TD/104/Rev.1

The regulation of liner conferences

(a code of conduct for the liner conference system)

UNITED NATIONS

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UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT
Geneva

The regulation of liner conferences

(a code of conduct for the liner conference system)

Report by the UNCTAD secretariat

UNITED NATIONS
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ABBREVIATIONS

CENSA	Committee of European National Shipowners' Associations
c.i.f.	Cost, insurance and freight
f.a.s.	Free alongside ship
f.o.b.	Free on board
IATA	International Air Transport Association
UNCTAD	United Nations Conference on Trade and Development

Note : References to "dollars" ($) indicate United States dollars.

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INTRODUCTION

1. At its fourth session, in April-May 1970, the Committee on Shipping considered the UNCTAD secretariat's report entitled "The liner conference system", [1] which had been prepared in connexion with item II (*e*) of the programme of work of UNCTAD in the field of shipping.[2] After discussion, the Committee adopted resolution 12 (IV) on the level and structure of freight rates, conference practices and adequacy of shipping services,[3] by which it decided, in view of the importance of the report, to transmit it to the UNCTAD Working Group on International Shipping Legislation for its consideration.

2. At its second session, in February 1971, the Working Group on International Shipping Legislation decided to consider the subject of liner conference practices at its third session.[4] The Working Group further decided that its consideration of conference practices should be based on the secretariat report "The liner conference system" and on additional information to be provided by the secretariat regarding legislative and other systems for regulating the practices of liner conferences, which would provide the Working Group with the elements and necessary material for further work.

3. The Working Group expressed the hope that its work on conference practices would "lead to the formulation of internationally acceptable appropriate rules of conduct for liner conferences, which will take full account of the needs of international trade and development, in particular of developing countries." [5]

4. The Committee on Shipping, at its fifth session in March-April 1971, adopted resolution 19 (V) entitled "International shipping legislation: report of the UNCTAD Working Group on its second session",[6] by which it took note of the report of the Working Group and the resolutions adopted by it. It also unanimously recommended "that the [Trade and Development] Board at its eleventh session, in its preparation of the provisional agenda for the third session of the United Nations Conference on Trade and Development, give due and sympathetic consideration to the inclusion in that agenda of the report of the Working Group on International Shipping Legislation on its third session". The Board, by decision 83 (XI) of 18 September 1971, included in the provisional agenda of the third session of the Conference, as item 16, an item entitled "Development of shipping; maritime transport costs; freight rates; a code of conduct for the liner conference system".[7]

5. The present report has been prepared by the UNCTAD secretariat in response to the request of the Working Group and in accordance with the formulation of item 16 of the provisional agenda for the third session of the Conference.

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[1] TD/B/C.4/62/Rev.1 (subsequently issued as United Nations publication, Sales No.: E.70.II.D.9).

[2] See *Official Records of the Trade and Development Board, Tenth Session, Supplement No. 5* (TD/B/301), annex III.

[3] *Ibid.*, annex I.

[4] *Ibid., Eleventh Session, Supplement No. 3* (TD/B/347), annex VI, appendix I, sect. B.

[5] *Ibid.*

[6] *Ibid.*, annex I.

[7] *Ibid., Eleventh Session, Supplement No. 1* (TD/B/386), p. 5.

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Chapter I

LINER CONFERENCES[8] AND THE QUESTION OF REGULATION

A. The background to regulation

6. Shipping conferences,[9] groups of shipping lines operating on routes with basic agreements for charging uniform rates, for allocating routes, berthing and sailing rights, and for pooling cargo and revenues, and intended to shut out non-conference competition, are among the earliest cartels in international trade.[10] A particular feature of conferences is that the power they exercise to regulate the conditions under which liner services can operate in a particular trade is concentrated in the hands of private interests.[11] They make unilateral decisions which affect vitally the interests of users of shipping services and hence the national or public interest of the countries whose trades they serve.

7. From the earliest days there has accordingly been considerable discontent on the part of shippers, who complained that the monopoly power[12] of the conferences had led to abuse and required regulation in the public interest.[13]

8. The protection of the national economy against the possible harmful effects of combinations of firms formed for the purpose of regulating markets is usually embodied in restrictive business practices legislation. There are two main practices which separately or together are the targets of such legislation—price-fixing and the making of other agreements which adversely influence competitive conditions. Since it is one of the objectives of conferences to concentrate market power, to influence the conditions of the trades in which they operate, to decide on who can engage in the trade, and to fix by common agreement the prices (freight rates) in those trades, these practices might *prima facie* be considered to be in conflict with the spirit of such legislation.[14] Restrictive business practices legislation has not, however, been applied to shipping conferences by most of the countries which have such legislation.[15]

9. Historically, ocean carriers have been subjected to few restrictions in most countries "even when they have maintained a monopoly in fact", because of the wide acceptance of the legal doctrine of freedom of contract and consequential judicial disinclination to extend the field of "public policy" to the control of conference practices.[16] Legislation and other forms of public regulation governing conference practices have been adopted, however, in a few countries such as the United States of America. This happened only after sustained pressure from shipper interests and because of the force of public opinion in favour of the control of those practices that could be considered as being restrictive of trade.

10. Further, from the very nature of its operations, shipping cuts across national frontiers every time a vessel flying the flag of a particular country leaves its own territorial waters. Goods imported by one country form the exports of some other country. Accordingly, any regulation which one country may impose upon shipping services touching its own shores must affect the commerce and shipping of some other country trading with it. Nevertheless, and notwithstanding these international implications, there is at present no international or

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[8] The term "conference" as used in this report should be taken to cover also "rate agreement", "freight agreement" and "freight association".

[9] Shipping conferences have been analysed in the UNCTAD secretariat's report *The liner conference system* (United Nations publication, Sales No.: E.70.II.D.9).

[10] See D. Marx, Jr., *International Shipping Cartels: A Study of Industrial Self-regulation by Shipping Conferences* (Princeton, N.J., Princeton University Press, 1953), p. 3.

[11] There are several conferences in which some member lines are partly or wholly owned or controlled by Governments, but the Governments concerned do not, so far as is known, play a dominant role in formulating conference policy to control the relevant trades.

[12] The power of conferences to "maintain rates higher than those that would result from free competition is monopoly power" (see "Rate regulation in ocean shipping" note 78, *Harvard Law Review* (1964/65), p. 636); also, "The general effect of conferences is to eliminate price competition" (see United Kingdom, *Committee of Inquiry into Shipping* (Chairman, Viscount Rochdale), *Report* (London, H.M. Stationery Office, 1970), Cmnd. 4337, para. 410).

[13] In response to complaints by shippers, investigations were carried out at the beginning of this century in the United Kingdom (*Royal Commission on Shipping Rings, Report with minutes of evidence and appendices* (London, H.M. Stationery Office, 1909), vols. 1 and 2, Cmnd. 4668), and (*Final report of the Imperial Shipping Committee on the Deferred Rebate System* (London, H.M. Stationery Office, 1923), Cmnd. 1802); also, in the United States of America (House of Representatives Committee on Merchant Marine and Fisheries, *Report on steamship agreements and affiliation in American foreign and domestic trade* (Washington, D.C., Government Printing Office), H.R. document No. 805, 63rd Congress, 2nd session (1914)).

[14] "In form and object most of the activities of shipping conferences resemble the restrictive practices in other commercial fields which have, in recent years, been prohibited or subjected to control in many countries" (see the Rochdale Report, para. 456).

[15] See, for example, Federal Republic of Germany, Act against Restraints of Competition, 1957, section 99, which exempts shipping conferences from some important provisions of the Act. But see section 104 of the Act, which deals with the abuse of those exceptions. See also paras. 24, 44 and 80 below.

[16] See paragraph XIV of the memorandum on legal aspects of conference practices annexed as appendix V to vols. 1 and 2 of *Royal Commission on Shipping Rings, Report*. The common law approach to conference practices as described in the memorandum remains basically relevant today.

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regional regulation[17] of conference practices, although a demand for some form of international control has been raised increasingly in recent years by predominantly transport-using countries. These demands have been raised most often by Governments of developing countries in international organizations such as UNCTAD. In these circumstances, and after the publication of the Rochdale Report,[18] representatives of a group of shipping nations organized in the Consultative Shipping Group[19] met at Tokyo at ministerial level in February 1971 and adopted a series of decisions on the subject.[20]

11. There is thus on the one hand the multinational nature of most conferences and of the conference system without any form of international control over its operations, and on the other hand the disinclination so far of most States to regulate unilaterally those liner services which affect their trades.[21] As a result, most conference services have remained self-administered or self-regulated, public control being absent or limited.

B. Classification of conferences

12. The UNCTAD secretariat's report *The liner conference system* shows that that system in most countries places two basic restraints upon the free operation of competitive forces in liner shipping.

13. There is, first, the restraint imposed by the organization of the relationship among member lines as expressed in the conference agreements into which they enter with each other and by which they undertake, *inter alia*, to charge uniform rates, and also frequently to allocate routes, berthing and sailing rights, and to pool cargoes and revenues; the objective is to restrict the possibility of the individual member lines securing a trading advantage over their fellow members, and so to preserve the integrity of the conference as a whole.

14. There is, secondly, the restraint imposed by the organization of the relationship between the member lines and the users of the conference services through "tying" or "loyalty" arrangements such as deferred rebates, dual rate systems or the contract system. Loyalty arrangements have the effect of forcing shippers who do not patronize, or who are "disloyal" to, the conference to pay higher freight rates than loyal shippers. The objective is to enlarge the circle of "loyal" shippers and to attract and retain for conference vessels a consistent flow of the maximum available cargo that can be secured by this means against the threat of casual rate-cutting by unscheduled ships or non-member lines.

15. The manner in which these restraints are exercised in different conferences depends upon the type of regulation to which their practices are subject. Conference agreements differ widely in their scope and effect, for they operate under various legal régimes and trading conditions. There is, accordingly, no such thing as a typical conference, but it is possible to classify conferences by the methods used to regulate their practices.

16. Regulation has so far been accomplished by essentially two methods:

(*a*) Voluntary regulation, i.e. self-regulation by conferences themselves;

(*b*) Public regulation, which may range from a discreet survey and analysis of conference activities to strong economic and political pressure and direct and comprehensive legislative regulation.[22]

17. Conference agreements of self-regulated conferences are considered to be confidential documents. Nevertheless, the principal characteristics of such conferences can be deduced from the outward manifestations of their practices. Conference agreements of publicly regulated conferences are filed with a government agency as a requirement of law,[23] and are normally available for public inspection.

18. When the restraints alluded to in paragraphs 13 and 14 are analysed, they are found to be the outcome of certain basic features that are characteristic mostly of self-regulated conferences today. Before public regulation was first adopted by the United States of America in 1916, most of these features were characteristic of all conferences operating in various parts of the world at the time. These are set out in table 1 below.

C. Self-regulation by conferences

19. By definition, self-regulated conferences prescribe their own rules of conduct and have their own institutional procedures for regulation, supervision and control. A chairman and a secretariat usually look after conference administration. A number of committees consisting of various member lines are appointed to deal with specific issues and to facilitate conference decisions on various matters and also to ensure that the member lines operate within the framework of the conference agreement.

[17] Regional regulation has been in preparation in the Latin American Free Trade Association (LAFTA) since 1966. The LAFTA Convention on Waterborne Transportation *(Convenio de Transporte por Agua de la ALALC)* and the Regulation of the LAFTA Convention on Waterborne Transportation *(Reglamento del Convenio de Transporte por Agua de la ALALC)* have both been approved but they have not entered into force because the Convention requires five ratifications and only four countries have so far complied with this requirement (Mexico, Chile, Ecuador and Paraguay). The draft of a Draft Model Conference Agreement *(Proyecto de Estatuto Tipo de Conferencia)* has been prepared by the Asociación Latinoamericana de Armadores (ALAMAR), but it is understood that no official action has yet been taken on the subject.

[18] The Rochdale Report was the outcome of an inquiry into the shipping industry commissioned by the British Government in 1967, under the chairmanship of Viscount Rochdale; see paras. 30-33 and table 2 below.

[19] Belgium, Denmark, Finland, the Federal Republic of Germany, France, Greece, Italy, Japan, the Netherlands, Norway, Sweden and the United Kingdom. The decisions were subsequently endorsed by Spain as a new member of the Consultative Shipping Group.

[20] See paras. 34-38 and table 2 below as to the contents of the decisions. The text is reproduced in the note by the UNCTAD secretariat on the decisions taken by the meeting of European and Japanese Ministers of Transport at Tokyo in February 1971 (TD/B/C.4/C.69, annex).

[21] See paras. 89 and 90 below.

[22] See Canada, Restrictive Trade Practices Commission, *Shipping Conference Arrangements and Practices—A Report in the Matter of an Inquiry under the Combines Investigation Act in Connection with the Transportation of Commodities by Water from and to Ports in Eastern Canada* (Ottawa, Queen's Printer and Controller of Stationery, 1965), p. 10.

[23] Several conference agreements are reproduced in the UNCTAD secretariat's report entitled *The liner conference system*, annexes IX, X and XI.

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TABLE 1

Basic features of most self-regulated conferences, loyalty agreements and practices

Feature	*Comment*
Relations between member lines	
(*a*) Membership	Closed conference with confidential criteria for the admission, withdrawal or expulsion of members.
(*b*) Share of trade	The basis for the allocation of shares of cargo to members is usually kept confidential.
(*c*) Pooling	Confidential cargo or revenue pooling agreements cover the shares of cargo or revenue due to each member line; sometimes there is provision to ensure the carriage of low-rated cargo.
(*d*) Sanctions	Agreements provide for sanctions against breaches of agreement by member lines.
(*e*) Self-policing	Self-policing machinery exists to ensure compliance with the terms of conference agreements.
(*f*) Publication of conference agreements	The conference agreement is considered as a confidential document.
(*g*) Contents of conference agreements	Contents of agreements are confidential.
Relations with shippers	
(*a*) Loyalty arrangements	Loyalty arrangements comprise fidelity clauses and ties with shippers (dual rate system, contract system and deferred rebate system).
(*b*) Dispensation	There are no arrangements for giving reasonably prompt dispensation to loyal shippers to use non-conference vessels.
(*c*) Publication of tariffs and related regulations	No provision for publication is usually made.
(*d*) Consultation machinery	There is general concentration of authority at headquarters.
(*e*) Representation	There is no representation of merchant interests in rates and other conference committees.
Freight rates	
(*a*) General freight rate increases	Freight rates are imposed unilaterally; the basis for freight rate changes is confidential. There are usually no specific provisions for determining freight rates, and usually no procedures for prior consultation. The time of notice is not necessarily specified.
(*b*) Specific freight rates	There are procedures for determining freight rates on new cargo items and handling requests from shippers for reductions of specific freight rates, but no procedures for consultation on increases of specific freight rates.
(*c*) Promotional freight rates	There are usually no specific provisions for determining promotional freight rates.
(*d*) Surcharges	Surcharges are imposed without prior notice and often without specific justification.
(*e*) Currencies—devaluation, revaluation, rates of exchange, floating currencies	Procedures for consultation existing in Western Europe in connexion with devaluation or revaluation of tariff currencies do not seem to operate effectively. There are no procedures regarding floating currencies.
Other matters	
(*a*) Outside competition	There are devices to prevent or eliminate outside competition.
(*b*) Averaging of freight rates	There is provision for the averaging of freight rates over port ranges.
(*c*) Quality of service	There is usually no provision regarding the type or other characteristics of the shipping to be used.
(*d*) Adequacy of service	The responsibility for providing adequate service usually rests with individual lines.
Implementation	
(*a*) Settlement of disputes	There is provision for impartial adjudication machinery.

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20. Despite the rules which conferences lay down to regulate the behaviour of member lines, competition among the members of a conference may appear in certain forms which are in breach of the conference agreement. This includes such malpractices[24] as intentionally miscalculating freight charges, for example, by charging freight on the basis of weight when it should have been charged on the basis of volume and vice versa, accepting a wrong description of the cargo or ignoring certain physical or chemical properties of cargo so as to give a shipper the advantage of a lower freight rate, or giving secret rebates to shippers. Advantages of a non-pecuniary kind may be given to shippers by the wrong dating of the bill of lading or accepting cargo after the booking for a particular sailing has been officially closed. These constitute only a few of the various malpractices which may occur and which are contrary to the spirit of conference agreements, although they are not specifically forbidden in all agreements.

