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Shipowners' View on Liner Conferences

by R. B. C. Farthing, London *

This article, a critical reply to Dr M. R. Malinowski's contribution "UNCTAD: Regulation versus Self-regulation", which was published in INTERECONOMICS No. 9, September 1972, p. 279 seq., reveals the differences of opinion between the UNCTAD Secretariat and the shipowners of the developed countries on liner conference issues.

Dr W. R. Malinowski's article "UNCTAD: Regulation versus Self-regulation" presents an interesting and informative account of the proceedings of the Third Session of UNCTAD and the preparatory work leading up to it. However, when the author leaves his official desk and moves into the area of opinion, he leaves room for other views; and it is the purpose of this note to present another view of the implications for liner conferences—and indeed for shipping in general—of Resolution 66 III passed by the Third Session of Conference.

Theory and Practice

Dr Malinowski's article illustrates the gap between the approach of the UNCTAD Secretariat to liner conference matters, which in turn has no doubt greatly influenced the thinking of governments of developing countries, and that of the shipowners who provide liner shipping services. Almost more remarkable than this inevitable difference of opinion, however, is the degree of common concern felt by shipowners of developed countries (and, perhaps of some developing countries also) about the consequences for world trade that are likely to follow from some form regulation of liner conferences. Similar concern is also felt by many shippers and shippers' organisations and by international organisations concerned with the development of international trade.

Some 75–85 p.c. of world trade, measured in terms of value, moves by sea. Shipping is frequently referred to as the "servant" of trade, but it is also an industry in its own right. As the manufacturer produces goods, so does the shipowner provide and sell services. Shipping has economic interests of its own; it seeks the opportunity for reasonable profits, and is not ashamed of doing so. It is not a public utility, still less a public or private enterprise which should prefer the interests of one particular section or another of the world's traders.

The liner conference system was introduced some 100 years ago to maintain an orderly association among shipowners, broadly matching the shipping services provided with the volume of cargo available. To avoid cut-throat price competition between shipowners in an utterly free market position, which could only lead to gross surfeit or gross disruption of regular services, they also agreed prices for their services. And, properly, they decided to take, and still do take, a long-term view of the trade they serve, which is in their customers' interests. Shippers, like the shipowners, clearly benefited from regular services and stable rates.

The Liner Conference System

Liner conferences are multi-national bodies whose long-term profitability depends wholly on giving cheap and reliable services to a developing and expanding international trade. Their outlook is therefore different from those who look at trade and shipping only from their own national point of view. To enable liner shipping to make its best contribution to the movement and expansion of world trade and to adapt to the changing pattern of trade, traders should be free to use the services which will best meet their commercial needs; shipowners of all flags should be as free as possible to compete for all world trade without governmental restriction; and the shipowner, just as the primary producer or manufacturer, is entitled to look for an adequate return on the capital invested in his business. Without this prospect, he would have no incentive to invest fresh capital, or, indeed, to remain in business; and world trade would suffer as a result.

The danger is that the pressure of national interests may result in the removal of any or all of these basic essentials, and so impair the contribution of liner shipping to world trade. In passing, two points may be noted. First, the liner operators of socialist countries are required just as much, if not to make a profit, at least to cover the costs of their operations as those in capi-

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talist countries'. Secondly, Dr Malinowski suggests that the member lines of conferences have enjoyed the support of their governments to a much greater extent than have shippers; many European and Japanese shipowners might be surprised to hear this, since their experience in practice is that their governments tend to be more concerned with the maintenance of exports than the interest of the industry which carries them.

Criticism of Conferences

Despite Dr Malinowski's dislike of liner conferences, UNCTAD itself has accepted, in the "Common Measure of Understanding on Shipping Questions" (adopted without dissent by the First Session of the Conference) that „the liner conference system is necessary in order to secure stable rates and regular services". Conferences have certainly been criticized, particularly on the grounds that they seem to be monopoly organisations making arbitrary decisions; these criticisms and their attendant suspicions and disagreements may well have been due to the absence in the past of an effective dialogue between conferences and their customers the shippers.

¹ See also R. Federspiel, *International Transport Journal*, March 17, 1972.

It may be that conferences have tended too much to regard their case as self-evident.

