significant over-capacity of tonnage. This situation of excess supply of tonnage together with a fundamental structural change in liner shipping, the so-called container revolution, had weakened conference position.

Containerization has changed the face of liner shipping, introducing new, highly-productive ships in the decline in growth of world trade worsened the situation of the excessive supply.

Liner shipping is now increasingly seen by many as a part of the world-wide, integrated, intermodal system of transportation moving goods from door to door rather than as a discrete activity moving goods from port to port.

Containerized shipping operations, however, are capital intensive. In these circumstances, many liner operators are constantly seeking to rationalize their services via consortia, coordinated sailings, space charter agreements, joint services etc. This arises some problems regarding the Code's application. The Code never mentioned of 'consortium'. It is a new type of combination which is considered as a single carrier and, in the Code terms is not a group of vessel-operating carriers. It can be a member of the
conference as it can trade as an independent line which represents a real threat to conferences.

And due to its high fixed costs, financial success of containerized shipping operations depends upon high load factors and quick turn around time. One of the consequences of containerized shipping is the emergence of the concept of load center ports. From the standpoint of economy of operation, large container vessels should operate only between such load centers rather than calling at several ports at each end of a trade.

Another aspect of containerized shipping which may impact Code implementation is reflected in the growing competition among ports for cargoes. While ports have always competed to some extent, by virtue of geographic propinquity and limited alternative transportation possibilities from inland areas ports could rely on cargo being provided from their national hinterlands. With containerization all this is changing; hinterlands of different ports increasingly are overlapping due to the shipper's ability to move his goods via a variety of ports, even on different coasts. Land-bridge and mini-bridge service is a reality today.

Non-conference shipping lines and fair competition on a commercial basis:

In the Code text, there are no provision dealing with 'non conference line' except for Article 18 dealing with fighting ships, the use of which is prohibited. UNCTAD regarded fighting ships as an anticompetitive device which almost
invariably led to the disruption of the trade. In addition to the Code article there is a resolution on non-conference shipping lines annexed to the Code. This picks up some of the provisions which had been proposed for inclusion in the Code and is protective of the position of non-conference lines. The Code always uses the term 'non-conference line'. It never utilize the word 'outsider'. There is a difference between a non-conference line and an outsider. The term 'outsider' embraces all types of competitors to the conference such as tramps, specialized carriers and include non-conference line, whereas the term 'non-conference line' covers only the offer of regular service on a similar basis to those offered by the conference. 'Outsider' is also used to refer to a line, member of a conference, whose ships are rarely fully loaded on one or other leg of their normal voyages, calling at ports which are served by another conference with the purpose of taking cargo. The outsider offer a regular service, but without any guarantee of continuity. The resolution on non-conference shipping lines offers them protection only if they observe the principles of fair competition. The principles are easy to mention in broad terms, but difficult to define. Mr. Sturmey has shown his opinion that it is easier to give examples of what is not fair competition than of what is fair competition, and that a line member of a conference are operating under a number of constraints, as: - the need to make a sufficient profit in the long run to motivate the owners to maintain and replace their ships
in order to assure the continuity of the service;
- the need to maintain an administrative structure at the conference level.
- a common carrier obligation to take what cargo is offered and not to reject low-rated cargo, for example;
- the duty to provide a regular service in good times and in bad; and
- the need to conform to Code rules on a wide variety of issues, including giving notice of the intention to increase rates or impose surcharges, to hold consultations, to furnish information and reports etc.