21. Most conferences are understood to be active in trying to eliminate malpractices. Self-regulatory procedures are said to extend from the most informal arrangements for the reporting and settlement of grievances and disputes between members, to relatively formal measures providing for full-scale investigations, hearings, sanctions and damages or penalties for defaulting members such as forfeiture of "good faith" performance bonds, suspension or expulsion from membership; and as regards defaulting, i.e. "disloyal" shippers, the denial of space on conference vessels, the withholding of rebates and of other concessions.

22. The secretariat's research has disclosed no evidence that self-regulated conferences provide for arbitration in respect of complaints alleging malpractices by other than conference-appointed referees, i.e. arbitration by independent third parties is either non-existent or discouraged. The administrative machinery which self-regulated conferences provide for the investigation and adjudication of complaints of malpractices committed by their members or shippers is thus purely internal, that is, it operates within the conference itself.

23. Nor has any evidence been found to show that impartial adjudication machinery outside internal conference arrangements is available to member lines, non-conference lines or shippers who may wish to dispute, without litigation, conference decisions taken unilaterally. This gap in the procedures of self-regulated conferences presents a serious disability for the users of conference services, since many of their more frequent serious complaints concern important issues of public interest.[25]

24. Member lines, non-conference lines or shippers that become involved in disputes with self-regulated conferences and that may wish to appeal from the decision of the conference have, therefore, no recourse other than litigation. Apart from the disadvantage of the expense which litigation entails, recourse to law against conference decisions has not been found to be of much comfort to complainants, since there is no evidence of a superior court having declared conference practices to be unlawful in countries which tolerate self-regulation by conferences.[26] Thus, most self-regulated conferences remain the final arbiters in disputes arising from the operation of their agreements and practices.

25. There has, however, grown up in recent years a realization by some of the major self-regulated conferences, on the initiative of Governments of Western European maritime countries,[27] that their clients, i.e. shippers, needed to be given a greater feeling of participation in some aspects of conference operations and practices. Western European conferences, in other words, have been brought round to the view that increasing shipper discontent with the unilateral methods of self-regulation might be allayed to some extent by the establishment of formal national or regional consultation procedures to bring about a greater degree of co-operation between themselves and shippers.

26. *Joint recommendations of the shippers' councils in Western Europe and the Committee of European National Shipowners' Associations* (CENSA).— A Joint Standing Committee [28] of the Western European shippers' councils and CENSA have agreed on twelve important matters pertaining to the liner trades. These agreements concern general rules of conduct in respect of various matters of interest to shippers and/or shipowners and are intended to achieve a greater measure of standardization. The agreements are embodied in joint recommendations. The joint recommendations attempt to lay down broad principles and, in some cases, also the detailed application of those principles.

27. The subjects of these 12 joint recommendations [29] are:

(*a*) Port congestion surcharges;

(*b*) Availability of conference tariffs and regulations;

(*c*) Introduction of and alterations in shippers' contracts and agreements;

[24] For a fuller discussion and an extensive list of malpractices, see paras. 147 and 148 below.

[25] See para. 113 below for a list of the more important types of complaints which are frequently made against conferences.

[26] Note, however, the important decision of 10 September 1971 taken by the Bundeskartellamt (Cartel Office) of the Federal Republic of Germany against Hapag Lloyd AG and Rickmers Linie as members of the Far East Conference that they are restrained from making the granting of deferred rebates dependent upon the condition that non-conference lines have not and will not be used, as this was considered an abuse under section 104 in conjunction with section 99 of the Act against Restraints of Competition. This decision was, however, subject to recourse to the Court of Appeal and on 9 June 1972 the Berlin Court of Appeal set aside the Bundeskartellamt decision. There remains, however, the possibility of appeal to the Federal Supreme Court. An appeal has suspensive effect.

[27] See the resolution adopted on 15 March 1963 by the Western European Ministers responsible for shipping, the text of which is reproduced in the report by the Secretary-General of UNCTAD, *Consultation in Shipping—Establishment of national and regional shippers' bodies: Consultation and negotiation between shippers and shipowners* (United Nations publication, Sales No.: 68.II.D.1), part two, annex I.

[28] A Note of Understanding concluded in December 1963 between Western European conference lines and Western European shippers' councils (for the text, see *Consultation in Shipping*, *op. cit.*, part two, appendix I) makes provision for periodic consultation. The Joint Standing Committee did not become operative until 1965.

[29] The text of the joint recommendations is reproduced in annex V of the second report by the UNCTAD secretariat on consultation in shipping (TD/B/C.4/78 and Corr.1 and 2 and Add.1 and 2).

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(*d*) Fibreboard containers and cartons—clausing of bills of lading;

(*e*) Diversion—co-operation with cargo interests;

(*f*) Notice of increases in freight rates;

(*g*) Heavy lifts;

(*h*) Long lengths;

(*i*) Measurement rules;

(*j*) Pallet rules;

(*k*) Currencies—devaluation, revaluation, rates of exchange;[30]

(*l*) Container standard sizes.

28. The joint recommendations do not, however, have a binding character, since the parties to the joint recommendations, viz. CENSA and the national shippers' councils of Western Europe, cannot enforce sanctions against any of their members who disregard the recommendations. The Note of Understanding reached between the European conference lines and European shippers in December 1963 provides *inter alia* for the settlement of disputes by an "Independent Panel", this Panel to consist of three representatives nominated by European shipowners and three representatives nominated by the European Shippers' Councils. It is the function of the Panel to find a fair and equitable solution of the matter in dispute, and its recommendations are then considered by the interests concerned in a spirit of mutual acceptance. It is understood that the findings of the Panel are regarded as merely recommendatory with no binding force on the parties to the dispute.[31]

29. CENSA is in touch with some 170 conferences [32] and is thus able to make the joint recommendations widely known. While CENSA encourages the implementation of the joint recommendations, it cannot impose decisions on conferences. CENSA has pointed out that, although broadly speaking the record of co-operation is good, difficulties may arise where conferences include member lines which do not belong to the CENSA group and which may be less inclined to follow the recommendations of CENSA.

30. *Recommendations on a code of conference practice made by the United Kingdom Committee of Inquiry into Shipping (Rochdale Report), 1970.* — The Committee studied, *inter alia*, the operation of conferences in the United Kingdom trade and formulated a number of conclusions and recommendations on the subject.[33]

31. The Committee concluded that "on balance" it would not advance the public interest to prevent shipowners who provide organized deep sea services for the carriage and mixed cargo from entering into arrangements for the regulation of the trade. It further concluded that a joint service, with fully rationalized sailing agreements and operated within a "closed" conference, was desirable for most deep sea routes.[34]

32. The Committee believed, however, that the secrecy which has surrounded conference operations and the absence, more especially in recent years, of effective and mutually constructive consultation between shippers and shipowners have been responsible for much of the criticism of existing conference arrangements and for some of their difficulties. In view of this, and in particular of the effect of the introduction of container services on the structure of conference arrangements, the Committee recommended that members of conferences operating to and from United Kingdom ports should collectively adopt, as a condition of their operation, a published code of conference practice. The details of this code would need to be evolved in negotiation between representatives of the Government, shipowners and shippers. The Committee formulated a number of principles considered to be the minimum necessary to safeguard the immediate national interest (see table 2 below).

33. The Committee recognized that the issue of a code of practice inevitably had very broad international implications. It suggested, therefore, that the national interest of the United Kingdom would be best served by its participation in the development of an international accord on a code of conduct for conferences.

34. *Recommendations on a code of practice made by the Consultative Shipping Group.* [35] — The Western European and Japanese Ministers responsible for transport (the Consultative Shipping Group), at their meeting held at Tokyo in February 1971, agreed that the time had come to determine what further improvements were needed in connexion with liner conferences.

35. They 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 permit the acceptance by conferences of a public code of practice, which should take due account of the criticisms against conferences;

(*c*) They should aim initially at acceptance of the code by conferences serving the trade of their countries,[36]

[30] At the time the present report is being prepared, a revision of this recommendation is under consideration. A joint plenary meeting of the CENSA Council and the European Shippers' Council to be held in October 1971 was to consider the proposed revisions.

[31] This procedure, as far as is known, has never been invoked. It is reported, however (the Netherlands *Het Financiële Dagblad*), that a dispute arose between the Brazil/River Plate Conference and the Shippers' Councils about the appropriate freight rate reduction to be made by the Conference as a consequence of a subsequent change in the tariff currency from dollar to Deutschemark and the revaluation of the latter. This dispute was then submitted by the Shippers' Councils to the Independent Panel procedure under the Note of Understanding. When, however, the shipowners emphasized that, according to the Note of Understanding, the outcome of the procedure would be no more than a recommendation without binding force, the Shippers' Councils withdrew from the procedure established by the Note of Understanding. The Councils did so because the attitude of the Conference did not give any hope that it would accept the findings of the Independent Panel if those findings should be against the Conference.

[32] According to *Croner's World Directory of Freight Conferences*, 4th ed. (Kingston, Surrey, England, Croner Publications Limited, 1965), about 360 conferences operate at present in the various trades of the world.

[33] See the Rochdale Report, paras. 401-485.

[34] *Ibid.*, para. 476.

[35] See the note by the UNCTAD secretariat on the decisions taken by the meeting of European and Japanese Ministers of Transport at Tokyo.

[36] Conferences serving the countries of the Consultative Shipping Group also, of course, serve other countries, the national interests of which would be affected by any code established (see para. 10 above).

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TABLE 2

Comparative summary of recommendations of the Tokyo decisions (section II) and the report of the United Kingdom Committee of Inquiry into Shipping (the Rochdale Report)

Tokyo decisions	*Rochdale Report* (The recommendations are stated to be "minimum suggestions")
(*a*) Full annual reports by conferences about their activities, including important consultations held with shippers, changes in membership, over-all trends in costs, major changes in services, tariffs and conditions of carriage.	(*a*) No recommendations directly comparable with (*a*) opposite, but see (*b*) below.
(*b*) Maintenance of close contact with shippers, establishment, strengthening and extension of consultative arrangements; easier local access in developing countries to responsible conference representatives to discuss trade matters; preparation on an aggregated basis of a financial analysis designed to indicate the trend of costs and profits as a background to consultation. The possibility of independent panels to which commercial issues might be referred not to be ruled out; the chairman of any such panel *not* to be a government official or an official of an intergovernmental body.	(*b*) Agreed annual analysis of information on costs and revenue prepared by independent accountants to be submitted to government representatives and shippers when tariff changes are proposed or at stated intervals of 2 to 3 years.
(*c*) Appointment of a separate panel of conciliators to deal with disputes over admission; the views of shippers to be considered.	(*c*) The same; the panel to have shipper representation.
(*d*) Adoption by conferences of the 1963 CENSA Good Conduct Model Clauses to "ensure elimination of malpractices".	(*d*) No recommendation.
(*e*) Public availability of tariffs at reasonable cost.	(*e*) The same.
(*f*) Disputes between shipowners arising in application of the code to be referred to CENSA or some other suitable body provided by shipowners, for arbitration.	(*f*) No recommendation.
(*g*) No recommendation.	(*g*) The Government to arrange appropriate consultation on the broad principles of conference practice and fixture of freight rates.
(*h*) Due account to be taken of resolutions unanimously adopted by UNCTAD.	(*h*) No recommendation.

Source: Compiled by the UNCTAD secretariat on the basis of the relevant paragraphs of the Tokyo decisions and the Rochdale Report.

while bearing in mind the ultimate objective that such a code should receive world-wide endorsement.

36. The Governments recommended that their shipowners, in formulating the code, take due account of those resolutions that had been unanimously adopted by UNCTAD.

37. Accordingly, the Governments 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, and to keep the Governments informed of the progress of this work. [37] They recommended to their shipowners that the code should be designed to strengthen confidence in the working of the conference system, to avoid allegations of unfair practices and discrimination by ensuring the observance of a high standard of fair dealing in conference activities, and to formulate principles with regard to a number of specific recommendations submitted by the Governments (see table 2 above).

38. The Governments of the countries of the Consultative Shipping Group agreed that, when they had approved the code of conference practice, their shipowners should work for its adoption by the conferences of which they were members and should provide regular reports on progress made in this direction. It was further agreed that consideration should be given to supervising the implementation of the code of conference practice on a continuing basis, e.g. by the provision of reports by their shipowners, and to its amendment from time to time as appropriate. These Governments also agreed that, while their intention is to avoid in principle any governmental interference in commercial shipping matters, they should nevertheless stress the necessity for shipowners and conferences to comply with the provisions of these decisions and for the code to function satisfactorily. They agreed that, if difficulties should arise, they should consider what further steps might be necessary in order to achieve this aim.

39. A comparison of the recommendations made in the Rochdale Report and the Tokyo decisions (section II) is given in table 2 above. It can be seen that both groups of recommendations cover essentially the same matters of concern, viz. greater publicizing of the conference operation and closer contact between conferences and shippers, with maintenance to some extent of self-regulation by conferences. The Tokyo decisions are, however, more detailed than the recommendations of the Rochdale Report.[38]

[37] In a communiqué issued at the end of the Tokyo meeting it was indicated that CENSA, in the preparation of the code of practice, should co-operate with Western European Shippers' Councils.

[38] On self-regulation, the Tokyo decision stated "... that the liner conference system played an essential role and that it should continue to function by self-regulation to the greatest possible extent".

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40. It is obvious that the suggestions made in the Rochdale Report and in the Tokyo decisions represent a step forward towards the encouragement of greater publicity for conference practices and *rapprochement* between the conferences and shippers, and also, to some extent, Governments. However, the proposals of the Tokyo decisions appear not to meet the needs of world trade for an internationally acceptable code of conduct for the liner system, in the light of the problems discussed in the present report.[39]

D. Public regulation of conferences

41. Publicly regulated conferences have broadly the same basic institutional features as self-regulated conferences. They usually have a chairman, a secretariat and various committees, as described in paragraph 19 above. However, their rules of conduct and procedures for the regulation, supervision and control of the practices of their members are drawn up in conformity with the regulations prescribed by the regulating authorities. Further, in some publicly regulated conferences the power which self-regulated conferences possess to be the sole adjudicators with respect to malpractices committed by their members is to a greater or lesser degree curtailed. In recent years, provision has been made in some conference agreements for allowing appeals from a vote of conference members to a panel of arbitrators, one of whom may be appointed by the penalized member.[40] Other conferences may appoint an independent "neutral body"—which is often a firm of accountants—to investigate, prosecute, and, if need be, penalize violators of conference agreements.[41]

42. A number of types of public control over conference practices can be distinguished, namely direct and indirect statutory control, and quasi-official control.

43. *Direct statutory control.* A country may adopt the attitude that the shipping industry affects the public interest substantially and consequently requires careful direct statutory control. The industry may then be permitted by statute, provided that it fulfils certain specific and detailed requirements, to fix the rates and other terms for the services it provides through conferences, free of anti-trust sanction.[42] Another country may legislate only in specific areas of conference activity, for example requiring conference agreements to be registered or approved by a designated government agency or to ensure the allocation of a specified share of the conference trade to its national lines.[43]

44. In some countries, the anti-trust laws give the Government, or a special agency, broad powers to regulate or prohibit the use of agreements in restraint of trade, and these rules may to some extent be invoked for application to shipping conferences.[44]

45. The requirement of publicity makes it possible to scrutinize the details of some publicly regulated conference agreements. This is not possible in the case of self-regulated conferences, as was pointed out above. Further, if the agreements relate to publicly regulated conferences which have operated over a great number of years, such as those to the United States legislation, a body of jurisprudence and regulatory orders has usually been evolved. In the case of such conferences, better than in the case of those subject to more recent public regulation, it is possible to identify specific regulatory procedures and practices, and the extent of enforcement.

46. If the provisions of the United States legislation are taken as a model of the maximum prevailing regulation, the principal features are found to cover:

(*a*) *Supervision:* the filing of all relevant conference agreements and tariffs for approval by a designated Government agency;

(*b*) *Control:* the filing of reports on conference meetings and the results of their deliberations;

(*c*) *Prescription of conduct:* the prescription of conduct to be followed by liner conferences in order to safeguard the interests of shippers and non-conference lines; these safeguards can be divided into two categories:

(i) The prohibition of certain practices, such as deferred rebates, "fighting ships", discrimination between shippers and routes, false billing or misclassification of cargo, secret rebates, discriminatory rates;

(ii) The mandatory nature of certain clauses to be inserted into conference agreements, covering:
- *a.* Admission/withdrawal;
- *b.* Self-policing against malpractices;
- *c.* Procedures for hearing shippers' representations and complaints;
- *d.* The right of shippers to take independent action;

[39] The UNCTAD secretariat approached CENSA and the Western European Shippers' Councils with a view to taking into account, in the preparation of this report, the texts being prepared by these organizations. However, it proved impossible to achieve this before the submission of the draft code, which they are preparing, to the Governments of the Consultative Shipping Group countries.