Although much of this criticism can be shown to be either ill-informed or unjustified, during the last few years increasing interest has been shown by governments, in UNCTAD and elsewhere, in the working of the liner conference system; and, as a consequence, it now appears to be generally accepted by governments, shipowners and shippers that a code of practice for liner conferences should be introduced.

Basically, a code of practice for any form of industry should enunciate principles of fair dealing to which both sides are expected to conform, and lay down agreed procedures for resolving disputes. In the case of liner shipping, with the multi-national composition of its operators and customers, the world-wide cover of its activities, and the multiplicity of different conditions of all sorts surrounding its activities, a code of practice for universal application should consist of broad principles capable of modification in detail to suit the requirements of different trades. Many governments recognize this to be a fair point; for example, the record of the statement of the spokesman of the Group countries at Santiago reads: "The Governments of countries members

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of Group B believed that a code should be sufficiently flexible to allow conferences to adapt to the different situation of each trade while providing a common base for the regulation of their operations. Too detailed a code could hamper the movement of trade. It should provide the framework within which each liner conference would determine, in close consultation with the appropriate interests in the countries they served, detailed provisions for its implementation"².

The Code of Conference Practice

A Code of Conference Practice constructed on these lines and with these objects in view, has been elaborated by the Committee of European National Shipowners' Associations (CENSA) jointly with the European Shippers' Council (ESC) and has been in effect in some conferences for several months.

This Code, far from being rushed into being with unseemly haste, as has been implied, marks a stage in a process of development of shipowner/shipper consultation which has been going on for several years. Relations between European conference lines and European Shippers' Councils were first formalized in a "Note of Understanding" agreed between them in 1963 which stemmed from decisions taken in March of that year by the Ministers responsible for shipping in the Governments of the Consultative Shipping Group (CSG) as a result of their agreement that:

☐ the conference system was indispensable as a means of enabling shipowners to provide shippers with regular and efficient services at stable rates;

☐ it was important that means should exist, and should be widely known to exist, of ensuring fair practices and discussing grievances that shippers or groups of shippers might have against conferences; and

☐ that these means should preferably be provided by the conferences themselves rather than by governments.

Thus the governments of the traditional maritime countries, far from encouraging liner conferences to operate without regard for their customers, have in fact been concerning themselves with conference business for several years.

At their meeting in 1971, the CSG Ministers went further, underlining the importance of the liner conference system and laying down guidelines for the production of a code of conference practice which should ensure that conferences should not only observe but also be seen to ob-

serve certain principles of fair trading. The resultant Code embraces not only the Note of Understanding but also numerous Joint Recommendations agreed between CENSA and the ESC which stem from it, and in which the detail of the code is found. The Joint Recommendations deal, inter alia, with Periods of Notice of Increase of Freight Rates, rules in relation to Revaluation or Devaluation of the Tariff Currency, and cover altogether some 14 detailed practical matters of this nature. The Code was drawn up with due regard to the relevant unanimously agreed resolutions of UNCTAD. Indeed, some of its stipulations, for example those relating to the provision of financial information, dispensation, and malpractices, go beyond any understanding so far reached in UNCTAD.

Since the Code was accepted in November 1971 by the CSG Governments as meeting their requirements laid down in Tokyo, a substantial number of European-based deep-sea liner conferences have adopted it in at least one direction and are actively pressing its further progression within their trades.

This is the only Code of Practice for Liner Conferences in being, and in operation, at this time. It is a practical working document, capable of adaptation to the requirements of different trades, and including provision for up-dating as required. Although for convenience's sake it is sometimes called the CENSA Code, the contribution of shippers to its development, and its acceptance by Governments, should not be overlooked.

Developing Countries' Draft

Dr Malinowski describes the inability of the developing countries to accept this Code, and explains how they came to produce a draft code which was discussed at Santiago and has since been transmitted to the United Nations.

Dr Malinowski maintains that the only significant point of difference between the CENSA Code and the draft Code put forward by the developing countries is whether liner conferences should be regulated or allowed to continue voluntarily to regulate themselves, a concept which he discounts³. "The experience of the developing countries with liner conferences" he says, "shows that self-regulation does not work." It might perhaps be added that since the CENSA Code of Conference Practice was only approved in November 1971, self-regulation under the terms of that Code has scarcely had a fair chance to prove itself. He also quotes remarks made in 1970 by Commissioner Hearn of the US Federal

² TD/161/Add 3, page 18.

