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New Ground in International Shipping

A United Nations Conference of Plenipotentiaries convened under the auspices of UNCTAD recently adopted a Convention on a Code of Conduct for Liner Conferences. W.R. Malinowski offers a survey of the main results of the Conference while K. Reese discusses some – in his view – highly unpleasant economic consequences for an efficient low-cost sea transport.

The Code of Conduct for Liner Conferences

by W. R. Malinowski, Geneva *

On April 6, 1974, a United Nations Conference of Plenipotentiaries, convened under the auspices of UNCTAD pursuant to General Assembly resolution 3035 (XXVII), adopted a Convention on a Code of Conduct for Liner Conferences aimed at facilitating the orderly expansion of world sea-borne trade and at ensuring a balance of interests between suppliers and users of liner shipping services.

Contracting Parties

The Convention was adopted by a roll-call vote of 72 to 7, with 5 abstentions. Fifty-eight developing countries, China among them, voted for the Convention, together with Australia, Belgium, Bulgaria, Czechoslovakia, France, the Federal Republic of Germany, German Democratic Republic, Hungary, Japan,

Poland, Rumania, Spain, Turkey and the USSR, while Canada, Greece, Italy, the Netherlands and New Zealand abstained. The Nordic countries, Switzerland, United Kingdom and the United States voted against.

The 72 countries which voted for the Convention account for 56 p.c. of the world general-cargo and container tonnage. The countries among them which have a significantly large tonnage (over 1 mn tons or over 1 p.c. of the tonnage in question) include Brazil (1.4 p.c.), China (1.6 p.c.), France (2.1 p.c.), the Federal Republic of Germany (4.9 p.c.), India (1.8 p.c.), Japan (9.2 p.c.), Liberia (5.0 p.c.), Panama (4.4 p.c.), Poland (1.4 p.c.), Singapore (1.4 p.c.), Spain (1.4 p.c.), USSR (8.9 p.c.) and Yugoslavia (1.4 p.c.). Between them, the countries listed above have 45 p.c. of the tonnage in question. In fact, three countries among them, the Federal

Republic of Germany, Japan and the USSR, with a combined tonnage of 23 p.c., have more tonnage than the seven countries which voted against, which have a combined tonnage of 22 p.c. The countries with a significantly large tonnage which voted against include Denmark (1.9 p.c.), Norway (3.2 p.c.), Sweden (1.7 p.c.) and the United Kingdom (9.1 p.c.). The remainder of 22 p.c. is accounted for by the countries which abstained or which were not present at the Conference.

Significance of the Convention

The President of the Conference, complimenting the Conference on the successful conclusion of its work, said that "if this kind of revolutionary step can be taken by agreement, there is hope for mankind". It was indeed a revolutionary step, since the Convention is the first legally-binding instrument of its

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kind. It breaks new ground in international shipping legislation to the extent that it deliberately seeks to change existing practices of an important sector of international shipping, the liner conference industry, which has been self-regulating ever since the first liner conference (the Calcutta Conference) came into being nearly a century ago in 1875. The fact that some major shipping nations voted against or abstained cannot detract from the great historical significance of the event.

The adoption of the Convention set the seal on several years of efforts, particularly on the part of the developing countries, to bring about a change in the operations and practices of liner conferences that would promote an equitable balance of interests between liner operators and shippers on the one hand, and between the old-timers and newcomers to liner shipping on the other.

Objectives and Principles

The Convention begins with a statement of its objectives and principles, which, because of its importance, is reproduced below:

☐ the objective to facilitate the orderly expansion of world seaborne trade;

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

☐ the objective to ensure a balance of interests between suppliers and users of liner shipping services;

☐ the principle that conference practices should not involve any discrimination against the ship-owners, shippers or the foreign trade of any country;

☐ the principle that conferences hold meaningful consultations with shippers' organizations, shippers' representatives

and shippers on matters of common interest, with, upon request, the participation of appropriate authorities;

☐ 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.

The most important features of the Convention are summarized below¹:

Article 1 provides that any national shipping line shall have the right to be a full member of a conference serving the foreign trade of its country, subject to the criteria for the admission of national shipping lines set out in the Article (and not to the voting power of the existing members of the conference). It also provides that shipping lines which are not national lines in any trade of a conference, i.e. third-country shipping lines, shall have the right to become full members of that conference subject to the criteria for the admission of third-country shipping lines set out in the Article and to the cargo-sharing provisions referred to below.