[40] "This system was not successful in stamping out malpractices" (see United States of America, *The Ocean Freight Industry: Report of the Antitrust Subcommittee (Subcommittee No. 5) of the Committee on the Judiciary, House of Representatives, 87th Congress, 2nd Session* (Washington, D.C., U.S. Government Printing Office, 1962), p. 306).

[41] "... a focal point of difficulty has been the degree of neutrality with which the neutral body or its agents can or should be insulated" (*ibid.*, p. 313).

[42] The United States of America is the principal example of such a country; *vide* the United States Shipping Act 1916, as amended in 1961, and general orders made thereunder.

[43] Brazil is an example of such a country (see Instituto de estudios de la Marina Mercante Iberoamericana, *La Marina Mercante Iberoamericana*, 1968, p. 369: "Contralor de las conferencias por parte de la Comisión de Marina Mercante, Resolución CMM 3205 del 13/3/1968"; and 1969, p. 488: "Normas para la aprobación de tarifas para fletes internacionales, Resolución SUNAMAM 3469 del 23/5/1969").

[44] Many countries, although they have no specific rules regulating shipping conferences, have extensive legislation regulating the use of restrictive business agreements. The extent to which regulations of this type may be invoked or applied to shipping conferences is uncertain (see A. Frihagen, *Shipping Conferences and Anti-trust Laws* (Oslo, University Press, 1963), pp. 468-470). Note, however, the decision (Order) of 10 September 1971 of the Bundeskartellamt (Cartel Office) of the Federal Republic of Germany (see foot-note 26 above). In the reasons for its decision, the Cartel Office states *inter alia* that investigations failed to show that a relaxation of existing restrictions would result in a collapse of freight liner services to the Far East. Note also that on 9 June 1972, the Berlin Court of Appeal set aside this decision; at the time of writing, the reasons for the decision were not available to UNCTAD.

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(*d*) *Governmental powers on aspects of rate-making* through appropriate agencies;

(*e*) *Governmental powers of investigation* through appropriate agencies;

(*f*) *Quasi-judicial powers,* through appropriate agencies, to:

(i) Disapprove conference agreements and loyalty agreements;

(ii) Levy penalties;

(iii) Interfere with rates as authorized by legislation;

(iv) Issue orders;

(*g*) *Machinery for adjudication*, for the hearing of complaints, the drawing-up of rules of practice and procedure and the establishment of procedures of adjudication.

47. There is no evidence that direct statutory control as exercised in other countries covers other than partial aspects of conference practices. The range of its regulatory power is therefore much narrower than one would gather from the description in paragraph 46 above. There is also little evidence that conduct is prescribed, or detailed investigatory and adjudication machinery provided, in respect of as wide a range of conference practices as in the legislation of the United States of America.

48. The main instrument of direct legislative control over conference practices in countries other than the United States of America appears to be a general statutory supervision over conferences embodied in the power to withhold approval of conference agreements. National legislation of this type has been introduced only in very recent years in a few countries, and insufficient evidence is available to evaluate how exactly, and to what extent, the provisions are being applied in practice, and with what results.

49. *Indirect statutory control.* In some countries, Governments may exercise various types of indirect legislative control over conference activities, e.g. by way of postal subsidies and import duty levies; [45] or by governmental supervision over certain aspects of conference operations, e.g. of freight rates on some routes, by instituting agreements under which shipping conferences have to negotiate the general level of freight rates with government-sponsored associations of shippers.[46]

50. *Quasi-official control.* In a very few countries, Governments encourage consultation between shipowners and shippers on subjects of common concern, sometimes with government participation.[47]

51. Some Governments may have freight agreements with various conferences which serve their trades. These agreements can provide for the supply by the conference of information about operating costs of transport, both to and from the country concerned, and for reviews of freight rates at stated intervals.[48]

52. In the case also of countries which provide for various degrees of indirect statutory, and quasi-official, control over conferences, the methods of control are far less comprehensive and less far reaching than those prevailing in the legislation of the United States of America as described in paragraph 46 above. The forms of control do not appear to go beyond a duty to file or seek approval of conference agreements in some instances, or the sponsorship by the ministry or department concerned of consultation between conferences and shippers, particularly in respect of the level of freight rates on a few sensitive commodities. Remedies provided may be a governmental inquiry or civil action in a court of law. Insufficient information is available as to the extent to which these remedies are resorted to, or as to the outcome of complaints.

E. Conclusion

53. It is now self-evident that a distinction can be drawn between procedures or controls established to ensure that the integrity of the conference system as a whole is preserved against malpractices of its members and against non-conference competition, and procedures or controls that are necessary to ensure that conference practices do not jeopardize the national or public interest of the countries affected.

54. Control to preserve the integrity of the conference system is achieved by measures instituted to ensure that conference members respect their various undertakings as expressed in conference agreements, and that shippers who have bound themselves to use only conference vessels adhere to the terms of their agreement to do so.

55. The nature of the controls that are necessary to ensure that conference practices do not jeopardize the national or public interest differ according to the public policy of the countries affected. These controls comprise, to a greater or lesser extent, measures to ensure that conference agreements and practices are not kept confidential, that disputes between conferences and users of their services are not adjudicated unilaterally by conferences, and that a balance is struck between the legitimate trading interests of the country and the needs of both shippers and the conferences.

56. It has been seen that self-regulated conferences concern themselves almost wholly with the control of malpractices and with the defence of the conference system against non-conference competition. Publicly regulated conferences, on the other hand, are regulated through varying forms of control, with a view to safeguarding the public interest of the countries affected. Self-regulation does not, therefore, tackle those areas of concern which touch the public interest.

[45] This applies, for example, in the Republic of South Africa (see para. 83 below).

[46] Australia and New Zealand are examples of countries using this method (see para. 82 below). See also *Consultation in shipping, op. cit.*, part three. See also *New Zealand Shipping: Report of the Commission of Inquiry, June 1971* (Wellington, N.Z., A. R. Shearer, 1971), chap. 19, para. 20.

[47] For example, in India. See *Consultation in shipping*, part four.

[48] See the Rochdale Report, para. 441. The example cited concerns South Africa.

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Chapter II

PUBLIC REGULATION

A. Introduction

57. It has been seen that the conference system has evolved in such a way that conferences in various trades are divisible into two clearly distinguishable classes, those which are self-regulated and those which are publicly regulated.[49]

58. It has also been noted that the distinction between the two classes is that the purpose of the regulatory machinery of self-regulated conferences is to preserve the integrity of the conference as a whole and especially against outside competition, whereas the purpose of public regulation of conferences is to attempt to ensure that conference practices do not prejudice the public or national interest.

59. What now needs to be examined is the extent to which those characteristic features of self-regulated conferences described in paragraphs 13, 14 and 19 to 23, and table 1 above, which might be considered restrictive or arbitrary, have been brought under control, if at all, by public regulation of conferences in the public interest.

60. Owing to the dearth of case-law and of a body of practice showing how exactly the various methods of public control function in practice in most countries other than the United States of America, it is not possible to give a detailed presentation of the practical situation prevailing in most of the countries where publicly regulated conferences operate.[50]

61. A broad comparison shows that there are considerable variations in the manner in which different countries regulate international shipping conferences, both with regard to the extent of the regulation and with regard to the way in which the regulation is applied. In practice, the rules of law give only part of the picture, and anyone who wants to find out how the country concerned regulates and influences the competition and activities of conference members has to take into account the different conditions under which the statutes operate.[51]

62. For these reasons, the account which follows is based on a broad division of publicly regulated conferences into those that come within the class of "comprehensively" regulated conferences, and those which come under the heading of "partially" regulated conferences.

63. A further distinction is worth noting. Legislation can affect conference practices in two forms—positively, that is by actually regulating specific aspects of operations, or negatively, by giving conference practices immunity, under certain conditions, from suit under restrictive practices or anti-trust legislation.

64. A concise examination now follows of the scope of legislative control exercised in various countries[52] and the safeguards that have been instituted for the preservation of the public interest. As stated above, public control has been divided broadly into "comprehensive" and "partial" regulation.

B. National comprehensive public control

65. The sole existing example of this type of control is that of the United States of America, as exemplified by its Shipping Act, 1916, amended in 1961.[53]

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[49] Methods of regulation employed in the two types of conferences are not necessarily always exclusive of each other. Public measures may control or influence some aspects of self-regulated conferences.

[50] See para. 47 above.

[51] "Formal rules do not seem to have been very strictly enforced" is a typical statement generally observed in the literature on the situation prevailing in many countries where publicly regulated conferences operate (see A. Frihagen, *op. cit.*, p. 468).

[52] The principal statutes and decrees are listed in the note on statutory sources following table 3 below. Some countries, notably Canada, the United States of America, the United Kingdom and New Zealand, have instituted inquiries in recent years into the working of liner conference systems in their trades, which have produced *inter alia* the following reports:

Canada: Restrictive Trade Practices Commission, *Shipping Conference Arrangements and Practices, op. cit.*;

United States of America:

(a) *Hearings before the Special Sub-Committee on Steamship Conferences of the Committee on Merchant Marine and Fisheries, House of Representatives, 87th Congress, 1st Session (1961)*, on H.R. 4299;

(b) *House of Representatives, 87th Congress, 1st Session (1961), Report No. 498*, submitted by Mr. Bonner to accompany H.R. 6775;

(c) *Hearings before the Merchant Marine and Fisheries Sub-Committee of the Committee on Commerce, United States Senate, 87th Congress, 1st Session (1961)*, on H.R. 6775;

(d) *Senate Report, 87th Congress, 1st Session (1961), No. 860*, by Senator Engle, to accompany H.R. 6775;

(e) *Report of Senate Debate, September 13 and 14, 1961, 107 Congressional Record*, pp. 18128-18134, 18227-18254;

(f) *Conference Report, 87th Congress, 1st Session (1961), No. 1247*;

New Zealand: *New Zealand Shipping: Report of the Commission of Inquiry, June 1971*;

United Kingdom: the Rochdale Report.

[53] 46 United States Code Annotated, Sections 801-842. A measure of control is also contained in Section 19 (1) (*b*) of the Merchant Marine Act of 1920, Section 205 of the Merchant Marine Act of 1936 and Section 212 (*e*) of the same Act.

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66. The regulatory policy governing shipping conferences in that country rests on four major legislative provisions:

(*a*) The exemption of steamship conferences from the scope of anti-trust laws, subject to the fulfilment of certain conditions as set out below. The public or national interest is conceived of as identical with that of the United States exporter/importer and from this conception emerged the justification for exempting steamship conferences from the reach of the anti-trust laws;[54]

(*b*) Government regulation of conference practices. The Shipping Act, 1916, the result of the Alexander Committee's investigations, and the 1961 amendments to it, the result of the Bonner and Celler Committee's investigations, are based on the premise that the public or national interest requires the direct protection of shippers by specific statutory provisions;

(*c*) The legitimation of dual rate contracts to protect exporters and importers by a number of mandatory restrictions on the terms and conditions of such contracts;

(*d*) The illegality of deferred rebates.

67. The Shipping Act, 1916, states the basic regulatory pattern for ocean shipping in the United States foreign commerce. The scope of this Act and the regulatory orders[55] made under it are described in paragraphs 68 to 73 below.

68. The Act requires that all agreements between carriers and those between other persons subject to the Act which affect competition be filed with the Federal Maritime Commission.[56] The Commission is required, after notice and hearing, to disapprove, cancel or modify any agreement which it finds to be unjustly discriminatory or unfair, to operate to the detriment of the commerce of the United States, to be contrary to the public interest, or to be in violation of the Act. If approved, such agreements are exempted from the scope of the United States anti-trust laws.

69. The Act permits a carrier or conference to use a dual-rate contract system, unless the Federal Maritime Commission finds it to be detrimental to the commerce of the United States, provided that the contract expressly contains specific enumerated provisions[57] and any other provisions properly required by the Commission.

70. The Act requires that the conference agreements provide reasonable and equal terms for admission to membership, adequate policing of obligations under the agreements, and reasonable procedures for promptly and fairly considering shippers' requests and complaints.

71. The Act requires that the conference file with the Federal Maritime Commission, and keep open to public inspection, tariffs showing their rates, charges, rules and regulations for the transportation of cargo, and only rates so filed may be charged. Notice of all new rates and increases in rates must be filed 30 days in advance of their effective date, unless the Commission, for good cause, allows such changes to become effective in less than 30 days. Rate decreases can become effective upon filing. If a tariff is rejected by the Commission because of failure to meet the form and manner prescribed by the Commission for its publication and filing, it is void and its use unlawful.

72. The Act directs the Commission to disapprove any rate which, after hearing, it finds to be so unreasonably high or low as to be detrimental to the commerce of the United States.

73. The Act makes it an offence for any common carrier:

(*a*) To pay or to enter into any agreement to pay, a deferred rebate;

(*b*) To use a "fighting ship";[58]

(*c*) To retaliate against any shipper because he has patronized another carrier, by refusing or threatening to refuse space accommodation or by other discriminatory or unfair methods;

(*d*) To make any unfair or unjustly discriminatory contract or to discriminate unfairly against any shipper with respect to cargo space, loading and landing of freight, or the adjustment of claims.

74. The United States Shipping Act and orders made under it attempt specifically to regulate most of the more important restrictive characteristics of self-regulated conferences, referred to in paragraphs 13, 14 and 19 to 23, and table 1 above, with the exception, however, of the following main subjects:

(*a*) The share of trade allocated to members, and the basis for allocation;

(*b*) The extent of shipping tonnage made available for the trade;

(*c*) The detail of adequacy and quality of services;

(*d*) Rate-making procedure in setting specific rates;

(*e*) Shipper representation before local conference committees and the delegation of decision-making authority to conference representatives.

75. It is possible that most, if not all, of the conference practices in restraint of trade could be considered as

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[54] "In language and impact, the Bonner Act amendments of 1961 are surely the most explicit congressional statement to date of the identity of the national interest with the interests of American exporters and importers" (see J. S. Gordon, "Shipping Regulation and the Federal Maritime Commission", in *37 University of Chicago Law Review* (1969), p. 99). In the present report, national interest and public interest have been equated.

[55] Commonly called "General Orders"; published in *Code of Federal Regulations*, Title 46, Chapter IV, Part 500 *et seq.*

[56] The Federal Maritime Commission was established on 12 August 1961, to regulate the waterborne foreign and domestic off-shore commerce of the United States, and to ensure that United States international trade is open to all nations on fair and equitable terms, without undue prejudice and unjust discrimination. The maritime regulatory agency of the United States was named, from 1916, "The U.S. Shipping Board", from 1933, "The U.S. Maritime Commission", from 1950, "The Federal Maritime Board", and from 1961, "The Federal Maritime Commission".

[57] These provisions are spelt out by the *Uniform Merchant's Contract* (*Code of Federal Regulations*, Title 46, Chapter IV, Part 538.10). It deals with (1) dispensation, (2) notice of rate increases, (3) legal right to goods, (4) natural routing, (5) limitation on damages for breach, (6) bilateral rights of cancellation, (7) spread between rates, (8) cargoes excluded from contract.

[58] The Shipping Act, 1916, Section 14, defines a "fighting ship" as "... a vessel used in a particular trade by a carrier or group of carriers for the purpose of excluding, preventing, or reducing competition by driving another carrier out of [that] trade".

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coming within the scope of the Shipping Act, 1916, as amended in 1961, and its implementing regulations, if considered to violate section 15 of the Act, in that they are unjustly discriminatory, detrimental to the commerce of the United States, or contrary to the public interest. It would seem, therefore, that most of the institutional characteristics of self-regulated conferences that may be considered restrictive of trade have been either directly, or could be indirectly, covered by the United States shipping statutes and regulations made thereunder.

76. It is thus evident that the statutory powers of the Federal Maritime Commission place it in a commanding position with respect to conferences. These powers are: to approve or disapprove agreements filed by carriers; to regulate the practices of carriers and other persons engaged in the foreign commerce of the United States, and conferences of such carriers; to accept or reject the tariff filings of carriers in the foreign commerce of the United States, and conferences of such carriers; to review and determine the validity of alleged or suspected violations of the shipping statutes; and, in effect, to replace unilateral adjudication by conferences of malpractices and of disputes with shippers by the arbitrament of statutory standards intended to safeguard the public interest within the jurisdiction of the Commission.

