UNCTAD: Regulation versus Self-regulation

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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 document.

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 ago. 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 customers. 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/II/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 analysed 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 effectively.

**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 interests. 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 shippers 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 shippers 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".

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". Two, the CSG Governments, by asking their shippers 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 basis.

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 CENSA. 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 WGISL.

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

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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 therefore 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.

2 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.) Subsequent 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.)

3 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. The request was accepted, and 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.