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UNCTAD: Regulation versus Self-regulation

by W. R. Malinowski, Geneva *

The third session of UNCTAD adopted six resolutions on shipping and ports. They relate to: the development of ports; the international combined transport of goods; freight rates; the development of merchant marines; economic cooperation in merchant shipping; and a code of conduct for liner conferences.

These resolutions, which represent progress on previous resolutions passed by UNCTAD and its Committee on Shipping, were adopted unanimously except for the one on a code of conduct for liner conferences, which is of crucial importance and which is the subject of this article.

The Conference unanimously agreed that there was an urgent need for adopting and implementing a universally-acceptable code of conduct for liner conferences. In the resolution adopted, the Conference requested the United Nations General Assembly, at its 27th session, to convene, as early as possible in 1973, a conference of plenipotentiaries to adopt a code which would have a binding character and which could be suitably enforced, and to establish a preparatory committee to make the necessary preparations. It recommended that the preparatory committee use as a working document, among others, the draft code of conduct which had been prepared by the developing countries and which was annexed to the resolution. The draft code prepared by the developing countries formed the basis of the first round of discussion on the substance of a code at Santiago. An account of this exchange of views is given in a separate Conference document¹.

To understand the significance of the decision taken on the code, it is necessary to examine the developments that took place before, and during, the Conference in Santiago.

Liner Conferences under Criticism

Liner conferences are international cartels and are not subject to any form of international control. They have operated on the basis of self-regulation ever since they came into existence nearly a century ago². Looking back, it is an amazing fact that

this state of affairs should have been allowed to persist for so long. National cartels are, in many cases, either prohibited or subject to anti-trust legislation designed to protect the public interest, but the international cartels organised in liner conferences have been operating with little or no public control to protect the interests of their customers³. The result, which should not be surprising, is that liner conferences have been strongly criticised, particularly by the developing countries, for adopting unfair and discriminatory practices. The developing countries have criticised liner Conferences, among other things, for relegating their lines to second-class membership, refusing membership of wayport trades to their lines, discrimination in the fixing of freight rates on their imports and exports, and for unjustified increases in freight rates which are usually decided and applied without proper or adequate consultation with the shippers or the government concerned. The complaints would, in a national context, have rendered the offending party liable to censure or other forms of disciplinary action. However, for a long time, liner conferences have had no such fear. Apart from the fact that there is no system of international regulation, their member lines have enjoyed the support of their governments. Their foreign exchange earnings have made an important contribution to the balance of payments of their countries. Further, shipping lines, being relatively few in number, have been able to organise themselves effectively in liner conferences. On the other hand, shippers, because of the *laissez-faire* philosophy and the concept of "freedom of contract", have not enjoyed their governments' sup-

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¹ See "An informal exchange of views on the draft code of conduct for liner conferences contained in the annex to document TD/III/C.4/L.2 and Corr. 1: A summing-up by Mr. C.P. Srivastava, Chairman of the Fourth Committee", reproduced in TD/161/Add.3.

² Shipping conferences are analyzed in the UNCTAD secretariat's report on "The liner conference system", TD/B/C.4/62/Rev.1 (United Nations publication Sales No: E.70.II.D.9).

³ There are various forms of national control practised by a few countries (e.g. USA, Brazil, Australia). However, pressure is building up in many countries for national regulatory action (see "Legislation on shipping practices: Pressure builds up" published in *The Economic Times*, Bombay, March 27, 1972). The danger of a multiplication of national regulations is that it might cause a clash of jurisdiction between the countries concerned. This clash of jurisdiction may be avoided with a system of international regulation.

port to the same extent; and, being numerous, they have also found it more difficult to organise themselves effectively⁴.

