

UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT
Geneva

**Guidelines towards the application
of the Convention on a Code of
Conduct for Liner Conferences**



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Prepared by the UNCTAD secretariat



UNITED NATIONS
New York, 1986

FOREWORD

(i) From the time the Convention on a Code of Conduct for Liner Conferences came into force in October 1983 the UNCTAD secretariat has been receiving requests from developing country Contracting Parties for guidance in the clarification, interpretation, and application of its provisions. Consequent to the ratification of the Convention by several Western European States in the last quarter of 1985, it is expected that the Code will soon be applied actively in an increasing number of conference trades. In such a situation the requests from interested parties, including Governments, conferences, shippers' organizations and shipping lines, particularly from developing countries, for guidance with regard to the application of the Code will no doubt increase.

(ii) The Committee on Shipping, at its eleventh session held in Geneva in November 1984, reiterated that "the Secretary-General of UNCTAD, in co-operation with the Office of the Registrar as appropriate, should continue to give guidance and assistance, on request, to developing countries in regard to the implementation of the Convention in conformity with its scope and provisions, give such requests high priority in the work programme on shipping and report to the Committee on such guidance and assistance" (decision 50 (XI)).

(iii) This report has been prepared by the UNCTAD secretariat in co-operation with the Registrar appointed under the Code with the principal objective of assisting interested parties, including Governments, shippers' organizations and shipping lines, particularly of developing countries, in understanding and applying the provisions of the Code. While it is hoped that these "Guidelines" will fulfil the needs of such parties to a considerable extent, it is also intended to use them as material for training seminars on the application of the Code which may be conducted in developing countries.

(iv) It need hardly be emphasized that, if the full benefits of the Convention are to be obtained, all parties involved, namely Governments, conferences, shipping lines, and shippers' organizations, should not only be fully conversant with their rights and obligations under the Code, but should also put into effect without delay the actions necessary for the application of its provisions. It is equally important that all parties, from the outset, treat the Code as a total package consisting of both rights and obligations, rather than seeking partial application of those provisions which are favourable to them. At the same time, where it has become accepted and established practice for Governments to play a larger role than intended in the Code, it would be a pragmatic approach for the parties concerned to agree to apply the Code provisions, within the framework of such accepted and established practice, where practicable. Similarly, it behoves all parties to interpret the provisions of the Code in a flexible manner, taking into account the real changes that have occurred in the nature and structure of liner shipping on account of technological changes such as the development of multimodal transport services, slot chartering arrangements, etc., since the Code was adopted.

(v) There may, however, be fundamental differences between Contracting Parties with regard to the interpretation of specific articles of the Code. For example, there appears to be a fundamental difference with regard to the interpretation of article 2 of the Code on "Participation in trade". While the developed market-economy countries, the socialist countries of Eastern Europe and some developing countries treat this article as being applicable only to cargo carried by conferences operating in liner trades between Contracting Parties, several developing countries treat the provisions of article 2 as being applicable to the entire cargo carried in liner trades between Contracting Parties. To the extent that differences of interpretation of the provisions of the Code cannot be resolved through consultations between Contracting Parties which are trading partners, they will no doubt have to be taken up for consideration by the Review Conference which is required to be held five years after the Code comes into force, namely in the autumn of 1988, as provided for under article 52, paragraph 1. */

(vi) In any event, particularly in the present context of the substantial overtonnaging of liner trades, many developing country Contracting Parties may wish to take measures towards the implementation of the Code within the broader context of a national policy on liner shipping which covers both conference and non-conference services. Accordingly, some relevant issues relating to non-conference lines are examined in chapter III.

(vii) It would seem to be appropriate in this foreword to recapitulate the actions that require to be taken by the various parties concerned in order to bring about a speedy implementation **/ of the Code in the relevant trades;

- (a) Firstly, it would be the responsibility of Governments of Contracting Parties to establish the necessary national legislation and/or other measures as are required to enable the commercial parties concerned to exercise their rights and obligations under the Code. These measures are examined in chapter VIII. Governments may also take action, where appropriate, through consultations with liner conferences, to assure themselves that the necessary practical measures towards the implementation of the Code are being taken by the relevant conferences. The scope of such government action and the role of government in the practical application of the Code provisions are examined in chapter VI of part one and further elaborated in part two;
- (b) Secondly, an equally important responsibility devolves upon conferences to ensure that the conference administrative structures and consultation machinery required to give effect to the provisions of the Code are established and made known to the parties concerned. The conference responsibilities vis-à-vis the application of the Code provisions are set out in chapter IV of part one and elaborated in part two;

*/ See also chapter I, paragraph 17.