C. National partial public control

77. Regulation under this heading takes many forms; for example, it may require conference agreements to be approved by a designated Government agency, or to provide for the participation of national lines in the trade to a specified extent; or shipping statutes may be enacted which exempt certain conference practices from the anti-trust laws or restrictive business practices legislation; or administrative regulation may be applied; or statutes may be enacted which institute a shippers' council or equivalent body and consultation procedures in shipping;[59] or, finally, specific statutes may be enacted which do not relate directly to shipping activities or agreements in restraint of trade, but which nevertheless closely affect shipping.

78. Legislation which lays its principal stress on the requirement of approval of conference agreements by a Government agency, and on securing a specific share of the conference trade for national lines, is best exemplified by that prevailing in some Latin American countries, such as Argentina and Brazil.[60]

79. Legislation may exempt certain shipping conference practices from the provisions of the anti-trust statutes, and thereby legalize shipping conferences.[61] In Canada, for example, the Shipping Conferences Exemption Act (7 October 1970) provides for the filing of tariffs and agreements, stipulates the maximum permissible "spread" between contract and non-contract rates and rules out certain practices which are generally held to be unfair. The underlying rationale of the Act is that any legislation relating to conferences should be minimal, that conferences should be legalized but otherwise left alone and that maximum importance be given to direct negotiations between conferences and shippers. Provision is retained for carrying out public investigations into conference operations.

80. In countries which have no specific legislation relating to shipping activities the anti-trust laws may be invoked for the purpose of controlling conference practices. For example, section 26 of the Act against Restraints of Competition (27 July 1957) of the Federal Republic of Germany requires that enterprises or associations of enterprises shall not induce another enterprise or association of enterprises to refuse to sell or purchase [goods or services] with the intention of unfairly harming competitors. It further requires that associations of enterprises shall not unfairly hinder, directly or indirectly, any other enterprise in business activities which are usually open to similar enterprises, and shall not treat such other enterprise directly or indirectly in a manner different from the treatment accorded to similar enterprises.[62]

81. Administrative regulation may mention specific conference practices which are prohibited. In Japan, for example, the Fair Trade Commission Notification No. 17 (of 1959), on Specific Unfair Business Practices in the Marine Transportation Industry, prohibits discriminatory freight rates, discriminatory terms of admission to a conference; provides for the control of the spread of contract rebates and the termination of dual rate contracts; and provides for the control of penalties to disloyal and of dispensation to loyal shippers.

82. Legislation may institute consultation procedures between conferences and shippers on matters of common concern, and provide for governmental participation, e.g. the overseas cargo shipping provisions of the Trade Practices Act 1965/67 of Australia. This Act strengthens the principle of shipper-shipowner negotiations and instituted changes in the consultation machinery designed to give effect to this principle. The Government is apparently of the view that closed conferences best serve the interests of Australia and of the conferences carrying its trade. At the same time the Act provides for certain safeguards to curb excess of monopoly power. These safeguards are embodied in provisions dealing with such matters as the appointment of a resident representative by the shipowner, the filing of conference agreements, undertakings by shipowners, on request by the Ministry of Commerce, to negotiate with designated shippers' bodies on the fixing of freight rates and other conditions of carrying goods, the furnishing of economic data reasonably necessary for the negotiations with shippers' bodies, recognition of shippers' bodies, disapproval of conference agreements in certain circumstances, and civil remedies to recover compensation for loss or damage. The provisions of the Act apply only to outward cargo shipping from Australia.

83. Legislation not immediately related to shipping activities or to agreements in restraint of trade may be applied to conferences. For example, the South African

[59] A recent example is the Shippers Council of the Ivory Coast established by Law No. 69-240 of 9 June 1969.

[60] See para. 43 and foot-note 43 above.

[61] The United States Shipping Act, 1916, is basically a similar type of legislation but has been discussed under section B of the present chapter.

[62] See paras. 24, 44 and related foot-notes.

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Post Office is governed by an Act which prohibits "giving mail contracts to shipping lines which give rebates to shippers who do not ship with outsiders".[63] Under South African Customs regulations, moreover, the authorities may increase the tariff on goods imported at specially low rates if the import causes injury to the producers of the same goods in South Africa.[64]

84. The different forms of national partial public control, as discussed above, tend by their very nature to be concentrated on limited—albeit important and often vital—aspects of the entire complex of the institutional characteristics of conferences. They generally concentrate mainly on:

(*a*) The filing or approval of conference agreements or tariffs, though there may be only limited publicizing of agreements;[65]

(*b*) A specified share of conference trades for national lines and easier conference membership terms;

(*c*) Consultation procedures with Governments and shippers on matters of common concern;

(*d*) Broad governmental powers to investigate malpractices;

(*e*) Control of some of the more predatory practices used by conferences, to eliminate competition, e.g. the prohibition of the use of "fighting ships";

(*f*) The prompt refunding of rebates;

(*g*) The remedying of freight rate discrimination;

(*h*) The limitation of penalties for breaches of agreements.

85. Thus, whilst national partial regulation by statute apparently attempts in general to correct a number of restrictive features of the self-regulated conference system, its scope varies considerably from country to country. Some areas of concern, e.g. qualifications for admission, the maximum permissible spread of loyalty rebates, fair cargo shares for national shipping lines, adequacy and quality of services, dispensation to ship on non-conference vessels, more effective self-policing measures against malpractices, the need for the impartial arbitration of disputes[66] and full discussion and negotiation with shippers on increases in general freight rate levels and of specific and promotional freight rates, are left untouched by most national control regulations.

D. Summary of public regulatory action

86. Summing up the foregoing description of the public regulation of conferences, it appears that most of the areas of concern to the users of shipping services have been made the subject of control in one form or another in a number of countries. A synoptic view of the position in some countries is given in table 3 below.

[63] See A. Frihagen, *op. cit.*, p. 467. Frihagen adds: "This rule has had a very great effect, as mail contracts have been given to shipping lines which have been especially dominating in the trades in question and which have considerable influence in the shipping conferences in these trades. This seems to be the reason why deferred rebates and dual rates are not used in the main South African trades".

[64] *Ibid.*, p. 467.

[65] For example, although the law might require that agreements be filed with a government agency, such agreements may not be accessible to the public. However, the agreements filed with the United States Federal Maritime Commission are available to the public (see para. 68 above).

[66] i.e., their settlement other than through litigation.

TABLE 3

Regulation of conference practices* in six countries[a]

Conference practices	*United States of America*	*Brazil*	*Australia*	*Argentina*	*Japan*	*Canada*
Relations between member lines:						
(*a*) Membership	×	×	×	×	×	
(*b*) Share of trade		×		×		
(*c*) Pooling	×	×				
(*d*) Sanctions	×					
(*e*) Self-policing	×					
(*f*) Publication of conference agreements	×	×	×	×		×
(*g*) Contents of conference agreements	×	×				
Relations with shippers:						
(*a*) Loyalty arrangements	×	×			×	×
(*b*) Dispensation	×	×				
(*c*) Publication of tariffs and related regulations	×	×	×	×		×
(*d*) Consultation machinery			×			
(*e*) Representation	×		×			
Freight rates:						
(*a*) General freight rate increases	×	×				
(*b*) Specific freight rates	×	×	×			
(*c*) Promotional freight rates						
(*d*) Surcharges		×				
(*e*) Currencies—devaluation, revaluation, rates of exchange, floating currencies						

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TABLE 3 (*continued*)

Regulation of conference practices* in six countries [a]

Conference practices	United States of America	Brazil	Australia	Argentina	Japan	Canada
Other matters:						
(*a*) Outside competition	×					×
(*b*) Averaging of freight rates						
(*c*) Quality of service						
(*d*) Adequacy of service	×		×			
Implementation:						
(*a*) Settlement of disputes	×	[b]	[b]	[b]	[b]	[b]

* In this table, opposite the conference practices enumerated in the first column, the sign × appears under the names of countries in which those practices are covered by regulation.

[a] See, for cross-reference, table 1; it is to be noted that, in some countries, for example the Federal Republic of Germany, statutes not specifically relating to shipping may nevertheless affect conference activities.

[b] It is not clear from available information to what extent complaints against conferences are referable in these countries to impartial adjudication bodies other than judicial tribunals. In some of the countries, e.g. Japan and Canada, shippers may complain to the appropriate Restrictive Practices or Fair Trade Commissions with respect to alleged breaches of the provisions in those countries against restrictive trade practices.

LINER CONFERENCE REGULATION—NOTE ON STATUTORY SOURCES

Argentina

Registro de tarifas de conferencias; *Decreto 6186*, del 27/9/68

Australia

Trade Practices Act 1965/67, Part Xa—Overseas Cargo Shipping

Brazil

Se desconocen varias conferencias y se propicia la creación de otras nuevas, *Resolución CMM 3331*, del 15/10/68

Normas para la aprobación de tarifas para fletes internacionales; *Resolución SUNAMAM 3469*, del 23/5/69

Contralor de las Conferencias por parte de la Comisión de Marina Mercante, *Resolución CMM 3205*, del 13/3/68

El transporte maritimo de comercio exterior brasileño, *Resolución 2995*, del 30/5/67

Reglamento de los fletes marítimos del comercio exterior; *Ley 388*, del 3/2/37

Costos de explotación naviera, *Resolución SUNAMAM 3432*, del 7/3/69

[Information taken from *La Marina Mercante Iberoamericana*]

Canada

Shipping Conferences Exemption Act (7/10/70)

Federal Republic of Germany

Act against Restraints of Competition of 27/7/57

Greece

Law 6069/34, amended by Law 112/36

Japan

Marine Transportation Law (Law No. 187, June 1, 1949)

Fair Trade Commission Notification No. 17 of 1959 on specific unfair business practices in the marine transportation industry

New Zealand

The Protection of British Shipping Act 1936 (No. 43 of 1936)
Trade Practices Act of 1958 (Law No. 110)

South Africa

Post Office Act (Law No. 44 of 1958)

United States of America

Shipping Act 1916*: United States Code Annotated*, Title 46, Sections 801 to 842

Code of Federal Regulations (1970), Title 46, Chapter IV, Parts 521, 522, 523, 524, 527, 528, 529, 530, 536, 537, 538

General Order 7 (Revised), 35 Federal Register (October 28, 1970), pp. 16679-16682

General Order 13 (Amendment 4), 35 Federal Register (April 21, 1970), p. 6394

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Chapter III

POSSIBLE METHODS FOR REGULATING CONFERENCES

87. As preceding chapters have shown, the activities of liner conferences are already subject to a good deal of regulation in some countries. This comprises self-regulation through the mechanism of conference agreements and regulation through statutes or official or quasi-official regulations in a number of countries. The evidence that these measures have failed to meet the needs of the situation is seen in the continuing complaints arising in non-maritime and some maritime countries concerning the activities and practices of liner conferences.[67] It is also seen in the recognition by the Governments of the countries of Western Europe and Japan, whose Ministers met at Tokyo early in 1971, that conferences can no longer be entirely left alone to regulate their own policies and practices without some governmental guidance in the public interest, which is provided in the decisions adopted, and some indication of governmental interference if difficulties should arise in the future.

88. Conferences operate internationally and the majority of them count among their members lines from more than one country. For these reasons, unilateral national regulation of conferences is not satisfactory, while self-regulation is not, by its nature, concerned with wider questions of public interest. Both self-regulation and national regulation concern themselves with similar subjects. However, whereas self-regulation is entirely concerned with preserving the integrity of the conferences, national regulation is concerned also with the wider public interest. International regulation would clearly have a similar coverage, but since it would be concerned with satisfying the needs of several parties in an international context, the precise requirements and scope of such regulation would clearly go beyond what any particular self-regulation or national regulation provides. In this chapter, the problem considered is not that of the scope and substance of regulations or the specific requirements of the regulation[68] but the methods by which regulation might be enforced.

89. The necessity of some form of international regulation having been recognized,[69] the problem arises of selecting the appropriate form and machinery for regulation. The regulation would have to satisfy the public interest of all countries in which conferences operate and to conform to practical commercial considerations, without also causing major jurisdictional conflicts between the national interests of various countries.

90. In a discussion of the question why international would be preferable to national regulation, another important consideration needs to be taken into account. Developing countries, and in particular smaller countries, may fear that unilateral regulation on their part may be countered by retaliatory measures by conferences or Governments (see section II, paras. 14-16 of the Tokyo decisions),[70] to the detriment of their trade, since obviously developing countries do not possess the economic power of countries such as the United States of America, which has legislated comprehensively on conference practices. Such fears would not arise in the case of international regulation. Nor would they arise if a group of developing countries introduced identical regulations, although such action might cause a clash of jurisdiction between the developing countries concerned and conferences operating from outside the regulated routes and with authorities of countries in which conferences maintain their headquarters.[71] Such action would be avoided if international regulation were instituted.

91. Any system of regulation adopted should satisfy several criteria:

(*a*) It should provide for the settlement of all disputes as quickly as is possible, in keeping with the gravity of the issues;

(*b*) The procedure for the settlement of disputes should be accessible to all parties without the need to incur expenditures in travelling or legal representation

[67] See also a statement made by a representative of the Federal Maritime Commission: "Experience has taught us that self-regulation among ocean carriers has not worked and that they and their customers suffered in the 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, 1 May 1970).

[68] These are considered in chapter IV below.

[69] The resolution of the UNCTAD Working Group on International Shipping Legislation and the Tokyo decisions clearly aim at the establishment of an international instrument for regulating conferences. The resolution of the Working Group (cited in para. 3 above) expresses the hope "that its work on conference practices will lead to the formulation of internationally acceptable appropriate rules of conduct for liner conferences ...", and the Tokyo decisions state that conferences "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" (in this connexion, see footnote 36 above). Normally, an international instrument is established by adoption of a convention or an agreement (see para. 109 below, in which this suggestion is made). As pointed out above, the Rochdale Report also aimed at achieving an international accord on a code of practice for conferences.

[70] The countries of the Consultative Shipping Group submitted to the Committee on Shipping a note (TD/B/C.4/L.73) giving an explanation of the thinking which underlies the Tokyo decisions. According to paragraph 4 of that note, "... it was not the aim of the Tokyo meeting to set up a systematic policy of retaliation".

[71] This was the case with the United States of America; see footnote 72 below.

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disproportionate to the importance of the matter involved;

(*c*) The procedure should be as economical and as simple as possible in terms of the permanent institutions and machinery to be established;

(*d*) It should be impartial, so that all parties can readily accept the decisions taken;

(*e*) Because of the international character of shipping, in cases where serious complaints are made, the adjudicating institution should be competent to establish internationally authoritative interpretations of the rules governing conference behaviour and precedents which can guide the settlement of future disputes.

92. There is a choice of various possible methods for the international regulation of conferences in the public interest. These are:

(*a*) The regulation of conferences by statute;

(*b*) International agreement on a code of practice, without provision for any regulatory administrative organization or regulatory machinery;

(*c*) The establishment of an international agency to regulate and police conferences;

(*d*) The international regulation of conferences with national control;

(*e*) The regulation of conferences through local and international arbitration.

These methods are discussed below.

A. The regulation of conferences by statute

93. The regulation of conferences by statute would necessitate prior agreement among the countries concerned as to whether the statutes to be enacted would regulate only the conferences having their headquarters in the legislating country, or whether the effects of the statutes could extend to the operations of conferences having their headquarters elsewhere, but serving the ports and trade of the countries proposing to enact regulations. There would be a risk of a growing number of jurisdictional disputes if there were a proliferation of regulatory statutes, and also a risk of a clash of national interests. There would also be the likelihood that the regulation of conference activities might be considered by many countries to favour the interests of the regulating country at the expense of other countries; this case would arise in particular where the regulating countries had large liner fleets.

94. At present, extensive unilateral statutory regulation of conferences exists only in the United States of America. The system there has drawn a certain amount of criticism from that country's trading partners, mainly those developed market-economy countries whose important shipping interests are affected. Disputes concerning jurisdictional control over the production in the United States of documents of conferences having their headquarters in foreign countries have also arisen from time to time.[72]

95. The amendments to the United States Shipping Act, 1916, introduced in 1961 provided for greater regulatory control by the Federal Maritime Commission. While there are no overt signs of trade having been disrupted in any way in consequence of stricter national regulation, it is yet to be seen whether this would still be the situation if other countries began to take equally effective measures for exercising statutory control over conference services touching their shores. It would be reasonable to expect that a proliferation of national statutory regulations covering identical or adjacent trades might lead in time to the establishment of some form of international co-operation, if not of regulation, if costly and commercially harmful conflicts were to be avoided. Whether international co-operation would, in fact, result, and how long it would take to achieve it, is debatable.