And his further opinion of what are the cases of unfair competition as follows:
- Ships which had carried cargoes of cement to Lagos a few years back had earned enormous demurrage while lying at anchor for ten months or so; many then tried to lift cargoes from Abidjan at cut rates. Such ships were obviously not thinking of long term service and so were offering unfair competition.
- A ship which calls at ports only for high rated cargoes and ignores all the rest is not assuming common carrier obligations.
- A well established liner company, members of a conference, which poaches on the territory of another conference is not thinking of providing a regular service to the trade, nor thinking of long term costs etc.
foot notes

1. S.G. Sturmey, The development of the Code of Conduct for Liner Conferences, Marine Policy, April 1979
2. Amos Herman, Shipping Conferences, Lloyds of London Press Ltd, 1983
3. S.G. Sturmey, Ibid,
6. S.G. Sturmey, Workbook, Ibid,
7. Piyasiri Karandawala, Ibid,
9. Under this heading, this writing is based on the following sources:
   - Eli Moses, To Joint or Not to Joint the UNCTAD Convention on a Code of Conduct for Liner Conferences, An Examination of the Israeli Position, Israel Shipping and Aviation Research Institute, September, 1983.
   - Piyasiri Karandawala, Note on the U.N. Convention.
PART THREE

DEVELOPMENT OF NATIONAL FleETS WITH

THE CODE
CHAPTER VII

THE CURRENT SITUATION OF SHIPPING INDUSTRY IN THAILAND

International trade plays a very important part in Thai economy. Exports and imports both in terms of volume and value are increasing. The main imports are chemicals, machinery, iron ore, vehicles etc. The main exports are agricultural products, rubber & synthetic, electric machinery. The volume of trade both inward and outward by sea has increased from 20 mt. in 1974 to 32 mt. in 1981, which represented 60% increase.

In spite of the importance of international seaborne trade of Thailand, the size of national fleets is very small. In 1974, only 3.59% of the total volume of trade was carried by national fleets. The participation of national fleets in carrying national cargo has slowly increased to 7.12% in 1981, 8 years since then.

In 1978 Government issued the Mercantile Marine Promotion Commission Act 1978 with the purpose to support national shipping activities such as seetransportation, marine insurance, shipbuilding and repairing and ports. To carry out these tasks, the Commission and its secretariat office have been formed. Since then Government has already carried out several policy measures trying to expand national merchant fleets. In addition to man power development, giving incentive to foreign investment and encouraging Thai shipping.
companies to open new routes i.e. Thailand-America and Australia, we have laid down a plan to give supports to national ships by following measurements: (some measures have not been put into effect).

Cargo Reservation

1. not less than 40% of Government's export cargoes will be asked to be transported by Thai ships during sales negotiation and this will also be applied to individuals' exports when selling in CIF terms but must not obstruct the trade.

2. All import cargo that belong to Government, state enterprises and government loan cargoes shall be transported by Thai ships.

Tax incentive

Give tax privilege to Thai shipping companies' shareholders and those who use Thai ships.

Monetary measures

1. Founding merchant marine funds
2. Giving financial assistance in the form of packing credit.

In 1980 the number of Thai registered ships was 106, total capacity was 557,541 dwt. That number has increased to 149 ships with capacity 678,577 DWT. in 1983. The DWT increased 22%. When comparing with Thai neighbouring countries, it is found that, in 1980 the Philippines has general cargo ships totally 1.192 M.DWT. Indonesia and Malaysia have merchant fleets 1.086 M. and 1.0 M.DWT. respectively.
Table 1 No. DWT. classified by ship's type in 1980 and 1983

<table>
<thead>
<tr>
<th>Year</th>
<th>Total No.</th>
<th>DWT</th>
<th>Dry Cargo No.</th>
<th>DWT</th>
<th>Tanker No.</th>
<th>DWT</th>
</tr>
</thead>
<tbody>
<tr>
<td>1980</td>
<td>106</td>
<td>557,641</td>
<td>56</td>
<td>328,442</td>
<td>50</td>
<td>229,199</td>
</tr>
<tr>
<td>1983</td>
<td>149</td>
<td>678,577</td>
<td>87</td>
<td>435,341</td>
<td>62</td>
<td>243,236</td>
</tr>
</tbody>
</table>

Source: Office of Mercantile Marine Promotion Commission

Most of Thai ships are small and old. Most of them are conventional type. In 1980 the average capacity of Thai ships is 5,261 DWT, the average capacity of dry cargo ships is 5,865 DWT. In 1982, it was found that in 83 examples the percentage of ships that were in bad condition was 62.7 (more than 16 years old.) of these moderate was 32.5 (between 6 - 15 years old) and those in good condition was 4.8 (less than 6 years). Having most of the ship being in bad condition results in

1. the high cost of maintenance
2. having low speed, staying relatively longtime in dry dock result in low earning time of the ships.
3. more difficult to get cargoes. Shippers have to pay more insurance premium for their cargoes.