**/ For an examination of practical experience with regard to the implementation of the Code by Contracting Parties see "Implementation of the United Nations Convention on a Code of Conduct for Liner Conferences - Report by the UNCTAD secretariat" (TD/B/C.4/300).

- (c) Thirdly, shippers' organizations, which have the potential capacity to gain substantially from the provisions of the Code, should ensure that they have the appropriate structures to apply the provisions of the Code in their relations with conferences. These provisions are examined in chapters XIII to XVI. Consultation machinery needs to be structured on a formal basis and shippers' councils, with the support of Governments, as appropriate, should take the necessary steps to build up the requisite consultation capability, particularly through the establishment of freight investigation or research units, if they are to reap the full benefits of the Code provisions.

A check list of the items that require to be covered in conference agreements, as well as of items required to be agreed between conferences and appropriate authorities or shippers' organizations, as the case may be, is set out in chapter XVII.

(viii) Finally, it must be emphasized that in order that all parties concerned gain the optimum benefits from the Code, the application of its provisions should be carried out, as far as possible, through mutual discussion and co-operation, bearing in mind the overall spirit and flexible nature of most of the provisions of the Code.

(ix) Further direct assistance to developing countries with regard to the implementation of the Code may be provided upon request through country visits of the Registrar appointed under the Convention and of staff members of the Shipping Division of the UNCTAD secretariat. Copies of the national legislation enacted by some countries to implement the Code are also available from the Registrar. All such requests should be addressed to:

The Director,
Shipping Division,
United Nations Conference on Trade and
Development
Palais des Nations
1211 Geneva 10
Switzerland

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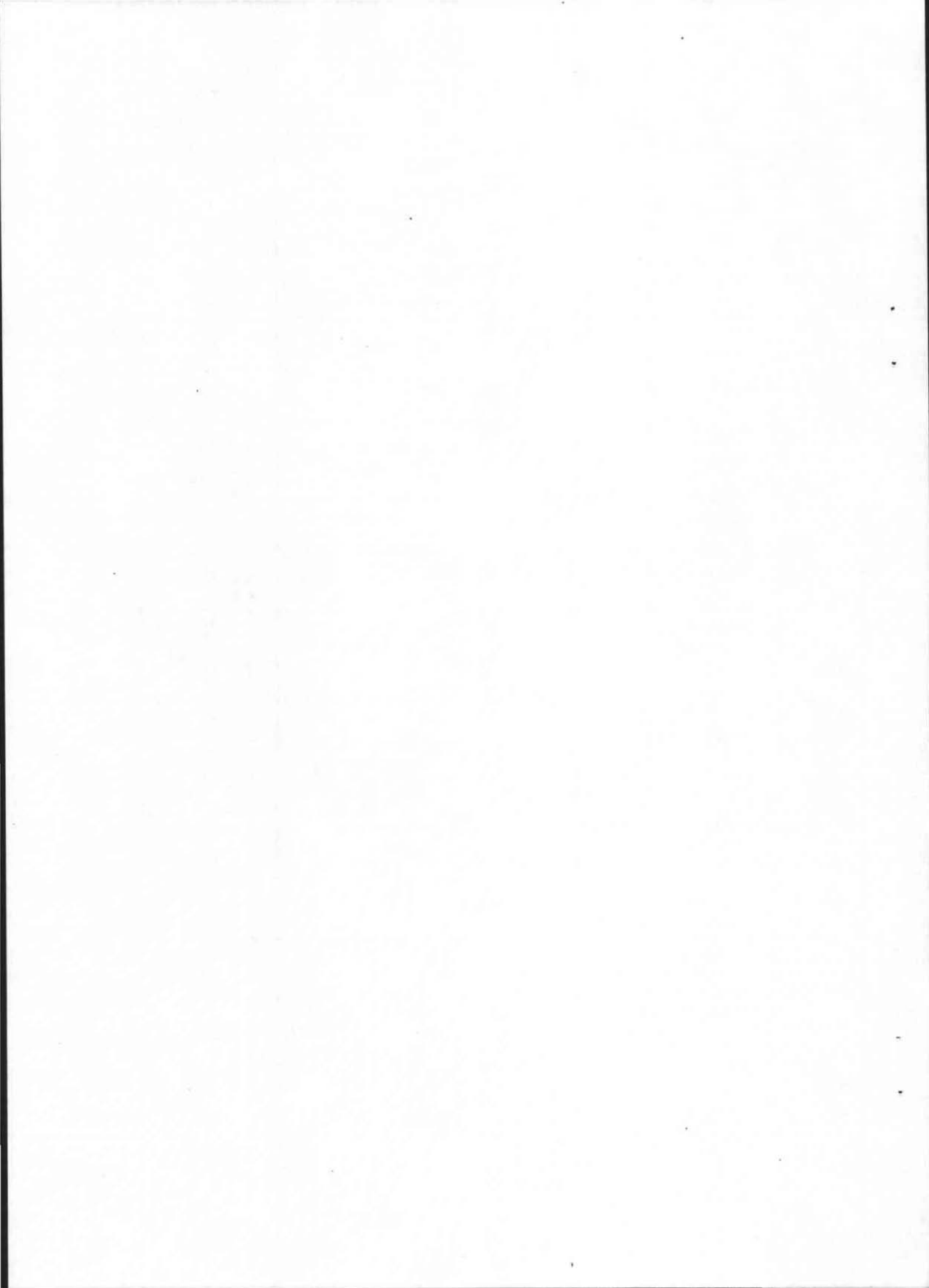
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Part One