96. National statutory regulation fails to satisfy most of the criteria listed in paragraph 91 above. Most important, it fails to satisfy the criteria of impartiality and international acceptability. The courts of the regulating country could be expected to apply the relevant statute impartially, but since the national policy which inspired the statute would be guided by considerations of the interests of the country concerned, a foreign party to a dispute determined under the terms of the statute would probably feel it had not received a balanced hearing or fair treatment. Thus, the criterion of international acceptability would not be satisfied.

97. A proliferation of detailed national regulations to govern conference practices does not, therefore, appear to be a satisfactory future solution to the problem.[73]

B. International agreement on a code of practice, without provision for any regulatory administrative organization or regulatory machinery

98. Two approaches could be envisaged:

(*a*) Countries would agree on normative criteria, and on areas of regulation within which individual States could legislate;

(*b*) Countries would agree on normative criteria, and on areas of regulation, but would leave it to their respective shipowners to draft an agreed set of principles that would guide their future conduct, and the shipowners themselves would apply these principles (self-regulation).

The second of these approaches is to some extent exemplified in the proposals for a code of practice suggested in the Tokyo decisions of the Western European and Japanese Ministers.

99. There are two main difficulties with either of these approaches to a method of regulation. First, countries would not enter into identical commitments to legislate or to ensure that their shipowners did, in fact, draft an agreed set of principles. Second, there would be differing interpretations of the normative criteria, with the consequence that the regulation would be different in different countries.

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[72] The Federal Maritime Commission was faced with a number of jurisdictional problems in connexion with its investigation of rate disparities in the foreign trade (imports and exports) of the United States and in securing compliance with its orders issued to implement the shipping statutes, during the years 1964-1966.

[73] Nevertheless, if efforts to establish an international system of regulation fail, countries concerned may consider following the example of the United States of America by imposing national regulations (see foot-note 54 above).

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100. Further, it is unlikely that if the second approach were used the conferences would institute regulatory measures significantly different from those which exist today in most of the self-regulated conferences. Thus, whilst the Tokyo decisions provide for the reference of disputes concerning admission to conference membership to a separate panel of conciliators, there is no indication that other types of dispute would be referred to an impartial arbitral or other tribunal, nor that any arbitral award would be binding on the parties to the dispute. The Tokyo decisions also state that disputes between shipowners arising in the application of the code (for the settlement of which no conciliation or other machinery has so far been established, either within conferences or otherwise), would be referred to CENSA or to some other suitable body provided by the shipowners. The concept of a reference of all disputes to an impartial arbitral or other tribunal is thus conspicuously absent in the type of agreement which would presumably materialize if this approach were adopted. In these circumstances, international acceptability would not be secured and there would be no question of establishing precedents through the hearing of cases.

C. An international agency to regulate and police conferences

101. It was suggested at the third session of the Committee on Shipping that the present structure of shipping should be modified by the establishment of an international organization, based on the IATA model,[74] that would eventually replace the conference system by another one more consistent with present-day needs.[75] An almost similar approach, although less far-reaching, would be to establish an international organization which might be similar in nature to IATA, with powers to regulate freight rates and to police conferences.[76]

102. In implementing these suggestions, a practical problem would obviously be the cost and the size of the organization and of the secretariat required and the necessity for its representation in most major world ports and trading regions. A great number of decision-making committees to deal with a variety of conference matters would have to be instituted, given the multitude of the existing different types of conferences, covering different trade routes with different cargo mixes, each with its own characteristic problems. Competition by non-conference vessels is another relevant factor. The difficulties which, for example, IATA faces over air charter flights carrying only passengers would be multiplied in the case of liner conferences. The complexity of the shipping industry's operations would make this a very real problem. Judged in the light of criterion (*c*) in paragraph 91 above, the method would therefore appear to be both expensive and complex.

103. There is no precedent to support the idea that such a body would in practice adequately protect shipper interests. IATA, for example, is an association of carriers and any body concerned with liner shipping and modelled on IATA would, presumably, be similarly constituted. Also it would be difficult to ensure that the interests of small, and particularly of non-maritime, countries were adequately protected. Its impartiality, and hence the international acceptability of its rulings, would, therefore, be in question.

D. The international regulation of conferences with national control

104. This method of regulation could take the form of an international agreement or convention which would determine the matters to be regulated as specified in "internationally acceptable appropriate rules of conduct for liner conferences".[77]

105. Each Government would need to designate a department of the civil service to receive complaints and to forward them to the Government of the other party concerned. A corresponding procedure for receiving and processing complaints would have to be instituted by the Government receiving the complaint.

106. If a satisfactory solution to the problem could not be found, then the complaining Government could inform the UNCTAD Committee on Shipping of the facts of the case.

107. This procedure has the advantage that it would not require the establishment of a new international organization or secretariat. However, machinery for the processing of complaints is likely to be very slow, and it would be difficult to ensure that an uninterested Government receiving a complaint would pursue it energetically. In addition, the ultimate sanction for a breach of the rules would be publicity in the UNCTAD Committee on Shipping, which would not necessarily lead to any remedial action being taken.

108. This method likewise fails to satisfy the criteria set out in paragraph 91 above. It would not be simple,

[74] The International Air Transport Association (IATA) is a voluntary private international association of the operators of scheduled international air services incorporated as a non-profit-making corporation by special Act of the Canadian Parliament. It provides the framework for co-operation among airlines themselves and with individual Governments or groups of States in specific projects. It administers their efforts to standardize, simplify and unify practices and procedures wherever desirable in both technical and commercial fields. It conducts an international clearing house for the settlement of inter-line transactions and acts as the agent of the airlines in the publication of consolidated tariffs and other basic transport publications. It also administers the IATA traffic conferences, semi-autonomous bodies concerned with international rates and fares, conditions of carriage and agency matters, and enforces conference resolutions after they have been made effective by government approvals. See Sir W. P. Hildred, "International Air Transport Association", *United Nations Transport and Communications Review*, January/March 1952, vol. V, No. 1, p. 11, and W. W. Koffler, "IATA: its legal structure—a critical review", *Journal of Air Law and Commerce*, Dallas, Texas (1966), p. 222.

[75] See *Official Records of the Trade and Development Board, Ninth Session, Supplement No. 3* (TD/B/240), para. 46. See also *Port Administration and Legislation Handbook* (United Nations publication, Sales No.: E.69.VIII.2), p. 69.

[76] Agreed rates would still be subject to the approval of national (governmental) authorities or regulatory agencies, as is the case with IATA.

[77] See the report of the Working Group on International Shipping Legislation on its second session, in *Official Records of the Trade and Development Board, Eleventh Session, Supplement No. 3* (TD/B/347), annex VI, appendix I, sect. B.

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although the costs to the shipper would be relatively low, since legal or arbitration fees would not be involved. Further, the non-co-operation of a Government in administering this method would prejudice its success, in the same way as a Government's known or alleged partiality towards a particular policy on conference practices would seriously imperil the principle of impartiality. Any suspicion of partiality would in turn affect the value of any of the decisions of such Governments in terms of their international acceptability or for citation as precedents. The main disadvantages of this method, however, would be its failure to ensure the prompt settlement of disputes and the possibility that complainants might allege that it did not ensure impartiality.

E. The regulation of conferences through local and international arbitration [78]

109. This method of regulation could take the form of an international agreement or convention which would specify the matters to be regulated as specified in "internationally acceptable appropriate rules of conduct for liner conferences". Once such a convention or agreement had been concluded, the actual functioning of the regulatory machinery might have two distinct aspects.

110. It was suggested in paragraph 91 above that expenditure and ease of access to a tribunal for the purpose of lodging or contesting a complaint should be in keeping with the magnitude of the problem. It would be wasteful to set in motion costly international adjudication machinery to deal with relatively minor disputes which could, in most cases, be disposed of at nominal cost through much simpler local arbitration procedures.

[78] Arbitration is the examination and decision of a matter in dispute, not by a court of law, but by persons who are expert in the matter in dispute, called arbitrators, selected in a manner provided by law or agreement between the parties. An agreement to refer a dispute to arbitration is called an "arbitration agreement", which means a agreement in writing to refer present or future differences to arbitration, whether an arbitrator is named therein or not. A submission is irrevocable except by leave of the court or a judge. In principle, parties may refer to arbitration all rights of which they have free disposition. This may be done either by each party appointing an arbitrator, with an umpire added as a third member if the arbitrators fail to agree, or by the two parties initially agreeing on the appointment of a single umpire. The decision by the arbitrators is called an award. It is admitted in all countries that the decision in the dispute can be made in arbitration proceedings without any control of the arbitral award by the courts. Usually, in practice, in commercial arbitration, the two parties who have referred a dispute to arbitration accept the arbitral award and thus avoid litigation.

A summary of arbitral rules or statutes, national, international and binational, will be found in the document entitled "Final version of the Handbook of national and international institutions active in the field of international commercial arbitration" published by the United Nations Economic Commission for Europe (TRADE/WPl/15/Rev.1, vols. I-V). See also *International Commercial Arbitration/Arbitrage international commercial*, published by Union Internationale des Avocats (Paris, Dalloz et Sirey, 1956), 2 vols. See in addition *Commercial Arbitration and the Law throughout the World/L'arbitrage commercial et la loi dans différents pays* (supplement No. 3), published by the International Chamber of Commerce (Basle, 1964).

111. Accordingly, there could first be provision for the arbitration of relatively minor disputes at a local level, in the country in which the complaint is raised. Second, international arbitration might be provided to deal with major disputes, the arbitration machinery being serviced with the aid of the services of an existing international secretariat.

112. A formula would have to be devised to distinguish between the type of dispute or complaints which would be amenable to investigation and settlement through locally appointed arbitrators and those which might be considered serious enough to be heard by an international tribunal. Such a classification would ensure that relatively minor complaints would be settled at lower tiers of arbitration at nominal cost and would not clog the case lists of the higher tier, which would deal only with the more serious matters and where costs would inevitably be higher, commensurate with the importance of the issues at stake.

113. Most complaints against conference practices relate to:

(*a*) Freight rates:
- (i) General increases of freight rates;
- (ii) The fixing of specific freight rates;
- (iii) Promotional freight rates;

(*b*) The participation and share of national lines:
- (i) Entry into conferences covering national trades;
- (ii) Entry into the way-port trades of conferences covering national trades;
- (iii) The share in main and way-port trades;

(*c*) Unfair clauses in loyalty agreements and imbalance in obligations as between shippers and shipowners;

(*d*) The inadequacy of a service, e.g. failure to serve a particular port or range of ports;

(*e*) The quality of a service, particularly the suitability of vessels and their costs of operation;

(*f*) The unreasonable withholding of dispensation to use non-conference vessels.

114. Not all these complaints can be considered as important enough or suitable for international adjudication. Shippers would be interested, in one way or another, in all the causes of complaint enumerated in paragraph 113, with the possible exception of the participation and share of national lines in the conference.[79] In practice, however, their principal grievances would concern short-term problems. These would include securing dispensation to use non-conference vessels, the negotiation of a specific freight rate or promotional freight rate, the failure to obtain a promotional freight rate or the failure of the conference to accept a specific cargo and other relatively minor problems which could be suitable for settlement at a local, easily accessible and relatively less costly level of arbitration. Questions of the quality and adequacy of services, being related closely to the nature and volume of cargo moving over a route, would also be more suitable for local arbitration in the first instance. In the case of disputes relating to such

[79] That is, unless some special interest of theirs was affected by their patronage of national flag vessels, e.g. the currency of freight payment.

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matters, however, because of their importance, reference from local to international arbitration might be envisaged.

115. Governments, on the other hand, while also undoubtedly interested in all the subjects mentioned in paragraph 113, would principally concern themselves with those which affected the national or public interest. These subjects would be those which raise broad issues affecting the national economy, such as general increases in the level of freight rates, the share of national lines in the conference trades and inordinately restrictive loyalty agreements. Governments would not usually interest themselves in any of the remaining subjects listed in paragraph 113, unless the circumstances of a particular case raised national or international issues, as might be the case with questions related to the quality and adequacy of service.

116. There are, therefore, two types of complaint: (*a*) relatively minor complaints on which a speedy hearing of the cases of the two sides and an adjudication are essential, and (*b*) major complaints which relate to the broad issues of conference policies and practices and an internationally authoritative settlement of which, arrived at without undue delay, is more important than speedy settlement. Questions relating to the quality and adequacy of service are not minor in nature but are probably best dealt with, in the first instance, at the local level.

117. To turn now to the machinery of adjudication, the paramount consideration must be impartiality and procedural simplicity to ensure the expeditious settlement of disputes on practical business lines. In the shipping industry, the use of arbitration for the settlement of disputes is a long-established practice. Not uncommonly, the decision of a single umpire in respect of disputes involving large sums of money is accepted as binding by parties residing in different countries. It seems appropriate, therefore, that the well-tried procedures at present in use in the shipping world should be applied to the regulation of conferences, although suitably extended to provide for international arbitration in respect of major disputes concerning the observance of provisions of an internationally agreed set of regulatory criteria and to be applied to complaints against a conference as a body rather than to complaints against individual shipping lines.

118. The procedure that might be adopted for the arbitration of relatively minor disputes could conveniently provide for a reference to two arbitrators in the country where the complaint arose, one appointed by the conference and the other by the shipper or shippers' council or other complainant, as appropriate. If these arbitrators disagreed, recourse could be had to a third impartial person as umpire. If either party refused to agree to the appointment of an umpire, the appeal could then, on representation by the appellant party, be heard by an umpire appointed by the Government of the country where the complaint arose, after both parties to the dispute had been consulted. Alternatively, both parties might jointly agree in the first instance upon a single arbitrator, whose decision would be final. The administrative services for local arbitrators could be provided jointly by the conference and shippers' councils or other organization representing shippers' interests.

119. Local arbitrators appointed in this way could deal with disputes concerning short-term or relatively minor problems, for example:[80]

(*a*) Failure of conferences to give dispensation;

(*b*) Disputes over the level of specific or promotional freight rates, the latter relating to non-traditional exports;

(*c*) Failure of conferences to accept specific cargo;

(*d*) Quality and adequacy of services.

120. The special circumstances of a particular case might conceivably be such that a relatively minor dispute became a relatively major one, and this would be particularly likely to happen where disputes concerned the quality and adequacy of services. It is suggested, therefore, that the result of any dispute arbitrated at the local level, which in the opinion of the Government of the country of nationality of either party to the dispute raised important international, national or public issues, might, if that Government so desired, be referred on appeal to international arbitration.

121. Major complaints, i.e. complaints relating to:

(*a*) Refusal of entry of national lines to conferences covering the national trade, entry into way-port conferences, or adequate cargo share of trade,

(*b*) Pooling,

(*c*) Unfair or discriminatory conference agreements,

(*d*) Improper loyalty agreements,

(*e*) Levels of freight rates and general increases,

(*f*) Surcharges (to cover general increases in costs or loss of revenue),

(*g*) Changes in foreign exchange rates (devaluation, revaluation of floating currencies) leading to changes in freight rates or to surcharges,

(*h*) Failure to observe proper procedures,

should be dealt with at an international level. The international adjudication of such complaints would be particularly important, since the decisions could, in this way, form a body of "case-law" which would be cited in subsequent cases relating to the same route or to other routes.

122. An existing international organization could be authorized to appoint and to maintain a panel of arbitrators drawn from the ranks of internationally known and respected persons knowledgeable in shipping matters. In a dispute requiring a unanimous decision, each party could select one person from the panel, not of the party's nationality. If the arbitrators failed to make a unanimous award, it should be mandatory upon the parties to the dispute, or on the arbitrators, to appoint a sole arbitrator or umpire, also from the panel, whose decision would be final and binding on the two parties to the dispute. In the case of disputes requiring a majority decision, the disputing parties, or their arbitrators by agreement, should appoint a third arbitrator. The administrative services of the international arbitration machinery could be provided by the secretariat of the international organization designated to administer the arbitration convention or agreement.

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[80] This list of problems is not meant to be exhaustive but is merely illustrative of the types of issues which are frequently raised by shippers with member lines or with local conference representatives in most countries.

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123. To assist the arbitrators in the conduct of their arbitration at both the local and international levels, rules of guidance, procedure and practice should be provided. These rules would specify the factors to be taken into account by arbitrators in deciding cases, contain provisions concerning the assessment of damages for the various types of claims and the apportionment of costs, and designate the types of cases which would require unanimous decision and those which would require majority decisions to become binding.