³ W. R. Malinowski, UNCTAD: Regulation versus Self-regulation, in: INTERECONOMICS No. 9, September 1972, Footnote 7, p. 280

Maritime Commission⁴. However, Commissioner Hearn's view can be seen in a more balanced perspective in a further statement in November 1971⁵.

As Dr Malinowski says, the developing countries draft became the basis of a very useful exchange of views between all groups of participating countries (all of whom started from the agreed point that work by governments towards the production of a universally acceptable world code of practice should proceed)⁶.

While it is true that self-regulation versus an apparatus of legislation was a primary issue, the admirable summing up by Mr C. P. Srivastava, to which Dr Malinowski refers, makes it clear that the developing countries' draft has highlighted a number of other philosophical differences between the participants.

Objectives and Principles

The most serious of these concerns the purpose of a Code of Practice itself. The view of the Group B countries has been made clear above. The developing countries, on the other hand, in their draft maintain that the Code of Conduct should be an instrument for implementing the International Development Strategy for the UN Second Development Decade and should, therefore, take into account the particular needs of developing countries and their objectives in the field of shipping, as stated in the Strategy. In discussion at Santiago Group B countries took the view that the elaboration of the Code was itself a contribution towards the fulfilment of the Strategy, and that its implementation would benefit the developing countries, but the Code, as a set of rules for regulating the day-to-day activities of liner conferences, was not the proper place for giving special treatment to the interest of any particular group of countries — the Code should be universal and non-discriminating in character if it was to be acceptable on a world-wide basis. Moreover, in its objectives, the draft Code of the developing countries refers to a "new structure of world shipping". This appears to ex-

tend its scope to cover not only liner shipping, but all other sectors of shipping also, which in the view of the Group B countries and other interested parties is not relevant.

In this connexion also, European and Japanese shipowners, and, they believe, their Governments, would find it difficult to accept the broad and uncompromising proposition that: "developing countries have the right to protect and promote their national merchant marines and the measures adopted to this end will neither be considered discriminatory or give place to retaliation"⁷, which appears to be a licence for unlimited discriminatory measures of any kind.

This is not to say that Group B countries, or their shipowners, do not recognize the legitimate aspirations of developing countries to compete in commercial markets and their duty to help in the achievement of this aim. CENSA in particular supports the principle of development assistance laid down by the CSG Governments at Tokyo in 1971; and the record of CSG Governments and their shipowners in providing practical assistance to developing countries in the establishment of merchant fleets, co-operation in the modernization of ports, training of personnel, financial and technical assistance, and other related activities, is good.

Role of Governments In Shipping

The question of self-regulation versus legislation, which Dr Malinowski presents as a "black and white" central issue, in fact embraces a number of areas in which there is room for considerable debate.

While European and Japanese shipowners believe fundamentally that commercial affairs should be conducted without government intervention, they recognize of course that governments have a role to play in shipping affairs (and that this has become increasingly clear in recent years) — it is a question of where the line should be drawn. No one would disagree, for instance, that governments have an essential part to play, at one end of the spectrum, in technical, safety and allied matters. At the other end, if a particular government is thought to be practising discrimination in restraint of trade, it can only be dissuaded from doing so by other governments. In between these general areas of acceptance is a "grey" area, dominated, for free-enterprise shipowners, by the belief that a government presence is inappropriate in purely commercial matters — unless of course the government, as may well happen, is actually engaged in a commercial capacity, as an exporter or importer, or as the operator of a national shipping line.

⁴ W. R. Malinowski, UNCTAD: Regulation versus Self-regulation in: *INTERECONOMICS* No. 9, September 1972, Footnote 14, p. 281.

⁵ "I am not prepared to cast so sweeping an indictment against existing regulation of the conference system... I believe that some alteration in the regulatory framework and a new balancing of government and self-regulation would go far toward eliminating the problems in ocean commerce." Remarks of Mr Hearn before Benelux Chapter of National Defense Transportation Ocean Commerce Association, Antwerp, 15th November 1971.