GENERAL CONSIDERATIONS

INTRODUCTION

A. A brief history

1. At the first session of the United Nations Conference on Trade and Development (UNCTAD) held in Geneva in 1964, the question of liner conferences occupied an important place in the discussions on shipping. At this Conference, the experiences in shipping of developing countries from all regions were brought to the attention of the world for the first time. A recommendation with the title "The Common Measure of Understanding on Shipping Questions" was adopted. This became the basis for much of the work programme of UNCTAD as adopted by its Committee on Shipping.

2. On the subject of liner conferences, the Common Measure stated: "The liner conference system is necessary in order to secure stable rates and efficient services". It went on, however, to note certain questions which gave rise to dissatisfaction among the users of conference services. It also noted that the development of merchant marines in developing countries, "as well as their participation in liner conferences as full members on equitable terms", was to be welcomed. It was the work of the secretariat of UNCTAD, based in part on these phrases in the recommendation, which led to the developments which resulted in the elaboration and adoption of the Convention on a Code of Conduct for Liner Conferences.

3. While the behaviour of liner shipping conferences was being subjected to increasing criticism by the Governments, shippers' organizations and shipping lines of developing countries, the national shipowners of Europe and Japan responded to such criticism by formulating in 1971, in consultation with the National Shippers' Councils of Europe and based on guidelines provided by their Governments, a code of practice for liner conferences which came to be known as the CENSA Code (CENSA being the Committee of European and Japanese National Shipowners' Associations). This Code was accepted by the Governments constituting the Consultative Shipping Group, then consisting of Belgium, Denmark, Finland, France, the Federal Republic of Germany, Greece, Italy, Japan, the Netherlands, Norway, Sweden and the United Kingdom.

4. The UNCTAD Working Group on International Shipping Legislation examined the CENSA Code at its third session in January 1972. The developing countries did not find this Code acceptable. A text of a code prepared by the developing countries (supported by the socialist countries of Eastern Europe and by China) ^{1/} was examined at the third session of the UNCTAD Conference in April/May 1972. However the differences between the developed and developing countries on the nature of the proposed code could not be satisfactorily resolved. The Conference therefore requested the General Assembly at its twenty-seventh session to convene a Conference of Plenipotentiaries to adopt a Code of Conduct for Liner Conferences. The formulation of the Convention involved two sessions of a Preparatory Committee, in January 1973 and June 1973, respectively, as well as two sessions of a Conference of Plenipotentiaries in November/December 1973 and March/April 1974, respectively.