124. The question of the desirability of treating the decisions of arbitrators in matters relating to a particular conference as precedents needs special mention. Ordinarily, the awards of commercial arbitrators determine only the particular issues to which they relate and are decisive solely between the parties to a particular dispute. They have no general application and do not, in most jurisdictions, usually possess any status as precedents in the legal sense of leading judicial decisions. In several legal systems, a losing party in an arbitration case has the right to appeal to a higher arbitral tribunal or to the Courts of Appeal for the final determination of his case.

125. In the scheme being discussed here, however, the international arbitration would be final, and there would be no right of appeal to a superior body. It would be necessary, therefore, to ensure that the decisions resulting from international arbitration could form precedents in the legal sense and that they would be binding on the parties to the dispute. In order to ensure that, where appropriate, arbitral awards at the international level could be cited as precedents, it would be necessary that appropriate provision to that effect be made in the international convention or agreement establishing the arbitration procedure and in the national legislation that would incorporate its terms. As the number of hearings increased and decisions were reported, a body of "jurisprudence" would be built up and come in time to constitute precedents backed by the authority of the agreement or convention and of the statutory enactment.

126. It is evident that this method satisfies all the criteria set out in paragraph 91 above. With regard to criterion (*a*), the need for a settlement of disputes with a speed in keeping with the gravity of the dispute, the use of local arbitrators and umpires for minor disputes would clearly meet the need. The criterion of accessibility (*b*) would also be satisfied, since only major disputes would be settled outside the area where the disputes arose. The requirements of relative economy and simplicity would likewise be fulfilled by this system, since the machinery could be serviced by an existing international secretariat. The personal distinction of the members of the roster from which arbitrators would be selected, and the method of selection and appointment of the arbitrators for each dispute, would ensure impartiality. Lastly, the arbitral awards, in that they would emanate from international arbitration proceedings where the arbitrators in each case were not of the same nationality as either party to a dispute, would ensure impartiality and international acceptability and would be internationally known and respected. In this way, precedents would be established under the authority of the international convention or agreement and the appropriate statutes.

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Chapter IV

RULES OF CONDUCT (CODE) FOR LINER CONFERENCES [81]

A. Introduction

127. To be internationally acceptable, any set of rules (a code) must satisfy two conditions. First, it must cover all those aspects of conference agreements and practices which are contentious or felt by shippers or Governments to be arbitrary and restrictive. Second, it must contain clear provisions for its implementation.

128. Before discussing these two conditions, it will be useful to consider briefly how such internationally acceptable rules may be arrived at. Clearly, this can only be done in an international forum. While preliminary and preparatory work can be carried out and draft rules of the code can be prepared in bodies such as the Working Group on International Shipping Legislation and at the third session of the United Nations Conference on Trade and Development, the final preparation and adoption of a code calls for a special forum. This would best be provided by a conference of plenipotentiaries convened by the Secretary-General of the United Nations, which would prepare a final agreement or convention containing the necessary rules.[82]

[81] Although in this chapter the matters which an internationally acceptable set of rules (code) of conduct for liner conferences should cover, including the possible substance of each rule subject by subject (as listed in para. 129 below), are considered, as well as implementation provisions, no attempt is made to:

(*a*) Suggest the content and form of the introductory part of the code, which would state *inter alia* the broad objectives and general principles of the rules (code), or the nature of the final clauses covering e.g. entry into force, procedures for amendments, etc.;

(*b*) Specify all the administrative procedures involved in arbitration;

(*c*) Provide a model conference agreement, even though it is suggested that such a model agreement should be an integral part of the code.

[82] This procedure has a precedent in UNCTAD. At the first session of the United Nations Conference on Trade and Development, which met in March/June 1964, eight "Principles Relating to Transit Trade of Land-locked Countries" were adopted (see *Proceedings of the United Nations Conference on Trade and Development*, vol. I, *Final Act and Report* (United Nations publication, Sales No.: 64.II.B.11), annex A.I.2). The Conference also recommended that the United Nations request the Secretary-General of the United Nations to appoint a committee of twenty-four members to be convened during 1964 in order to prepare a draft convention on the subject, and that the United Nations should decide to convene a conference of plenipotentiaries in the middle of 1965, for consideration of the draft and adoption of the convention (*ibid.*, annex A.VI.1). The General Assembly of the United Nations on 10 February 1965 approved the convening of an international conference of plenipotentiaries for the adoption of the draft Convention on Transit Trade of Land-locked Countries (see *Official Records of the General Assembly, Nineteenth Session, Supplement No. 15* (A/5815), p. 9). The United Nations Conference on Transit Trade of Land-locked Countries met in June/July 1965 and adopted the Convention on Transit Trade of Land-locked States on 8 July 1965 (United Nations, *Treaty Series*, vol. 597 (1967), No. 8641). The Convention came into force on 9 June 1967.

129. The subjects which need to be covered by the set of rules, if they are to fulfil the two conditions stated in paragraph 127 above, are:

Relations between member lines:

(*a*) Membership;
(*b*) Share of trade;
(*c*) Pooling;
(*d*) Sanctions;
(*e*) Self-policing;
(*f*) Publication of conference agreements;
(*g*) Contents of conference agreements;

Relations with shippers:

(*a*) Loyalty arrangements;
(*b*) Dispensation;
(*c*) Publication of tariffs and related regulations;
(*d*) Consultation machinery;
(*e*) Representation;

Freight rates:

(*a*) General freight rate increases;
(*b*) Specific freight rates;
(*c*) Promotional freight rates;
(*d*) Surcharges;
(*e*) Currencies—devaluation, revaluation, rates of exchange, floating currencies;

Other matters:

(*a*) Outside competition;
(*b*) Averaging of freight rates;
(*c*) Quality of service;
(*d*) Adequacy of service.

Provision and machinery for implementation

The subjects listed above are dealt with in the paragraphs which follow. For each subject, a concise statement of the problem involved is given, followed by suggestions as to how the problem as stated might be solved.

B. Relations between member lines

1. Membership [83]

(a) *The problem*

130. Closed conferences are often unwilling to admit new members to participate in the trade on equal terms

[83] See the UNCTAD secretariat's report *The liner conference system*, paras. 76-113, for a full discussion of problems related to this subject.

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with existing members, on the plea that the trade would be over-tonnaged as a result. However, the judgement as to whether the admission of a new member will have this result rests solely with existing members, who may as a consequence face a conflict between preserving their own trade shares and following a liberal policy on admission. Where admission is refused, at present conferences do not have to state their reasons in detail, and their decisions are not open to appeal by the unsuccessful applicant.

(b) *Suggested solution*

131. Membership of any conference should be open to lines of any of the countries whose trade, including way-port trades covered by that conference, is carried by the conference, and in accordance with provisions for allocating trade shares indicated below (para. 134), provided that the line furnishes evidence of its ability and intention to institute and maintain a regular service between the ports concerned.

132. Where lines of countries none of whose trade is carried by the conference concerned are refused entry, the full grounds for such refusal should be given to the applicant, who should have the right of appeal to international arbitration against the conference decision.

2. Share of trade [84]

(a) *The problem*

133. When new lines are admitted to conferences, the trade shares allocated to them are determined by the existing members, without any reasons for the decisions being given; frequently those shares are relatively small and there is no built-in provision for future growth. The usual refusal to allow new lines which have joined a conference to participate in "way-port trades" [85] hinders the economic operations of those lines.

(b) *Suggested solution*

134. Any line admitted to a conference should have a share of any cargo or revenue pool, or, in the absence of a pool, should have berthing or sailing rights, such that within an agreed and defined time period:

(*a*) Where no third-flag carriers participate in the trade, the over-all share of the lines of the flag of each of the trading partners should be equal; and

(*b*) Where one or more third-flag carriers participate in the trade, the share of those carriers should be at least 20 per cent of the total trade, the balance being equally divided among the flags of the lines of the trading partners, as provided under (*a*) above.

135. The agreement between the lines regarding the shares of the pool or of the sailing rights should be deposited with the international organization concerned (see para. 232 below) and be available to Governments concerned but should not be open for public inspection. Any member dissatisfied with its share of the pool should have a right to appeal to international arbitration on the matter.

[84] For a full discussion of problems related to this subject, *ibid.*, paras. 303-310.

[85] For a definition of way-port trades, *ibid.*, paras. 407-422.

3. Pooling [86]

(a) *The problem*

136. Shares of member lines in pools, and the basis on which they are determined, are secret. New lines admitted to the pool frequently receive allotments of small shares, with no provision for an escalation of the share. Penalties for over-carrying are frequently so heavy that ships with empty space leave cargo behind, so as not to over-carry. According to the nature of the pool, low-rated cargoes are particularly likely to be left behind to avoid over-carrying. Changes in pool shares over time are subject to negotiation among the pool members, and persistent under-carrying or over-carrying are not generally regarded as grounds for changing shares. Hence, a line which is efficient in canvassing for cargo, or is favoured by shippers, cannot automatically expand its share of the trade, while the inefficient line is not spurred by automatically falling pool shares to improve its performance.

137. Co-operation between the shippers and the conference is necessary if pooling is to be advantageous for both parties. This presupposes not only the existence of machinery for assessing the demand for space and the establishment of adequate liaison between the two parties, but also the establishment of adequate consultation machinery which would enable the shippers to satisfy themselves that the benefits of rationalization were shared equally between the conference members and the shippers.

(b) *Suggested solution*

138. Pooling agreements should be registered with the international organization concerned and be available to the Governments whose nationals are affected by the conference services to which the arrangements relate, but the agreements should not be open to public inspection.

139. Pool shares should be reviewed at two-year intervals, and new shares should be based on the performance of the individual lines, but subject to the provisions regarding cargo-sharing among national flag groups set out in paragraph 134 above.

140. A specific responsibility should be assumed by the conference for ensuring that cargo which has been shut out by a line, for any reason other than late presentation by the shipper, is lifted by the next available sailing, or at the latest within fourteen days. To prevent cargo being left behind, provision should be made for dispensation to a line to lift cargo, even in excess of its pool share, if otherwise the cargo would be shut out and delayed by fourteen days or more. If, despite this provision, cargo is shut out and the conference cannot guarantee its lifting within fourteen days, the shipper of that cargo should automatically be exempt from the loyalty provisions of the conference.

141. Any member line dissatisfied with its share of the pool should have a right to appeal to international arbitration on the matter.

142. Through consultation between shippers and the conferences, the demand for shipping space should be

[86] For a full discussion of problems related to this subject, *ibid.*, paras. 273-335.

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kept under continuous review and the supply of shipping adjusted accordingly.

143. Regular meetings between the conferences and the shippers should be held in all services where sailings have been rationalized, to ensure that the benefits of rationalization are shared equitably between the conference members and the shippers.

4. Sanctions [87]

(a) *The problem*

144. Sanctions against member lines who may wish to secure their release from the terms of the conference agreement include fines or forfeiture of "performance bonds". These sanctions are unduly punitive.

(b) *Suggested solution*

145. Conference members should be entitled to secure their release from the terms of the conference agreement after ninety days' notice, without incurring any punitive sanctions, although they may be required to pay a nominal severance charge to the conference to cover any cost or inconvenience which their withdrawal imposes on the conference. Any line which considers that the severance charge is excessive should have the right of appeal to local arbitration.

5. Self-policing [88]

(a) *The problem*

146. Conferences adopt varying approaches for identifying and policing malpractices, i.e. breaches of conference agreements by their members. The fact that most practices of self-regulated conferences are kept highly confidential makes it difficult to identify all the types of acts or omissions that are considered to be malpractices in various conferences or the degree of importance given to their prevention, detection and adjudication.

147. A number of devices employed "to effect malpractice" in some of the foreign trade routes of the United States of America were enumerated during the Celler Committee's Congressional hearings.[89] Some of these devices include:

(*a*) Retaliation against shippers by resort to discriminatory or unfair methods;

(*b*) Undue or unreasonable preference for or discrimination against shippers, e.g. in absorbing inland charges, in the provision of space, and illegal rebating;

(*c*) Payment of cash to clients;

(*d*) Issuance of correction notices (with no copies to the conference), reducing the measurement or the weight of the shipment, or the freight rate;

(*e*) Free ocean trips for the client, his family or his friends;

(*f*) Financing of trips abroad for the client or members of his family;

(*g*) Lavish entertainment;

(*h*) Establishment of credit at a night-club or bar for the client;

(*i*) Expensive gifts, such as a new car, jewels, radios, television sets, refrigerators, a house or expensive curios;

(*j*) Establishment of a pension for the client for a given time;

(*k*) Payment for the education of the client's child or children at a boarding school or college;

(*l*) Gifts of stocks or bonds, either of the steamship line involved or purchased from an investment house or other corporation;

(*m*) Purchase of land for the client;

(*n*) Establishment of credit at a grocery, meat or provision store;

(*o*) Purchasing of supplies manufactured by the client which can be used on board ships, etc., at prices above competitive levels.

148. It was mentioned in the hearings that this list was "far from exhaustive" and instances were also cited of malpractices said to have been perpetrated by some shipping lines to circumvent the foreign exchange regulations of certain countries, involving the issuance of false bills of lading.

149. The uncertainties as to the range and incidence of malpractices make it extremely difficult to evaluate the efficiency and impartiality of conference self-policing procedures. If the conferences' self-policing methods are lax or ineffective, it is self-evident that the very foundation of their own avowed *raison d'être* is undermined.[90]

(b) *Suggested solution*

150. Conferences should adopt a standard and comprehensive list of practices which are regarded as breaches of the conference agreement and should provide effective self-policing machinery to deal with malpractices, with specific provisions requiring:

(*a*) The fixing of maximum penalties for the designated offences, to be commensurate with their seriousness;

(*b*) The establishment of machinery for the examination and impartial adjudication of complaints against malpractices by a person or body unconnected with any of the conference member lines or affiliates;

(*c*) The reporting on the disposition of complaints against malpractices to Governments whose shipping and trade are involved and to the international organization concerned.

6. Publication of conference agreements [91]

(a) *The problem*

151. The conference agreements of practically all self-regulated conferences are kept confidential. In the case of some publicly regulated conferences, the agreement must

[87] For a discussion related to this subject, *ibid.*, paras. 47 and 103.

[88] For a full discussion of problems related to this subject, *ibid.*, paras. 21 and 45-48.

[89] See United States of America, *Index to the Legislative History of the Steamship Conference—Dual Rate Law* (Washington, D.C., Government Printing Office, 1962), p. 303.

[90] "These contractual breaches cannot be lightly ignored by the conference members, since they threaten the very existence of a conference. Obviously a cartel can be effective only to the extent to which its members live up to their agreement" (see United States of America, *The Ocean Freight Industry: Report of the Antitrust Subcommittee* (Subcommittee No. 5) of the Committee on the Judiciary, p. 303).

[91] See *The liner conference system*, para. 42, for a discussion of problems related to this subject.

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be submitted to a government agency for approval. In others, it has to be submitted to the Government for registration and filing. It is vital that documents of such importance to the users of conference services and to the public interest should always be made available for inspection by the Governments concerned, shippers and the public.

(b) *Suggested solution*

152. All conference agreements and amendments thereto, but not pooling agreements, should be registered with the international organization concerned and be open to inspection by the public. The international organization concerned or any member of the conference should have the right to refer any agreement to international arbitration if it considers it to be *a priori* unfair or discriminatory, in the light of the code.

7. Contents of conference agreements [92]

(a) *The problem*

153. Conference agreements differ considerably in scope and content, having regard to each conference's historical background, practices and the varying requirements of the legal régimes within which they operate. Thus, conference agreements governing different services affecting one particular country may differ markedly, according to the extent to which they are subject to regulation by the legal systems of other countries served. Such diversity is confusing to Governments and to the users of conference services. Clearly, the agreements should be made as uniform as practicable in all countries.[93]

(b) *Suggested solution*

154. Conference agreements should conform to a uniform model text, subject to such changes as may be necessitated by the demands of a particular service. Each agreement should incorporate in its provisions the terms of the international convention or agreement on a code of conduct for the liner conference system, either through a paramount clause or by specific incorporation of the text of the convention or agreement. A uniform model text should be annexed to, and be considered as an integral part of, the convention or agreement.

C. Relations with shippers

1. Loyalty arrangements [94]

(a) *The problem*

155. There are three forms of loyalty tie in operation. The first is the deferred-rebate system, the second is the contract system and the third is the dual-rate contract (see paras. 156, 157 and 158 below, respectively).