Participation in Trade

Article 2 provides that, where pooling arrangements exist in a liner conference, the group of national shipping lines of each of two countries served by the conference shall have equal rights to participate in the freight and volume of traffic generated by their mutual foreign trade and carried by the conference. Third-country shipping lines, if any, shall have the right to acquire a significant share, such as 20 p.c., of the freight and volume of traffic generated by that trade.

¹ The texts of the Convention and its annex are contained in Annex 1 of the Final Act of the Conference. See Final Act and Annexes (TD/CODE/11/Rev. 1 and Corr. 1).

Where no pooling or other trade participation arrangements exist, either group of national shipping lines members of the conference may require that pooling arrangements be introduced or that sailings be adjusted along the lines of the cargo-sharing provisions mentioned above. If there is no agreement to institute such a pool or adjustment of sailings, the groups of national shipping lines at both ends of the trade shall have a majority vote in a decision on the matter. Failing an agreement between them, either group of national shipping lines may request an adjustment of sailings. If no agreement is reached, the dispute shall be dealt with in accordance with the provisions of the Convention on the settlement of disputes (Articles 23–46 of the Convention).

Consultation Machinery

Article 11 provides for the holding of consultations on matters of common interest between a conference, shippers' organizations, representatives of shippers and, where practicable, shippers, *whenever requested by any of them*, before final decisions are taken on such matters. The Article gives a list of such matters, including changes in general freight rates. Advance notice shall be given of the intention to take decisions on such matters. After notice has been given, consultation shall begin without undue delay and, in any case, not later than 30 days after the receipt of a request for consultation to be held. The parties shall use their best efforts to provide relevant information, to hold timely discussions, and to clarify matters for the purpose of finding agreement.

Article 11 also provides for appropriate authorities, defined as government or bodies so designated by them, *at their request*, to participate fully in such

consultations, although without playing a decision-making rôle. This may be considered to be of great importance to developing countries because it is generally the case that their shippers, unlike those in many Western European countries, either are not sufficiently well-organized or lack the necessary expertise or experience for negotiating effectively with liner conferences during consultations. Although the representatives of appropriate authorities will not assume a decision-making rôle, their presence should have a positive effect to the extent that they will provide some countervailing weight to the conference and, at the same time, ensure that the national or trading interests are not ignored.

Criteria for Freight-rate-Determination

Article 12 provides 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 cost of operations of conferences shall, as a rule, be evaluated for the round voyage of ships, with the outward and inward directions considered together. When applicable, the outward and inward voyages should be considered separately. The freight rates should take into account, among other factors, the nature of cargoes, the inter-relationship between weight and cargo measurements, as well as the value of cargoes. In fixing promotional freight rates and/or special freight rates for specific goods, the conditions of trade for these goods of the countries served by the conference, particularly of developing and land-locked countries, shall be taken into account.

Article 14 provides for a five-month period of notice of a general freight-rate increase (to allow for consultation between

the conference and shippers in respect of the basis and amount of the proposed increase and the date from which it is to be given effect, and for any dispute related thereto to be referred to international mandatory conciliation) and a minimum period of 10 months between one general freight-rate increase and the date of notice for the next general freight-rate increase, thus effectively a 15-month "freeze" between one general freight-rate increase and another. The 15-month "freeze", however, will not apply to temporary surcharges imposed by a conference to cover sudden or extraordinary increases in costs or losses of revenue, or to changes in freight rates due to exchange rate changes, including formal devaluation or revaluation of currencies.

As regards consultations in respect of general freight-rate increases, Article 14 provides for the submission by a conference, prior to the consultation, of a report from independent accountants of repute, including an aggregated analysis of the data regarding relevant costs and revenues which in the opinion of the conference necessitate an increase in freight rates.

International Mandatory Conciliation

Disputes on certain matters, such as refusal to admission of a country's shipping line to a conference serving its foreign trade, which have not been resolved through an exchange of views or direct negotiations between the parties shall, *at the request of any of the parties to the dispute*, be referred to international mandatory conciliation in accordance with the provisions contained in the Convention unless the parties concerned, by mutual consent, have agreed or agree to use another dispute settlement procedure. Disputes on freight-rate matters

such as a general freight-rate increase may also be referred to procedures other than international mandatory conciliation unless national legislation, rules or regulations prevent shippers from having this freedom of choice.

The purpose of conciliation is to reach an amicable settlement of the dispute through recommendations formulated by independent conciliators who shall be drawn from an international panel to be established for the purpose. The recommendations, which shall include reasons, will be binding if accepted by the parties. Any party which rejects the recommendation shall notify the conciliators and the other parties to the dispute of its grounds for rejection, comprehensively and in writing.