5. The Convention embodying the Code was adopted on 6 April 1974, by majority vote, 72 countries voting in favour, 7 voting against and 5 abstaining. The Code entered into force on 6 October 1983. The Convention was to enter into force six months after the date on which not less than 24 States, with a combined tonnage 2/ of at least 25 per cent of the world general cargo fleet, had become Contracting Parties to it. These criteria were met when the Convention was ratified by the Federal Republic of Germany and the Netherlands as the fifty-seventh and fifty-eighth Contracting Parties on 6 April 1983, bringing the tonnage owned by all Contracting Parties to 28.67 per cent of the relevant tonnage. The above-mentioned requirements for entry into force must be considered exceptionally stringent and the reason for this can be seen in the desire of the Conference of Plenipotentiaries to ensure as wide a support as possible for the Convention at the time of its entry into force, as it deeply affects the liner shipping industry as well as the right of Governments to regulate economic activities of that industry. As of June 1986, 67 countries had become Contracting Parties to the Convention. These include four countries which voted against the Convention, one which abstained on the vote and 13 which did not participate in the preparation of the Convention.

B. Objectives of the Code

6. The text of the Code as contained in the Convention, and which appears in annex I, opens with a statement of objectives and principles, drawn up in the name of the Contracting Parties. The following is an extract of the most significant elements of this statement:

"The Contracting Parties to the present Convention,

Desiring to improve the liner conference system,

...

Taking into account the special needs and problems of the developing countries ...

(Agree) to reflect in the Code the following fundamental objectives ...:

- (a) The objective to facilitate the orderly expansion of world sea-borne trade;
- (b) The objective to stimulate the development of regular and efficient liner services adequate to the requirements of the trade concerned;
- (c) The objective to ensure a balance of interests between suppliers and users of liner shipping services."

7. The fundamental objectives of the Code, particularly the second, make it clear that the Code is to be seen as part of an overall liner shipping policy dedicated to the attainment of regular and efficient liner services. While the Code provides an internationally accepted regulatory framework within which liner conferences would operate, it may be seen also as an important instrument for the attainment of a more significant participation by

developing countries in liner shipping, in line with the goal expressed in the International Development Strategy for the Third United Nations Development Decade in the field of transport ^{3/} which recognizes the aspirations of developing countries in the attainment of structural change in the shipping industry and of a 20 per cent share of world tonnage for themselves by the end of the decade. The importance of the Code for developing countries should also be seen in relation to other issues that have been under consideration within UNCTAD. These interrelated issues include those of ship financing, conditions for registration of ships, multimodal transport operations, model legislation, etc. ^{4/}

8. The Code, however, is not limited in its application to developing countries but is of a universal character. In fact, the preamble to the Convention stresses this universality.

9. The Code seeks to ensure rights of participation in trade of national lines so that they are entitled to carry a substantial share of their countries' foreign trade, to balance the interests of shippers and shipowners, and to facilitate the orderly expansion of liner trade. To this end, the Code regulates, *inter alia*, the relationship between member lines of conferences, in particular the rights of admission of national shipping lines to conferences serving their countries' foreign trade. It also establishes rules for the participation by member lines in the trade carried by conferences. Unless otherwise agreed, when determining a share of trade within a pool operated under a conference, the group of national shipping lines of each of two countries the foreign trade between which is carried by the conference shall have equal rights to participate in the freight and volume of traffic generated by their mutual foreign trade and carried by the conference. Third-country shipping lines, if any, shall have the right to acquire a significant part, such as 20 per cent, in the freight and volume of traffic generated by that trade and carried by the conference. The Code sets forth rules for the establishment of pools or other types of trade-sharing arrangements in conferences, as well as for other internal conference activities, such as self-policing. The Code also regulates the relationship between shippers and liner conferences by establishing equitable principles for the use of loyalty arrangements as well as the provision that conferences are required to hold consultations with shippers and their representative organizations on matters of concern to shippers, such as changes in freight rates, loyalty arrangements, imposition of surcharges, etc. It also sets forth rules regulating freight rate increases, promotional freight rates, surcharges and currency adjustment factors. The relevant provisions of the Code are examined in part two.