Avoidance of National Regulatory Action

However, there is an increasingly strong tendency for developing countries to resort to national regulatory action in order to protect their interests⁵. To ward this off, the Japanese and some western European Governments, constituted in the Consultative Shipping Group (CSG), decided to take the initiative. They met in Tokyo in February 1971 and requested their shipowners to prepare a code of practice for liner conferences designed "to strengthen confidence in the working of the conference system [and] to avoid allegations of unfair practices and discrimination by ensuring the observance of a high standard of fair dealing in conference activities". Recognising that "unilateral governmental regulatory actions may prejudice the adoption and implementation of the code" they instructed their officials "to explore the possibility of improving the means of defending their interests against governmental regulation . . . possibly through an appropriate co-operative plan". The CSG Governments obviously looked upon regulatory governmental action with distaste and intended the code to obviate the need for it. They affirmed that conferences "should continue to function by self-regulation to the greatest possible extent." They agreed that "when they had approved a code of practice their shipowners should work for its adoption" and that "consideration should be given to supervising the implementation of the code of conference practice on a continuing basis". Further, they resolved that "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 world-wide endorsement"⁶.

Three important points in the Tokyo decisions need to be emphasised. One, the code was to be based on self-regulation by the industry "to the greatest possible extent"⁷. Two, the CSG Governments, by asking their shipowners to prepare a code, and by agreeing that they should approve the code and consider supervising its implementation on a continuing basis, clearly accepted the need for some form of governmental intervention in the activities of liner conferences. In fact, they threatened further governmental intervention by

asking their officials "to explore the possibility of improving the means of defending their interests against governmental regulation". Three, the ultimate objective was to have the code endorsed and implemented on a world-wide basis⁸.

Acting upon the Tokyo decisions, the Committee of European National Shipowners' Associations elaborated a code of practice (the CENSA code) in consultation with the European Shippers' Councils, but not with the Freight Committee of the Council of All-Japan Exporters' Associations (the Japanese shippers' body), although the Japanese Shipowners' Association is a member of CENSA⁹. The code was prepared and completed in the amazingly short time of less than a year.

Critical Points

It should be noted that, after the Tokyo meeting, the fifth session of the Committee on Shipping met in Geneva in March/April 1971, and the third session of its Working Group on International Shipping Legislation (WGISL) met in Geneva in January 1972. The CSG Governments and CENSA had the opportunity to present the CENSA code as a draft for negotiation to either of these meetings but they did not do so. In fact, the CSG Governments endorsed the CENSA code and, without consulting other governments, asked CENSA to put it into effect on the eve of the third session of the WGISL¹⁰.

Being aware of the Tokyo decisions, the developing countries proposed, at the fifth session of the

¹ It is important to distinguish between self-regulation as it affects the relationship among members of a conference and self-regulation as it affects the relationship between a conference and its users. Historically, self-regulation had been confined to the former situation, i.e. to self-policing of conference agreements in the interest of a group of shipping lines, and had worked reasonably well until the lines of developing countries, which are generally weaker than those of developed countries, began to join liner conferences. However, in the CENSA code, self-regulation is now extended to cover the latter situation and can only work if conferences are prepared to go against their own group interests in protecting the rights of their users. As it is unrealistic to expect them to do so, self-regulation as it affects the relationship between a conference and its users is no regulation at all.

The fundamental question is who remains the final arbiter when disputes arise among member lines or between a conference and its users. Self-regulation means that liner conferences, and the powerful members within a conference, will remain the final arbiter.

² Despite what happened at Santiago, the aim of CENSA is still to have its code applied as widely as possible. See the article entitled "UNCTAD: wearisome negotiations expected over codification of liner business — chances for CENSA code? — CENSA decides on modifications", published in *International Transport Journal*, June 16, 1972.

³ The Freight Committee of the Council of All-Japan Exporters' Associations (CAJEA) took strong exceptions to the CENSA code and the Japanese Shipowners' Association was obliged, because of this, to reject the CENSA code. (See: *Lloyd's List*, March 29, 1972.) Subsequently CAJEA and the Japanese Shipowners' Association decided to set up a working group to draft proposals for a conference code. (See: *Japan Maritime Gazette*, June 8, 1972.)

¹⁰ The CSG Governments requested the UNCTAD secretariat to circulate the CENSA code as a document of the third session of the WGISL, and of UNCTAD III. They did not propose that it should serve as a basis for the preparation of a universally-acceptable code.

⁴ Shippers' councils were first organised in western European countries and their example was soon followed by shippers in some of the developing countries, although shippers in most of them have still to come together.