The Secretary-General of the United Nations, subject to the approval of the United Nations General Assembly, shall appoint a Registrar who shall among other functions, maintain a list of conciliators of the international panel.

In international mandatory conciliation, the appropriate authorities concerned shall have the right, *at their request*, to participate in the conciliation proceedings, or may attend as observers.

Article 52 provides for a system of review conferences to review the working of the Convention, with particular reference to its implementation and to consider and adopt appropriate amendments.

The first Review Conference shall be convened by the Secretary-General of the United Nations, in his capacity as depositary of the Convention, five years from the date of entry into force of the Convention, with the proviso that if the Convention has not entered into force five years from the date

of the adoption of the Final Act of the Conference of Plenipotentiaries, i.e. on April 6, 1979, it shall be convened, at the request of one-third of the states entitled to become contracting parties to the Convention and subject to the approval of the United Nations General Assembly.

Adopted Resolutions

On April 6, 1974, the Conference of Plenipotentiaries also adopted two resolutions and the Final Act of the Conference².

The Conference, in one of the resolutions, resolved that nothing in the Convention "shall be construed so as to deny shippers an option in the choice between conference shipping lines and non-conference shipping lines, subject to any loyalty arrangements, where they exist" and that, in the interest of the sound development of liner shipping service, non-conference lines should not be prevented from operating so long as they adhere to the principle of fair competition on a commercial basis.

In the other resolution, the Conference, noting that proposals had been made to submit certain types of disputes to local conciliation, requested the first Review Conference to give priority consideration to the matter of local conciliation, taking into account the views expressed by the Contracting Parties to the Convention on whether or not the absence of local conciliation has hampered the effective settlement of disputes and, if so, to consider the appropriate subjects and procedures for local conciliation.

Concluding Remarks

There can be no doubt that the Convention is a revolutionary piece of international shipping legislation, of great significance for liner conference shipping. To the extent that it is the first internationally-negotiated and internationally-agreed legal instrument for regulating the activities of what is after all a form of multinational cartel, its significance may be said to go beyond the liner conference industry. By contributing to the progressive development of in-

ternational law, it will also contribute to the building of a new international economic order, on which the UN General Assembly, recently at its sixth special session devoted to the problems of raw materials and development, has adopted a Declaration and a Programme of Action.

The Programme of Action in fact called for all efforts to be made to ensure the early implementation of the Code of Conduct for Liner Conferences³.

It remains for Governments to become contracting parties to the Convention and to take such legislative or other measures as may be necessary to implement the Code. Article 48 of the Convention provides that all states are entitled to become contracting parties to the Convention by signature subject to and followed by ratification, acceptance or approval; by signature without reservation as to ratification, acceptance or approval; or by accession.

² For the texts of the resolutions and the Final Act, see Final Act and Annexes (TD/CODE/11/Rev. 1 and Corr. 1).

³ See General Assembly resolution 3202 (S-VI), para. 4 (IV).

Flag Discrimination – A Pressing Problem

by Dr K. Reese, Johannesburg *

During the last decade private shipping companies have been under ever increasing pressure from competing state owned lines. The latter gained much ground even though the private companies, as a rule, run their ships more economically. The relative success of the state liners has rather been brought about by non-economic factors, i. e. owes much to political weapons, such as bilateralism and revitalized nationalism. The basic rule of efficient ship-

ping, as advocated by the established maritime nations of Europe, is under attack, viz. the freedom of every shipper to select whichever vessel he wants, irrespective of the flag it flies¹.

Private shipping has been and is beset by a host of "other" problems, e. g. containerization, lack of capital to push the construction of profitable specialized ships such as liquid gas tankers or oil/bulk/ore carriers, etc². All of these "other" problems are, however, relatively

easy to cope with because they are economic in nature. Real serious difficulties for private shipping only arise once the decisive variables are outside their direct sphere of influence, i. e. once the variables are political. Flag discrimination, the topic of this article, undoubtedly

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¹ J. Horn, Nationalism Versus Internationalism. In: Shipping, Journal of Transport Economics And Policy, Vol. III, No. 3, September 1969, pp. 246 and 249.

² Sea Shipping. In: Economic Quarterly Review, Industrial Kaleidoscope, Amsterdam – Rotterdam Bank, No. 27, December 1971, pp. 15 and 20-21.