156. Under the deferred-rebate system, a shipper who utilizes exclusively the vessels of the member lines of the conference for the 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 initially charged at the full freight rate, but is entitled to receive a deferred 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 during both the shipment period and the deferment period. The reward for loyalty in the past is thus made conditional upon continuing loyalty in the future. The rebate is not a legal right which the shipper has, since there is no contract covering its payment. Because freight is initially billed at the full rate, shippers who are not the owners of goods support the system, since they in turn are able to charge their customers at the full freight rate and afterwards receive the rebate, which is not passed back to the owners of the goods shipped. Shippers consider the system unduly restrictive and the penalty for breach—loss of rebates earned during both the shipment period and the deferment period—excessive. Conferences do not ordinarily permit shippers to cease to patronise the conference, even by giving advance notice, without losing their accumulated rebates.

157. The second form is the contract system. In many trades, excluding in this connexion trades to and from the United States, this system is offered to shippers as an alternative to the deferred-rebate system. Under the contract system, the carriers offer an immediate discount to those shippers who sign a contract to the effect that they agree to give their entire support to the conference carriers. In some trades, instead of a discount, shippers who sign such a contract are offered a "contract rate", that is, a rate lower than that charged to the non-contract shippers. In the case of the breach of a contract of either type (i.e. in the case of shipment by non-conference lines), the shipper is liable to pay as liquidated damages a sum which may amount to as much as two-thirds of the freight (excluding transhipment additionals) which would have been payable to the conference lines if the goods concerned had been carried by them. The conference may suspend the shippers' entitlement to the discount, provided that the period of suspension of entitlement to the discount does not exceed a total of six months or continue after the discharge by the shipper of all liability to the carriers consequential upon the breach of the contract.

158. The third form of loyalty arrangement is the dual-rate contract. Under this contract, the full rate is charged to shippers who do not sign an exclusive patronage contract with the conference lines, and a lower rate to shippers who do sign such a contract. In the case of a breach of contract (i.e. shipment by non-conference lines), the shipper is normally liable to the conference only for the freight which would have been payable on the shipment concerned at the full rate.

159. Under all three forms of loyalty tie, the difference between the rates charged to loyal and non-loyal shippers

[92] For a full discussion of problems related to this subject, *ibid.*, paras. 41-50.

[93] The drafting of model conference agreements is not attempted in this report. However, the present chapter contains many of the elements which would clearly be needed to guide the drafting of such a model agreement. The attention of the Working Group on International Shipping Legislation and UNCTAD is drawn to the texts of the agreements and draft agreements reproduced in *The liner conference system*, annexes IX, X and XI.

[94] See *The liner conference system*, paras. 114-155, for a full discussion of problems related to this subject.

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is not identical in all trades. The difference between the rates is sometimes varied, or additional discounts are granted as a means of restricting outside competition. Thus, the loyalty discounts are increased as an added inducement to loyal shippers to remain loyal when there is a threat of non-conference competition and lowered again when the threat of such competition disappears. This appears to be a misuse of the system.

160. In many trades, a loyal shipper can be held in breach of the loyalty arrangements for shipments made on ex-works, f.o.b., or f.a.s. terms which he does not control and also for shipments of bulk cargoes which do not ordinarily move on liners.

(b) *Suggested solution*

161. Loyalty arrangements should be based only on the dual-rate contract system which provides for a lower freight rate to be charged to shippers who sign the contract of exclusivity with a conference.

162. The difference between the contract and the non-contract rates should be a fixed percentage of the non-contract rate and should be variable only on ninety days' notice to shippers, provided that, if a reduction of the differential is proposed, the same procedure and time limits as for rate increases should be observed.

163. The percentage difference between the two rates in any conference should lie within a fixed range of percentages of the non-contract rate.

164. The contract should contain a number of safeguards making explicit the contractual rights of shippers and conference lines, viz.:

(*a*) The shipper should be bound only in respect of cargo whose routing he controls according to the terms of the contract of sale;

(*b*) Liquidated damages to be paid by the shipper if he breaks the terms of the contract should not exceed the freight charges computed at the contract rate on the particular shipment, less the cost of handling;

(*c*) A shipper who has broken his contract should be immediately entitled to resume full loyalty status after payment of liquidated damages;

(*d*) The contract should not apply to any cargo of the contract shippers which is loaded and carried in bulk without mark or count, or to any cargo carried in merchant-owned vessels or merchant-chartered vessels where the term of charter is for six months or longer.

2. Dispensation [95]

(a) *The problem*

165. Conferences do not always grant dispensation to loyal shippers to use non-conference vessels, even when conference vessels are unavailable, without jeopardy to the rebates or lower contract rates which shippers enjoy as a result of their loyalty. Shippers are thus deprived of shipping opportunities and complain that they lose markets or sustain other losses as a result of their inability to secure timely shipment of cargoes. Where dispensation is granted, the procedure is often so slow that the non-conference shipping opportunity in question is lost.

[95] For a full discussion of problems related to this subject, *ibid.*, paras. 360-363.

(b) *Suggested solution*

166. Conferences should provide machinery for requests for dispensation to be examined and a decision given quickly. Should the conference fail to confirm requested space within three business days of such a request on a vessel scheduled to sail within fourteen days of the date of the request, the shipper should have the right, without being penalized, to utilize any vessel he chooses for the cargo in question.

167. There should be a provision in conference agreements and in loyalty agreements to the effect that dispensation should not be unreasonably withheld, and that reasons for its withholding should be given in writing to the shipper by the conference secretariat. Any shipper who considers that dispensation has been unreasonably withheld should have the right of appeal to local arbitration and, if his appeal is upheld, be entitled to the award of damages against the conference of an amount determined by the local arbitration procedure.

3. Publication of tariffs and related regulations [96]

(a) *The problem*

168. Many self-regulated conferences do not publish their tariffs and related regulations. As a consequence, considerable difficulties arise for shippers who require the tariffs in order to be able to provide freight rate information promptly to their customers without having to inquire from one of the lines or the conference secretariat in each case, or who need the information in order to work out freight charges on a shipment themselves for the purpose of deciding whether to enter into a contract on a c.i.f. or f.o.b. basis, or of verifying that the correct freight charges are being claimed by the lines. General conditions regarding the application of freight rates and conditions relating to particular loading and unloading areas or to specific cargoes may not be included in the tariff.

(b) *Suggested solution*

169. Tariffs and related regulations and any amendments thereto should be published and made available to all shippers and their councils at reasonable cost. The related regulations should spell out all conditions relating to the application of freight rates, to specified loading and unloading areas and to the carriage of specific cargoes.

4. Consultation machinery [97]

(a) *The problem*

170. There has been widespread interest in recent years in the establishment of effective consultation machinery,

[96] For a full discussion of problems related to this subject, *ibid.*, paras. 181-188.

[97] See the second report by the UNCTAD secretariat on consultation in shipping (TD/B/C.4/78 and Corr. 1 and 2 and Add. 1 and 2) for a discussion of problems related to this subject. See also *Consultation in shipping* for an earlier discussion of problems related to this subject.

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in order that shipowners and shippers can meet to discuss their needs and interests. Unilateral action by shipping conferences, even when acting with the most genuine desire to assist the trades they are serving, leads to misunderstanding, while the taking of decisions at a headquarters remote from the countries of export or import gives the impression that the interests of shippers, importers and the national interest are ignored.[98] In an industry such as shipping, where both the trader and the shipowner depend on each other so closely, consultation at all stages of decision-making and on all matters is essential.

171. Most shippers also complain that consultation machinery, in those countries where it exists, does not go far enough. They complain that such consultation machinery as exists does not provide for the discussion and negotiation of all the subjects of common concern in which shippers and importers are interested.[99] The complaint relates particularly to those subjects on which conferences are most prone to take unilateral action, such as the determination of freight rates. In developing countries, the involvement of the government representatives in consultation is usually necessary in order to protect the interests of importers on c.i.f. terms and exporters on f.o.b. terms who have no contractual relationship with the shipping lines, and also to protect the interests of small shippers and consumers generally.

(b) *Suggested solution*

172. Consultation machinery should make provision for appeal against conference decisions.

173. Conferences should maintain in the countries served by their vessels full-time conference representatives or committees having powers to negotiate with shippers and to make decisions in all important matters of common interest to themselves and shippers, such as applications for reduction of freight rates, the adoption of promotional freight rates, or space reservation, but within the limits specified in paragraph 177 below.

174. Conferences should submit annually to independent chartered accountants, acceptable to shippers, full information about their costs and revenues. An analysis furnished by the accountants should be made available to shippers and to Governments concerned at regular intervals and also when changes in freight tariffs are proposed.

175. Conferences should submit annually to the Governments of the countries whose trade is served detailed reports on their activities, e.g. consultations held with shippers, disposition of complaints, changes in membership, major changes in services, changes in tariffs, conditions of carriage.

176. Government representatives should participate in consultation procedures.

177. Conferences should consult with shippers before taking decisions on any matters which affect them, including, *inter alia:*

(*a*) Changes in general tariff conditions and related regulations;

(*b*) Freight rates: the fixing of specific rates, changes in general or in particular freight rates, the imposition of surcharges, promotional freight rates, classification of ports;

(*c*) Shippers' loyalty arrangements and conditions of carriage;

(*d*) Operation of cargo inspection services;

(*e*) Changes in loading and discharging areas;

(*f*) Reduction of conventional service or loss of direct services as a consequence of unitization;

(*g*) Adequacy of shipping services;

(*h*) Quality of shipping services.

5. Representation[100]

(a) *The problem*

178. In taking decisions on freight rates and other matters, conference committees do not normally invite merchant or shipper interests to appear before them in order to assist the decision-making process.

179. Conference representation in most ports usually takes the form of the appointment of a shipping agent, who has authority only to book cargo and quote tariff rates, but no power of decision in any other matter.

(b) *Suggested solution*

180. Conferences should provide shipper and merchant interests with an opportunity to appear, or be represented, before committees taking decisions on changes in freight rates, frequency of service and other matters of direct concern to shippers.

181. In each country served, the conference should maintain a representative with power to make decisions, binding on the conference, on specific matters and to give provisional decisions binding for specified periods on other matters, as outlined in paragraph 177 above.

D. Freight rates

1. General freight rate increases[101]

(a) *The problem*

182. There are usually no defined procedures for consulting Governments or shippers, shippers' councils or other bodies before decisions on freight rate changes are announced, except in some publicly regulated conferences.

[98] As an example of the way in which liner conferences act arbitrarily, the case of the New Zealand trade may be cited. The conferences, after indicating that containers would be used in the trade, which led port authorities in New Zealand into making large investments in equipment to handle containers, announced without prior consultation that they would not be used (see *Financial Times*, London, 2 September 1971, p. 9).

[99] See the draft resolution entitled "Consultation machinery, level and structure of freight rates, and conference practices" submitted as document TD/B/C.4/L.81 at the fifth session of the Committee on Shipping by twenty-four developing countries (the text is reproduced in annex II (b) to the report of the Committee on the first part of that session (*Official Records of the Trade and Development Board, Eleventh Session, Supplement No. 3* (TD/B/347)).

[100] See *The liner conference system*, paras. 59-75, for a full discussion of problems related to this subject.

[101] For a full discussion of problems related to this subject, *ibid.*, paras. 189-209.

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183. Another deficiency in existing procedures for determining general freight rate increases in most conferences—except in some publicly regulated conferences[102]—is that, when conferences announce freight rate increases, they do not provide sufficient information about revenue and cost factors underlying their decisions. Consequently, Governments and shippers cannot evaluate the justification for the proposed freight rate increases.

184. Most conference tariffs provide that freight rates may be subject to alteration without notice. Where provisions exist for the advance notification of freight rate increases, these provisions are not uniform, nor generally adequate. The same comment applies to notice given when there is no provision in the tariff for such notice. Sometimes the current month plus the next two following is stated as the period of notice, or the period may be as short as one month. Notification to shippers of freight rate increases is usually made through press releases and "notice to shippers" circulars.

(b) *Suggested solution*

185. Conferences should give not less than thirty days' notice to shippers of their intention to increase freight rates and at the same time should provide shippers' councils or other bodies, including Governments, with financial returns of their operations in the trade, prepared as outlined in paragraph 174 above, to justify the increase. Within that thirty-day period the conferences should make representatives with powers of decision available to discuss and negotiate with shippers, shippers' councils or other bodies, and with Governments, the question of the need for an increase in freight rates and, if the need is agreed, the size and timing of the proposed increase and the treatment of individual cargo items.

186. Where agreement is reached on the size of the increase, at least a further sixty days should elapse before the increase becomes effective, with the proviso that the total period from the original notice of intention to the date when the increase becomes effective should not be less than ninety days.

187. Where agreement cannot be reached, the matter should be referred immediately to international arbitration and arbitration proceedings should commence within thirty days of the notice being given. The arbitral award should enter into effect not less than thirty days after it has been delivered, provided always that at least ninety days elapse between the date of the original notice of intention and the date when the increase becomes effective.

188. Any freight rate increase agreed in negotiation or fixed as a result of international arbitration should be embodied in an agreement with a duration of at least twelve calendar months from the date when the increase becomes effective, during which period no notice of intention of further increases may be given, subject always to the rules regarding surcharges (see paras. 200 and 201 below).

[102] See, for example, para. 82 above.

2. Specific freight rates [103]

(a) *The problem*

189. When a new cargo item is shipped, conferences frequently apply the high general cargo freight rate, which may be appropriate for a once-for-all shipment, but not for continuous shipments. The use of the high general cargo freight rate may inhibit growth of the trade in the cargo item.

190. Most conferences have procedures for handling shippers' requests for fixing a specific freight rate or for reducing a specific freight rate, but these are often slow and involve usually reference to conference headquarters. The problems which the conferences face in this regard arise largely from the complexity of tariff structures drawn up on a commodity basis and could be reduced by simpler tariffs drawn up on a class basis.[104]

(b) *Suggested solution*

191. Conference freight rate tariffs should be drawn up on a class basis and should contain no more than twelve classes.

192. Local conference representatives should be empowered to give a provisional decision on an application for a specific freight rate by determining provisionally the class in which the cargo item in question should be placed. This provisional decision should be valid for ninety days, during which time the item in question would be carried at that freight rate. During this ninety-day period, the conference would consider the application and fix a final freight rate to become operative at the end of the specified period.

193. A shipper should have the right to appeal against such a final freight rate within thirty days of its entering into effect, the appeal to be submitted to local arbitration, either the conference or the shipper having the right to appeal to international arbitration if any part of the grounds for fixing the freight rate or for the shippers' first appeal is based on comparability with freight rates in other trades.

3. Promotional freight rates [105]

(a) *The problem*

194. Available evidence makes it clear that an overwhelmingly large proportion of conferences have no specific policy and procedures for the discussion and negotiation of promotional freight rates on non-traditional exports, although they may have some machinery for considering requests for either the fixing of new freight

[103] See *The liner conference system*, paras. 210-224, for a full discussion of problems related to this subject.

[104] For definitions of "commodity" and "class" based tariffs, *ibid.*, para. 160. See also the report by the UNCTAD secretariat entitled *Freight markets and the level and structure of freight rates* (United Nations publication, Sales No.: 69.II.D.13), paras. 62-64.

[105] The general issues of the concept of promotional freight rates are discussed in chapter IX of *Freight markets and the level and structure of freight rates, op. cit.*

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rates or the lowering of existing freight rates. This machinery is inadequate to cope with the demand for promotional freight rates.[106]

(b) *Suggested solution*

195. Specific procedures should be established whereby requests for promotional freight rates on non-traditional exports can be promptly considered. This procedure should be clearly distinguished from the general machinery for considering freight rate reductions or exemptions from freight rate increases in favour of traditional exports. Requests by shippers or exporters for promotional freight rates, to be effectively formulated, should include detailed information concerning costs incurred in the country of production, in international transport and at destinations, and concerning the prices at which comparable products are being sold in the market concerned; also, information about particular difficulties encountered in penetrating the markets successfully and the factors which would enable costs to decline in the future and which might therefore enable the product ultimately to bear a higher freight rate, if necessary.

196. The procedures to be set up should be made well known by the conferences to all interested exporters and potential exporters through Governments, shippers' councils and appropriate commercial and other organizations.

197. Local conference representatives should be empowered to fix promotional freight rates on the basis of broad criteria which should be worked out by the conferences concerned to serve as guidelines in this connexion. Such decisions should be taken in consultation with the shippers concerned and their organizations. The shippers should have the right, through their Governments, to appeal to local arbitration against decisions rejecting their applications for promotional freight rates or against the level fixed for such freight rates.

198. Each promotional freight rate should be reviewed every twelve months. At the first review, the onus of proving any grounds for discontinuing a promotional freight rate should rest upon the conference. At all subsequent reviews, the onus of proving grounds for continuing the rate should rest upon the shippers concerned.