10. In order to ensure the smooth functioning of this new system of international regulation of liner conferences, the Code establishes the machinery for a system of dispute settlement based on mandatory conciliation. To this end, it contains detailed rules governing its functioning, including in an annex to the Convention, a set of model rules of procedure for international mandatory conciliation. The dispute settlement machinery of the Code is examined further in chapter V.

C. The relevance of the Code for present-day liner shipping

11. The Code was elaborated and finally adopted at a time of largely unbroken monopolistic power of conferences. There was no commonly agreed framework within which they operated. These cartels were usually autonomous with separate rules, ranges of operation, customs and practices. Yet there were, of course, common denominators. Conferences monopolized most trades by eliminating both internal and external (outsider) competition, which allowed them to adopt rate setting procedures unilaterally, fix freight rates at levels that enabled even high-cost conference operators to make operating profits, to decide unilaterally on sailing frequencies and vessel employment which often did not take into account the requirements of trading interests and to deny, at their discretion, adequate participation of national lines of developing countries in conferences. However, dissatisfaction with conference practices at no stage resulted in a desire to abolish the system. In fact, the Common Measure of Understanding adopted at UNCTAD I in 1964 supported the conference system as an indispensable instrument for the maintenance of regular and adequate liner services. The Code in no way attempts to abolish, or for that matter even to weaken, the conference system, but only to provide a commonly accepted framework within which conferences would operate.

12. The environment within which conferences operate today is certainly different from that which prevailed when the Code was adopted. Conferences no longer enjoy an absolute monopolistic situation in many trades. Outsiders have made important inroads into various trades, and cargo shares of non-conference carriers of up to 50 per cent or even more have been recorded. The current situation of substantial overtonnaging has favoured such a development and it can be expected that this situation will prevail in the short- to medium-term future. Conferences have also been challenged by competition from services involving alternative modes and routes offered by multimodal transport operators on the basis of point-to-point through rates. Similarly, the behavioural patterns of the conferences themselves have changed. Applications for membership by national lines of countries served by the conferences are hardly ever turned down. The principle of consultations with shippers on a number of issues, particularly on general freight rate increases, is generally accepted.

13. It is sometimes claimed that, because of such developments, the Code has, in fact, outlived itself. However, this argument appears not to take into account a number of factors. The present relative weakness of a number of conferences vis-à-vis outsiders is a result of the market situation and should not necessarily be expected to be a lasting development. Conferences may be expected to regain strength once they have adapted themselves to new transport technologies and organizational forms. In the process, the membership of conferences may change, with some outsiders coming in and some traditional operators disappearing. Furthermore, some conferences may give way to newer conferences. It should also be noted that the fact that a number of conferences are no longer exercising their monopolistic powers to the extent that they used to may, to some extent, be attributed to the existence of the Code and to the fear on the part of conferences of retaliatory action by Governments rather than to a genuine process of opening up of the market. In any case, in quite a number of liner trades serving the developing countries, the conferences still carry the preponderant part of the cargo and the

questions that the Code deals with are as relevant today as when it was adopted. Even in liner trades where outsiders are strong, it is not unusual for many outsiders to enter into understandings with conferences on market sharing, freight rate differentials, etc. A "tolerated" outsider having some measure of understanding with a conference is virtually an associated member of that conference. In such situations the conference would still be dominant in spite of a strong outsider presence.