Most of Thai ships are conventional type. There are only 5 small LNG carriers. Almost all tankers are product carriers. Thailand at the present time do not have a
container vessel but a few container feeders.

**Paticipation of Thai ships in carrying national cargo**

In 1974 Thai seaborne trade volume carried by Thai vessels is only 3.61%. The percentage has increased gradually to 5.26% in 1978 and 7.12 in 1981.

**Problems and obstacles**

National fleets cannot develop and take very little part in the transportation of Thai foreign trade due to many factors:

1. Lack of competitive condition: Shipping today is a capital intensive industry as already mentioned. Competitive shipping companies have used very high advance technology in many sections of operations and management, ship operation, maintenance, fuel saving, information networks. Comparing to Thai ships most of which are small and old. And most of them are conventional type. Conventional vessels are considered to be inefficient ships. Their speeds are relatively slow. A container ship is about two times faster than conventional ships. And at the same size a containership has 6 times more capacity than a conventional ship. The next problem is Thai shipping companies are too many but small, many shipping companies have only one ship to operate. This results in high operating cost per ship. And lack of marketing and management skills.

The enforcement of international convention on safety and pollution prevention limited the trading area of
Thai ships.

2. Lack of funds: shipping today is high investment. To buy or build new ships is expensive. And the returns are relatively small. Governments in many countries are providing their national shipowners with long term loans and low interest rates. In Thailand there is only one state-owned financial company that offers loans for shipping with the interest of 14.5%. No private-owned commercial companies are interested in this industry. One main reason is lack of skilled people in this business.

3. Lack of skilled manpower in the field of shipping:
Statistics in 1977 shows that 2,037 people are employed in 67 ships (both dry cargo carriers and tankers). Of the 2,037 people 869 people are foreigners or represented 43%. Those needed are high level managers and operators. Most of Thai master mariners came from the Navy.
CHAPTER VIII

LINER SHIPPING IN THAILAND AND STATUS OF PARTICIPATION OF THAI NATIONAL FLAG VESSELS IN CONFERENCES

Dry cargo prospects

<table>
<thead>
<tr>
<th>Dry cargo (mln.tons)</th>
<th>1976</th>
<th>1980</th>
<th>1985</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Imports</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>General cargo</td>
<td>3.65</td>
<td>4.1</td>
<td>5.5</td>
</tr>
<tr>
<td>Bulk agricultural</td>
<td>0.06</td>
<td>0.1</td>
<td>0.15</td>
</tr>
<tr>
<td>Fertilizers</td>
<td>0.25</td>
<td>0.5</td>
<td>0.7</td>
</tr>
<tr>
<td>Sub total</td>
<td>3.96</td>
<td>4.7</td>
<td>6.35</td>
</tr>
<tr>
<td><strong>Exports</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>General cargo</td>
<td>0.3</td>
<td>0.4</td>
<td>1.0</td>
</tr>
<tr>
<td>Agricultural produce</td>
<td>9.8</td>
<td>10.9</td>
<td>12.3</td>
</tr>
<tr>
<td>Molasses, cement, ores and sodaash plus rock salt</td>
<td>1.5</td>
<td>2.0</td>
<td>3.2</td>
</tr>
<tr>
<td>Sub total</td>
<td>11.6</td>
<td>13.3</td>
<td>16.5</td>
</tr>
<tr>
<td><strong>TOTAL TRAFFIC</strong></td>
<td>15.56</td>
<td>18.0</td>
<td>22.85</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Containerisable general cargoes</th>
</tr>
</thead>
<tbody>
<tr>
<td>Containerised cargoes in 1000 tons</td>
</tr>
<tr>
<td>1980</td>
</tr>
<tr>
<td>Total Imports</td>
</tr>
<tr>
<td>1241</td>
</tr>
</tbody>
</table>