⁵ If the developing countries acted in sufficient numbers and cooperated as a group, as the shipping lines have done in CENSA, liner conferences would find it necessary to treat them as real partners.

⁶ See TD/B/C.4/L.69 for the text of the Tokyo decisions.

Committee on Shipping, that the WGISL, which was to consider liner conference practices at its third session, be authorised to transmit the report on its third session directly to UNCTAD III. The developed market-economy countries, which at that time did not even favour the inclusion of the subject of a code in the agenda of UNCTAD III, opposed this and a compromise solution was found which recommended that the Board, in its preparation of the provisional agenda for UNCTAD III "give due and sympathetic consideration to the inclusion in that agenda of the report of the WGISL on its third session"¹¹. When the developing countries subsequently met in Lima, Peru, in October/November 1971 to make preparations for the third session of UNCTAD, they decided to press the matter further. Declaring that the CENSA code "prepared without direct involvement of the developing countries will not fully meet their needs and interests", and that "member States of UNCTAD should undertake the preparation of a code of conduct", they recommended that the third session of the WGISL "should prepare for consideration by UNCTAD at its third session a draft code of conduct"¹².

Differences among Developing Countries

As the CENSA code is based on self-regulation, and as the experience of the developing countries with liner conferences shows that self-regulation does not work¹³, the developing countries, at the third session of the WGISL, proceeded to draft a text which could be embodied in a binding legal instrument and which they could use as a basis for discussion and negotiation with other groups of countries. However, when they embarked on the task, they found that there were some differences among them. The principal of these centered on the manner of settling disputes. While agreeing with the principle of arbitration (the last resort when both consultation and conciliation have failed) a number of Latin American countries were afraid that a system of compulsory arbitration might infringe upon their national sovereignty or impinge upon the right of their governments to take action to settle disputes not properly resolved by consultation or conciliation. As this was a complex subject, and with insufficient time at their disposal, the developing countries failed to find a solution acceptable to all of them. The result was that two drafts were tabled,

one by a group of developing countries in Asia and Africa, and the other by a group of Latin American countries. Having insufficient time to consider the two drafts, the WGISL adopted a resolution transmitting the two draft codes of conduct prepared by the developing countries to UNCTAD III. The CENSA code had already been circulated, at the request of the CSG Governments, as a document of the Santiago Conference.

Unity at Santiago

At Santiago, the developing countries continued from where they left off at Geneva, and, before the debate on shipping began, produced a common draft code, thus restoring their unity. This was attached to a draft resolution and submitted to the Conference to serve as a basis for discussion and negotiation.

Developing countries were aware that, prior to the opening of UNCTAD III, the CENSA secretariat began to make preparations for the third Conference aimed at winning over some of the developing countries and the socialist countries to the CENSA code and to its philosophy of self-regulation by the industry. The CENSA secretariat noted that contacts had already been established by the CSG Governments with a number of developing countries to explain the code and urged its member associations to persuade their governments to approach the governments of selected developing countries. It is known that this was done in some cases.

They were also aware of a position paper prepared by one of the member associations of CENSA, which proposed that the governments of the traditional maritime countries should be prepared to discuss all aspects of a world-wide UNCTAD code with the developing countries but should not accept any modification to the central principle of self-regulation of the CENSA code. At the same time, they should play for time in order to give an opportunity to the CENSA code to gain world-wide acceptability. In fact, the scenario that unfolded at Santiago came very close to that drawn up by the western European shipowners.

Some of the developed market-economy countries asked for time to allow CENSA to gain experience in the working of its code. All of them engaged in a discussion with the other groups of countries on the structure and content of a code for liner conferences, using the unified draft code prepared by the developing countries as a basis for discussion. This was a most useful exchange of views as all the participants in it acknowledged. An account of this discussion is given in the summing-up by Mr. C.P. Srivastava referred to earlier.

¹¹ See resolution 19 (V), reproduced in TD/B/347, Annex I.

¹² See pages 57 and 58 of the "Declaration and Principles of the Action Programme of Lima" (TD/143).

¹³ See also a statement made by Commissioner George H. Hearn of the Federal Maritime Commission: "Experience has taught us that self-regulation among ocean carriers has not worked and that their customers suffered in complete absence of regulation". Federal Maritime Commission Press Release 70-20; remarks by Commissioner George H. Hearn before the National Defence Transportation Association, 7th Annual European Conference, Venice, May 1, 1970.