⁶ Dr Malinowski suggests that the term "universal acceptability" is open to different interpretations depending upon whether one believes in regulation or self-regulation. But there appears to be no doubt where the Group B countries (which include some countries with regulatory systems) stand on this issue. "The Governments of Group B wish to make it clear that they fully support the concept of careful and deliberate work towards the evolution of a world code agreed by governments in UNCTAD and universally acceptable to liner conferences and shippers alike". Statement by Group B spokesman, 4th Committee (public session), UNCTAD III, 29th April 1972.

⁷ TD/161/Add. 3 Annex III, page 4, para 2 (d).

The role of governments in a Code of Practice, as envisaged by the developing countries, covers a wide field of matters which developed countries would generally regard as best dealt with by the commercial interests concerned, including the setting of freight rates and cargo sharing. On freight rates, European and Japanese shipowners believe that pricing policy is a matter for the sellers and buyers of shipping space. They would also oppose the specification, in a universal code, of arbitrary divisions of trade, believing this to be wrong in principle and potentially wasteful and damaging in practice.

Resolution of Disputes

On the resolution of disputes, the developing countries' draft code is both stringent and ambivalent, since, as Dr Malinowski points out, it represents a compromise between those who insisted upon arbitration as the ultimate recourse and those who feared that a system of compulsory arbitration might infringe upon their national sovereignty or the right of their governments to take action.

The draft code demands compulsory arbitration as the means of solving disputes, specifically on freight rate increases; surcharges and currency matters; and generally on all matters which cannot be settled as a result of consultation, negotiation and conciliation. Disputes on the specific matters listed above must go to international arbitration. But it also provides for the option of settlement by national legislation instead of arbitration, and for confirmation by the local government of the results of local arbitration. It seems doubtful whether the impact of a proposal for statutory regulation in such rigid and yet differing terms on the conference system as a whole and shipowner/shipper relationships in particular has been thought through.

The term "arbitration" requires careful definition. European and Japanese shipowners understand it to mean a procedure by which, instead of referring a dispute to courts of law, the parties concerned agree to go to a private tribunal. Submission to the tribunal is voluntary; the award can be legally enforced; and the arbitrators are appointed by the parties themselves. Arbitration appears to be appropriate only where both parties have a legal relationship under existing contract, or agree to the procedures. It does not appear suitable for settling matters involving commercial judgement.

The enforced adoption of such complex regulations would entail the risk of widespread clashes of jurisdiction, and of situations in which awards might be virtually incapable of enforcement; this

would be no advantage over the system of self-regulation which is more flexible and capable of adaptation to the situations prevailing in different trades.

Dr Malinowski emphasizes the difference in approach between the developed and developing countries on whether the Code of Practice (which both agree should be prepared) should be made legally enforceable by a "multilateral legal instrument" or morally binding by a UN Resolution. Those who argue against an international convention believe that it would be a time-consuming and cumbersome process because of lengthy ratification procedures and also of the difficulty in keeping it amended in step with the constant progress of evolution in shipping.

Dr Malinowski points out that many conventions have been adopted and put into effect in the maritime field. It does appear, however, that maritime conventions on the whole seem to take anything from five to seven years to become effective; and it may be that the type of convention susceptible to rapid processing which Dr Malinowski draws upon as an illustration might well concern subjects which command the general support of the parties involved, rather than the highly controversial subject matter of the content of a Code of Conference Practice.

An International Instrument?

Dr Malinowski suggests that a system of international regulation would remove the danger of a clash of jurisdictions between the countries concerned resulting from the spread of national regulations. However, this will not be the case if a code on the lines of the developing countries' draft is evolved. Such a code would give rise to so many issues of a jurisdictional nature, due to the ability of governments to interfere in the processes of rate-making, arbitration and other issues, that a system of international regulation could not be regarded as a solution to the problems involved.

There may be good arguments in favour of adoption of a Code of Conduct through an international convention; but for this to gain general acceptance, and to provide a practical solution to outstanding problems, it will be necessary first to do some very hard work to resolve the major philosophical differences of approach to shipping which are evidently embraced by the groups of countries involved. When these issues have been clearly brought into the open, fully debated by the interested parties (including the shippers), and satisfactorily resolved, the issue of whether the resultant Code of Conduct should be enforced by a convention may have more practical relevance than it appears to possess at present.