There are 5 outward conferences carrying outward cargoes from Thailand.
1. Thailand/Bay of Bengal Rate Agreement
2. Thailand/Europe Conference
3. Thailand/Japan Conference
4. Thailand/Pacific Freight Conference
5. Thailand/US Atlantic and Gulf Conference

There are as many as 20 inwards conferences carrying inward cargoes to Thailand either calling Thai port (Bangkok port) as direct port or base port. But most of those conferences' vessels do not call Bangkok port directly. They call at Singapore and have their cargoes transhiped in feeders to Bangkok port. Singapore serves as a centre port for FAREAST and another reason is Bangkok port is a river port. It is too small to receive ocean containers.

The important inwards conferences are
1. Japan/Thailand Freight Conference
2. Far Eastern Freight Conference (East bound)

The participation of Thai ships in the Conferences:
Four Thai shipping companies are members of both Thailand/Japan Conference and Japan/Thailand Freight Conference
A Thai shipping company is a member of both Thailand/Europe Conference and FEFC

We don't have any Thai shipping lines sailing to and from the USA, Australia which are considered as Thai's big trading partners.
(1) Japan – Thailand Conference (import)
cargoes carried by flag vessels

<table>
<thead>
<tr>
<th>Year</th>
<th>Japan flag</th>
<th>Thai flag</th>
<th>Third country</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>1979</td>
<td>829,524 (51.1)</td>
<td>475,264 (29.1)</td>
<td>321,625 (19.8)</td>
<td>1,626,123</td>
</tr>
<tr>
<td>1980</td>
<td>769,965 (48.7)</td>
<td>499,087 (31.6)</td>
<td>310,549 (19.7)</td>
<td>1,579,601</td>
</tr>
<tr>
<td>1981</td>
<td>739,739 (47.1)</td>
<td>500,687 (31.8)</td>
<td>331,583 (21.1)</td>
<td>1,572,009</td>
</tr>
</tbody>
</table>

(2) Thailand – Japan Conference (export)

<table>
<thead>
<tr>
<th>Year</th>
<th>Japan flag</th>
<th>Thai flag</th>
<th>Third country</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>1979</td>
<td>292,745 (27.0)</td>
<td>460,014 (42.4)</td>
<td>332,882 (30.6)</td>
<td>1,085,641</td>
</tr>
<tr>
<td>1980</td>
<td>76,093 (12.2)</td>
<td>285,674 (45.9)</td>
<td>260,320 (41.9)</td>
<td>622,087</td>
</tr>
<tr>
<td>1981</td>
<td>113,662 (16.5)</td>
<td>294,556 (42.7)</td>
<td>280,954 (40.8)</td>
<td>689,172</td>
</tr>
<tr>
<td>1982</td>
<td>218,969 (31.7)</td>
<td>253,787 (36.7)</td>
<td>217,862 (31.5)</td>
<td>690,618</td>
</tr>
</tbody>
</table>

(3) Outside line (export to Japan)

<table>
<thead>
<tr>
<th>Year</th>
<th>OUTSIDE LINE</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>CARGO</td>
</tr>
<tr>
<td></td>
<td>sailing volume</td>
</tr>
<tr>
<td>1979</td>
<td>220</td>
</tr>
<tr>
<td>1980</td>
<td>198</td>
</tr>
<tr>
<td>1981</td>
<td>180</td>
</tr>
<tr>
<td>1982</td>
<td>216</td>
</tr>
</tbody>
</table>
From those tables showing cargoes carried in Thailand-Japan route, we can see that Thai vessels carried inward cargoes amounting to around 30% of cargo carried by conferences and outward cargoes amounting to around 40%. Table no. 3 shows that outside lines carried a substantial part of Thailand-Japan trade.