The different groups of countries also discussed the form in which to adopt an agreed text for the code. In this respect, the disagreement centered on whether the code should be adopted in the form of a binding instrument like an international convention or of a non-binding UNCTAD resolution or recommendation.

Arguments against Convention

The developed market-economy countries wanted the code to be adopted in the form of an UNCTAD resolution or recommendation. They said that if a resolution was adopted their governments would „use their best efforts to see that the code of conduct was implemented without delay“ just as the CSG Governments had done with regard to the CENSA code¹⁴. In their view, an international convention was a cumbersome and inflexible instrument because quite a long time was needed to draft and negotiate it and because the ratification or amendment of a convention was a difficult and time-consuming process. They were, therefore, against adopting the code in the form of a convention.

These countries also suggested, in informal discussions, that when a code had been prepared and adopted in the form of a resolution it should be given a trial period to see how it worked out in practice before deciding whether it should be transformed into a binding legal instrument. To use an analogy, this is like drawing up a bill to deal with potential law-breakers and then giving it a trial period to see what impact it has on law and order before making it law. Yet the above suggestion was put forward although there seems to be no precedent for it either in national or international law.

There is a point which appeared in the debates and negotiations on this subject that needs to be clarified. This is what „universal acceptability“ implies. For a code based on self-regulation (with which its adoption as a non-binding resolution is compatible) „universal acceptability“ means voluntary acceptance by individual enterprises, i.e. shipping lines. On the other hand, for a regulatory code, „universal acceptability“ means acceptance by governments in the case of an executive order and also by the legislatures of the countries concerned in the case of a law

which usually takes into account all the interests concerned, including the public interest, but does not mean its prior acceptance by enterprises in the regulated industry¹⁵.

Final Outcome

However, the arguments put forward by the developed market-economy countries against an international convention were viewed by many other countries as a smokescreen designed to obscure the true issue of whether the code should be regulatory or non-regulatory. The arguments about the difficulties of adopting a convention did not carry much weight with the developing countries since the draft TCM convention was considered at the Conference in connexion with the international combined transport of goods and similar arguments were not used against it by the developed market-economy countries. On the contrary, many of them asked for its early adoption. In any case, many conventions have been adopted and put into effect in the maritime field including the IMCO convention on oil pollution of the sea. In this regard it is interesting to note the remarks made in Stockholm by Mr. P. Walker, the British Minister for the Environment, in connexion with a convention to ban the dumping of hazardous wastes in the ocean. Referring to a special meeting to be convened in London to agree on the convention, he expressed the hope that the final conference would take place within a very few months and the belief that the convention could be completed for signing within six to seven weeks¹⁶.

When the negotiations at the Committee level failed to reach agreement, the resolution on a code of conduct was submitted to the Negotiating Group of the President of the Conference, where two high-level efforts were made to find a consensus, one by the Secretary-General of UNCTAD and the other by the President of the Conference. But both failed. No compromise was found between regulation and non- or self-regulation. In this situation, a vote was taken. 74 countries voted for the resolution, 19 against and two abstained. It is significant that the socialist countries of eastern Europe, Mongolia and China voted with the developing countries. Of the developed market-economy countries Turkey voted with the developing countries, while Austria abstained. The other country which abstained was Israel.

Bearing in mind recent developments in shipping and the crucial role of shipping in the service of international trade, and the possible spread of national regulations with the implied danger of a clash of jurisdiction between the countries concerned, the Conference took a decision in favour of negotiating a system of international regulation.

¹⁴ This was somewhat contradictory to the „hands-off private enterprise“ philosophy. The argument that the CSG Governments have persuaded CENSA to implement the latter's code is specious. CENSA does not need any encouragement to implement a code which it has itself drawn up.

¹⁵ For example, there is some evidence that the United States Shipping Act of 1916, as amended in 1961, would not have been accepted by the United States shipowners if they had had the option not to do so. The same seems to be true of anti-trust legislation in the countries which have introduced it.

¹⁶ See: The Times, June 8, 1972.