4. SURCHARGES [107]

(a) *The problem*

199. When there is a sudden general increase in the costs of shipping operations, or loss of revenue, for example as a consequence of changes in exchange rates between currencies or of an increase in costs at a specific port, the closure of canals, or the imposition of increased "war risk" insurance premiums, conferences traditionally meet the situation by imposing a surcharge without prior notice. No consultation occurs regarding the imposition of surcharges or the size of the surcharge, and detailed justification satisfactory to shippers is not usually given.

(b) *Suggested solution*

200. Conferences imposing surcharges to cover sudden general increases in costs or loss of revenue arising from whatever cause should, within thirty days, submit to international arbitration detailed financial particulars in justification of the surcharge. The arbitration should be held within a further thirty days. Where such a surcharge is disallowed or reduced in size, the conferences concerned should be liable to refund to shippers any additional moneys collected.

201. Conferences imposing port surcharges to cover additional costs arising from congestion or undue delays to ships should, if the surcharge continues for more than thirty days, present to local arbitration detailed financial particulars in justification of the surcharge. The arbitration should be held and the arbitral award made within a further thirty days. Where such a surcharge is disallowed or reduced in size the conference should be liable to refund to shippers any additional moneys collected.

5. CURRENCIES—DEVALUATION, REVALUATION, RATES OF EXCHANGE, FLOATING CURRENCIES [108]

(a) *The problem*

202. The membership of most conferences is multinational. The freight earnings of conference lines arising from the carriage of cargo to and from various countries, and their operating expenses, are incurred in various currencies. In these circumstances, it has usually been found convenient to express freight rates in a single currency, called "the tariff currency". Nevertheless, in many trades, freight is usually paid in some other transferable currency. This arrangement does not create any difficulty as long as the rates of exchange between the various currencies involved remain stable, but problems arise when changes in the rates of exchange occur, also when currencies are allowed to "float" in the currency markets.

203. To date, no specific formula has been found by reference to which conference freight rates in a particular trade should be increased or decreased after a devaluation or revaluation of a currency, although the principle that there should be a division of the risks associated with any effective devaluation or revaluation of the tariff currency has been accepted in certain trades between conferences and shippers. In practice, where a devaluation has occurred, a surcharge or freight rate increase has been introduced accordingly, although shippers frequently complain of the excessiveness of the surcharge or freight rate increase. Where a revaluation has occurred, shippers have claimed that the percentage reductions made in the

[106] See the report by the UNCTAD secretariat entitled "Promotional freight rates on non-traditional exports of developing countries" (TD/105 and TD/105/Supp.1) for supporting evidence, and for a full discussion of promotional freight rates.

[107] See the report by the UNCTAD secretariat entitled "Perspectives and problems in world shipping" (TD/102), para. 64, for a discussion of problems related to this subject.

[108] See also, in this connexion, the second report by the UNCTAD secretariat on consultation in shipping, paras. 138-140 and annex V. The text of joint recommendation No. 11 of the Western European Shippers' Councils and CENSA, reproduced in annex V is under revision. See para. 27 above and foot-note 30.

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freight rates by some conferences were inadequate. Some other conferences did not reduce their freight rates at all. Difficulties arise when tariff currencies are allowed to float, since no arrangements exist at present between conferences and shippers as to how to deal with the problems created when this occurs.[109] Where a currency is floating, a *de facto* devaluation or revaluation in terms of other currencies is likely to occur, with the same effects on freight revenues and costs as a formal devaluation or revaluation.

204. In all cases of a formal or *de facto* change in the exchange rate of tariff currencies, certain problems are to be found. For instance, the extent of the increase or decrease in shipowners' costs or the extent of a reduction or increase in the value of freight rates can be influenced by the extent to which other currencies follow or do not follow the devaluation or revaluation or the floating levels of the tariff currency. The revenue of the conference lines is earned and their expenditure is incurred in different countries in the course of a normal international voyage. As a result, the impact of a change in the exchange rate of the tariff currency upon the revenue and expenditure of the lines differs according to whether that revenue is earned or the expenditure is incurred in countries which have followed, or have not followed, the change in the exchange rate of the tariff currency. The impact of the increase or reduction in costs or the reduction or increase in the value of freight rates is likely to differ between the member lines of the conference. Freight rates, however, are established for all members of the conference, and it is the impact on the group of lines which make up the conference that must be determined in calculating the appropriate change in freight rates. There may be differences of opinion between shippers and a conference on all these matters which should be resolved through consultation and if necessary through arbitration.

(b) *Suggested solution*

205. The formal devaluation of a conference's tariff currency provides a *de facto* reason for the introduction of a surcharge or a freight rate increase reflecting the actual increase in shipowners' costs or the reduction in value of their freight earnings directly resulting from such a devaluation.

206. The formal revaluation of a conference's tariff currency provides a *de facto* reason for a rate reduction reflecting the actual decrease in shipowners' costs or increase in value of their freight earnings directly resulting from such a revaluation.

207. Both the freight rate increases or surcharges referred to in paragraph 205 above and the rate reductions referred to in paragraph 206 above should reflect only the increase or reduction in costs or the reduction or increase in the value of freight earnings for the conference as a whole.

208. The floating of currencies may result in their *de facto* revaluation or devaluation and should therefore be dealt with in the way outlined in paragraphs 205 and 206 above relating to formal changes in the exchange rates of tariff currencies.

209. The size of the freight rate increase (or surcharge) or of the freight rate reduction, as the case may be, should be subject to consultation between the conference concerned and shippers. If the conference considers that there is too little time to permit such consultations, a provisional exchange rate may be announced by the conference, but if as a result of subsequent consultations or arbitration the freight rate increase or surcharge or the freight rate reduction decided upon is different from that resulting from the provisional exchange rate announced by the conference, the conference concerned should be liable to refund to shippers any additional money collected, or the shippers should pay to the conference any shortfall.

210. Such consultations should take place and be completed within a thirty-day period from the date when the freight rate change has become effective.

211. Where agreement cannot be reached through consultation, the matter should be referred immediately to international arbitration, but if the change in currency exchange rates concerns a certain trade only, then the matter should be referred immediately to local arbitration. The arbitration should be held within a further thirty days.

E. Other matters

1. Outside competition [110]

(a) *The problem*

212. One of the devices that continue to be used by some conferences from time to time to prevent or eliminate outside competition is the "fighting ship", which conferences place on berth to undercut the freight rates charged by their competitors. This anti-competitive device has almost invariably led to the disruption of trade.

(b) *Suggested solution*

213. The use of "fighting ships" should be prohibited.

2. Averaging of freight rates [111]

(a) *The problem*

214. Under the present rating policies of conferences, freight rates are "averaged" over a range of ports served on a particular route. This means, in effect, that costs arising from inefficiency in one port are averaged and charged to all the other ports in the range.

215. The inefficiently administered port is thereby bolstered by an arbitrary system of cross-subsidization

[109] But note that the proposed revision of joint recommendation No. 11 provides that, where a currency has been allowed to float, the rate of exchange to be used shall be "the highest bank selling rate of exchange or where applicable the rate of exchange fixed according to official procedures of the country the currency of which is used for payment of freight".

[110] See *The liner conference system*, paras. 23-25, for a full discussion of problems related to this subject.

[111] See the report by the UNCTAD secretariat entitled "Perspectives and problems in world shipping", paras. 59-66, for a full discussion of problems related to this subject.

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determined solely by conference members. An efficiently administered port, on the other hand, whilst its turn-around of ships may improve, is not rewarded by economic advantages for its trade through reductions in freight rates.

(b) *Suggested solution*

216. Freight rates should be quoted on a port-to-port basis as far as existing base ports are concerned, and rates for other ports should be expressed as appropriate percentages above and below the rates applying for the nearest base port, in order to reflect differences in the actual costs incurred in the ports.

3. Quality of service [112]

(a) *The problem*

217. Conferences do not provide any positive guidance to shipowners, nor do they assume any responsibility concerning the types of ship best suited to the requirements of the trade. The question of quality of service is, therefore, left to individual lines, and nothing is done by the conference—which controls other aspects of the shipping service—to see to it that standards are established and adhered to which will ensure that the ships employed in the trade are such as to meet the needs of the trade properly at the minimum cost.

(b) *Suggested solution*

218. Conferences should be responsible for ensuring that the ships in each trade are suitable in terms of construction, cargo handling facilities, age and speed to satisfy the needs of the trade at the minimum cost.

4. Adequacy of service [113]

(a) *The problem*

219. Conference lines have no specific or contractual commitment to provide an adequate service, and the conference itself accepts no responsibility for defining the needs of the trade which it controls nor for ensuring that its members satisfy these needs, including the lifting of "peak" cargoes. In many trades, there is no over-all scheduling of conference vessels and hence there is often considerable bunching of ships in a port, followed by long gaps without any sailing and the conference does not accept responsibility for lifting "peak" cargoes. The "minimum inducement" [114] for a ship to call at a port included in the conference coverage, but not regularly served, is generally not specified. Shippers complain that, when services are rationalized to reduce costs, the services may as a consequence become inadequate. Consultations with shippers on the requirements of an adequate service do not normally occur.

[112] See *The liner conference system*, paras. 336-406, for a full discussion of problems related to this subject.

[113] For a full discussion of problems related to this subject, *ibid.*

[114] The minimum inducement is the minimum total freight which a carrier would consider worth while to justify calling at a particular port.

(b) *Suggested solution*

220. Conferences should be responsible for the scheduling of services and, so far as is reasonably possible, should provide regular services of the required frequency for the trade, eliminate bunching of sailings and make specific provision for carrying "peak" cargoes.

221. In respect of any port for which services are supplied only on inducement, the size of the required inducement should be specified to shippers in that port.

222. Where the gap between scheduled services at any port is more than thirty days, shippers should receive treatment as "loyal" shippers without signing a loyalty agreement, and the conference should have the right to cancel a scheduled sailing if, as a result of non-conference calls at the port, less than the minimum inducement is available.

F. Provision and machinery for implementation

Introduction

223. In paragraph 91 above, five criteria were enumerated which the machinery for implementation would have to satisfy in order to establish an internationally acceptable form of regulation for liner conference operations. These are:

(*a*) The machinery should provide for the settlement of all disputes as quickly as is possible, in keeping with the gravity of the issues;

(*b*) The procedure for the settlement of disputes should be accessible to all parties without the need to incur expenditures in travelling or legal representation disproportionate to the importance of the matter involved;

(*c*) The procedure should be as economical and as simple as possible in terms of the permanent institutions and machinery to be established;

(*d*) It should be impartial, so that all parties can readily accept the decisions taken;

(*e*) Because of the international character of shipping, in cases where serious complaints are made, the adjudicating institution should be competent to establish internationally authoritative interpretations of the rules governing conference behaviour and precedents which can guide the settlement of future disputes.

Various methods of regulation were discussed and tested against these criteria in paragraphs 97-126. It was concluded that the most suitable form of regulation would be one embodied in an international convention or agreement which would specify the content and scope of the regulation, and that the method of adjudication should be arbitration[115] at international and local levels. Provision would have to be made to ensure that the awards of arbitrators at the international level constituted precedents in the legal sense (see paras. 124 and 125 above), and also to ensure that the awards of arbitrators were binding on the parties to disputes.

224. In an annex to the code, rules of guidance, procedure and practice should be provided for arbitrators

[115] See foot-note 78 above for a definition of the term "arbitration" as used in this report.

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at both the local and international levels. These rules would specify the qualifications required of arbitrators and umpires, the method of designation of the panel of arbitrators and the mode of their selection for a particular dispute, the factors which arbitrators would have to take into consideration in deciding cases and in assessing the damages for the various types of claims, the method of apportioning the costs of the proceedings and the types of cases which would require unanimous, and those which would require majority, decisions.[116]

225. Governments which signed and ratified the convention or agreement and wished to give effect to its provisions after the necessary number of ratifications had been effected should incorporate its terms appropriately in statutory enactments or regulations. The terms of the international convention or agreement and the statutes or regulations would thus govern with binding force the practices of those conferences which were subject to the jurisdiction of the regulating countries.

226. Conferences serving the trades of countries which became parties to the convention or agreement should incorporate the terms of the convention or agreement and the relevant national enactments or regulations in their own membership agreements and loyalty arrangements as appropriate, either through a paramount clause or by specific provision. The inclusion of any terms or conditions in conference agreements which were repugnant to any of the provisions of the international convention or agreement or of the statutes or regulations, would, to the extent of such repugnancy, be null, void and of no effect.

227. Disputes should be settled through arbitration. They should be classified into (*a*) major disputes and (*b*) all other disputes. The latter would be of a relatively minor nature and would not ordinarily raise major international, national or public issues. Major disputes should be referred to international arbitration, and the arbitral award should be binding on the parties to the dispute. Other disputes should be referred to local arbitration in the country where the complaint arose and the decision of the local arbitration should be binding on the parties, unless an appeal to international arbitration was lodged.

228. For international arbitration on major disputes, a panel of internationally known and respected arbitrators should be elected by the intergovernmental organization designated to service the arbitration. For local arbitration, panels of qualified arbitrators should be maintained in each country by an association of arbitrators, the chamber of commerce, or other suitable body agreed on by shippers and conferences, subject to the condition that not less than one half of the arbitrators on the panel should be generally acceptable to the conferences covering the trade to that country and the other half should be acceptable to the shippers of that country.

229. The decision in any dispute arbitrated at the local level which, in the opinion of the Government of the country of nationality of either party to the dispute, raised important international, national or public issues might, if that Government so desired, be referred on appeal to international arbitration.

[116] No attempt has been made at this stage to draft these rules.

Subjects and outline of procedure for international arbitration

230. Disputes which raise major international, national or public issues should be referred to international arbitration. The matters which may form the subject of such disputes are:

(*a*) Refusal of entry of national lines to conferences covering the national trade; entry into way-port conferences; adequate cargo share of trade;

(*b*) Pooling;

(*c*) Unfair or discriminatory conference agreements;

(*d*) Improper loyalty agreements;

(*e*) Levels of freight rates and general increases;

(*f*) Surcharges (to cover general increases in costs or loss of revenue);

(*g*) Changes in foreign exchange rates (devaluation, revaluation or floating currencies) leading to changes in freight rates or to surcharges;

(*h*) Failure to observe proper procedures.

Outline of procedure

231. Each party to the dispute should select one arbitrator, not of his own nationality, from the panel of international arbitrators. If the arbitrators fail to make a unanimous award, it should be mandatory for the parties to appoint a sole arbitrator or umpire whose decision should be final. In the case of disputes requiring a majority decision, both parties should appoint a third arbitrator. If the parties do not agree on the person of the third arbitrator or umpire within a reasonable time to be determined, the Secretary-General of the United Nations should appoint, from the panel referred to above, a third arbitrator who is not a national of the country of either party to the dispute.

232. The hearings should be held at the headquarters of the international organization whose secretariat is responsible for administering the provisions of the international agreement or convention. This secretariat should provide the services needed for the arbitration and report, publish and circulate decisions to persons and authorities concerned.

Subjects and outline of procedure for local arbitration

233. Disputes concerning matters other than those enumerated in paragraph 230 above should be referred to local arbitration. Examples, which are not intended to be exhaustive, of such matters are:

(*a*) Failure of a conference to give dispensation to shippers to use non-conference ships;

(*b*) Dispute over the level of specific or promotional freight rates;

(*c*) Failure of a conference to accept specific cargo;

(*d*) The quality and adequacy of services.

Outline of procedure

234. Each party to the dispute should select one arbitrator from the panel of qualified local arbitrators in the country where the complaint arises. A party wishing to appoint an arbitrator from outside the country where the complaint arises may do so, provided that the

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party bears the entire cost of so doing, regardless of the result of the arbitration.

235. If the two arbitrators fail to make a unanimous award, either party to the dispute may request that the dispute be referred to a third arbitrator or umpire jointly appointed by them. Such an arbitrator or umpire should be a qualified person selected from the local panel and his decisions should be final.

236. If either party to the dispute refuses to agree to this appointment, the dispute should, on representation by the objecting party, be referred to an arbitrator or umpire appointed by the Government of the country where the complaint arises, after that Government has consulted both parties to the dispute. The person appointed should have the same qualifications as those prescribed for local arbitrators in paragraph 228 above.

237. Alternatively, both parties may jointly agree in the first instance upon the appointment of a single arbitrator or umpire from the local panel, whose decision should be final.

238. The hearings should be held in the country where the complaint arises. The provision of the administrative services for the arbitration should be the joint responsibility of the conference and the shippers' council or other relevant shipper or commercial interests, as may be most conveniently determined. These administrative services should include the reporting, publication and circulation of the decisions to all concerned.

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