Those statistics are a bit old. But it is said that at the time being Thai vessels carry more or less 40% of the cargoes carried by conferences and outsiders carry 40% of the total trade. This situation is somewhat similar to the Thailand-Europe trade. These statistics do not show the revenue earned by Thai ships. However, due to the fact that Thai ships are of conventional type, it is believed that they carry relatively low valued cargoes which generated low freight rates.
CHAPTER IX

SUGGESTION ON THE APPLICATION OF THE CODE IN THAILAND

The Code should be implemented in the way that it be taken as a philosophy that aimed to promote national shipping industry and national overseas trade. It should not be looked at as a set of rigid rules that bind all the parties concerned resulting in the restriction of the free flow of trade.

The following are the roles that should be maintained by the Government:

- to facilitate the conditions that bring stability and efficiency to the sea transportation services,
- to maintain the balance in the power between the seatransport suppliers and seatransport users,
- to support and assist in building up of a modern national shipping industry and other related infrastructure,
- to keep trace of the developments of new technology and new concepts which will bring changes to the shipping industry and to be able to take immediate actions whenever it was found that the changes will bring detriment to the national interests and securities.

In the present situation of world shipping, there is excessive supply of shipping services. This causes an unfettered competition among shipowners. This situation may result in the low utilization of vessels in many trades. In liner sector this will cause high cost per ton in the
ships operation and cause higher freight rates than otherwise when the whole space of the ship is utilized. One solution can be that the Government find a proper way to limit, in each particular trade, the number of carriers that can meet the demand for seatransport and can provide services according to the requirement of the trade. The Code attributes to the concept of having a limited number of carriers as it is in favour of "closed conference". Under a certain number of carriers, carriers can cooperate better than where the number is uncertain.

The Government's policy should encourage those non-conference carriers to enter conferences. In this way, they can coordinate and rationalize their services.

The Government's policy should strengthen the conference system by eliminating the circumstance by which non-conference lines gain benefit over conference member lines. That is to impose common carrier obligation to both of them equally and put an end to the chances of non-conference lines to pick up only high value goods with lower rates than those of the conferences.

The Code gives a definition to "conference" but never defines those new forms of combinations such as consortium, joint service etc. These new organisations can be big and powerful and be able to go alongside independently with conferences. The Government should force them to enter into the framework of conference. If consortia are free to operate outside, it is not justified for conferences' members who are
being under certain number of obligations given by the Code.

The Government should encourage Conferences to use
loyalty arrangements as fighting tools against different
kinds of outsiders.

The Government should encourage the use of pooling
agreement for making the best use of full rationalization.

The Government might support conferences by facilitat­ing
the operation of the conferences' vessels or giving
them some privileges for example.

Policy to promote national fleets

In the present situation of overtonnaging, the Go­
vernment should encourage Thai shipowners to replace the
old conventional type vessels with fairly new container
vessels the type, size and speed of which should be opti­
mum to the particular trade.

The Government should encourage the merger of
small shipping companies into larger concerns on which
Government might put the requirement that the new companies
be public companies before accepting as National Shipping
lines.

The Government should encourage the opening of new
routes for national ships in the trade the volume of which
is substantial enough to run a regular service. In the trade
the volume of which is small, the solution might be the use
of space chartering.

The Government should support joint ventures be­
ween National Shipping Companies and advanced foreign companies
for the gains of technical know how, management and operational skills.

The Government should induce direct calls by ocean carriers to Thai ports. If it is not commercially viable to do so, Government should initiate negotiations for Thai shipowners to get a fair share in the carriage of national seaborne trade in the regional level.

The Government should take initial steps to form an organization of shippers which represents the interests of every group of shippers. A Freight consolidation center or freight booking center should be established in the organization.

The Government should induce Thai exporters to sell in CIF term and importers to buy in FOB term and encourage them to use the services of national shipping lines or any lines which are members of conferences.

The Government should establish a freight study unit and shipping data base for the use of development planning and to strengthen the negotiation power of national shippers.
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