D. The changing structure of liner services and the review of the code

14. The world system of liner services is changing and the process of change is far from complete. The displacement of conventional ships by container ships is being followed by the increasing size of container ships. The most recent development is the emergence of round-the-world services involving container ships of over 4,000 TEUs. With these technological changes, both the organizational structures of liner operations as well as the structures of liner routes are undergoing changes both within and outside of conferences. Traditional shipping lines are being replaced by consortia of shipping lines which pool their vessels and cross-exchange slot charters. New concepts of multimodal transport involving integrated chains of sea and land transport, and even of air transport, based on a single bill of lading or multimodal transport document are becoming increasingly popular. The old liner routes of the traditional conferences are being replaced by new trunk and feeder service systems, round-the-world services and multimodal transport systems. But whatever be the changes of structural form, the dialogue between transport operators and shippers, which the Code provides for, needs to continue. Even if the traditional conferences were to be displaced by consortia, single operators or multimodal transport operators, there will be a need for consultations involving shippers, operators and Governments. Similarly, the need for principles of participation in liner trades by national lines and third country lines will remain. The Code Review Conference would be the opportunity for countries to re-examine the provisions of the Code in the light of the changes that are continuing to take place. Under the provisions of article 52, paragraph 1, the Review Conference is to be held five years after the Code comes into force, i.e., in the autumn of 1988.

Chapter I

SCOPE OF APPLICATION OF THE CODE

A. Application to Contracting Parties

15. Unlike many other Conventions, the Code does not contain any provisions which clearly determine the scope of its application. In the absence of such provisions, the question arises whether a Contracting Party has an obligation to apply the Code to all its conference trades or to those with other Contracting States only. From the Code itself, and in the light of Article 34 of the Vienna Convention on the Law of Treaties, it would appear that the Convention as such is applicable only between Contracting Parties.

16. On the assumption that the Code applies to conference trades between Contracting States, its provisions would apply to all entities operating in a particular conference trade, irrespective of their nationality. In this respect, the Code must be considered "nationality blind". If this were not the case, i.e. if the application of the provisions of the Code were subject to a nationality test (such that different rules concerning conference membership, participation in trade, decision-making, etc. would be applied to carriers, shippers, etc. depending on whether they originate in a Contracting State or not), the Code would not be able to function to achieve any of its purposes.

B. Application to liner conferences only

17. By its express terms, the Code applies to liner conferences, rate agreements and similar arrangements only 5/ and not to entire liner trades. 6/ This is also made clear through the preambular paragraphs of resolution 2 - particularly the second paragraph, which states that "... the Convention is applicable to liner conferences and their external relations". Several developing countries, however, have taken up the position that, in their opinion, the provisions of article 2 on "Participation in trade" may be applied to entire liner trades. It would seem that this view is based on their interpretation of article 2, paragraph 17, to the effect that the expression "all goods" in that article - without the subsequent phrase "carried by the conference" which was deleted from an earlier draft text before the Conference of Plenipotentiaries - indicates that cargo-sharing arrangements may be based on all liner cargoes moving in a given trade, including the cargoes carried by non-conference vessels. Other countries dispute such an interpretation. This matter will no doubt need to be considered at the international level, in particular at the Review Conference scheduled to be held in 1988.

C. Bilateral intergovernmental agreements

18. In many trades, shipping services have been established on the basis of bilateral agreements concluded either by the national shipping lines of the trading partners or by the Governments concerned. While the application of the relevant Code provisions to privately concluded agreements is generally not questioned, different views exist on whether shipping services established on the basis of intergovernmental bilateral agreements fall under the scope of the Code.

19. From the point of view of a technical interpretation of the text (thereby excluding the effect of any reservation made at the time of ratification), the definition of a liner conference contained in chapter one should include joint shipping services operating under a bilateral agreement between Governments. The definition indeed refers to a group of carriers providing a liner service which "has (referring to the group) an agreement or arrangement, whatever its nature, within the framework of which they operate ..." (emphasis added). This language, particularly with the use of the expression "whatever its nature" and "within the framework", certainly includes situations where government-owned lines themselves have concluded the bilateral agreement, as well as where the Governments have concluded the agreement and lines operate "within the framework" of the agreement. In support of the latter application, it can be argued that, at least in the English text, no reference is made to who concluded the agreement; rather it just states "a group of ... carriers ... which has an agreement ... within the framework of which they operate". The agreement could thus be one imposed on them by Governments. The French text, on the other hand, would not appear to support this latter interpretation, in that it refers to "un groupe ... qui a conclu un accord". In other words, reference is made to the group concluding the agreement, thereby making it more difficult to argue that an agreement concluded by Governments and imposed on individual carriers is one that the carriers as a group "concluded". The argument could, however, be made that the carriers constructively adopted the agreement by operating pursuant to it. Certainly in the case of a government-owned line where the Government concluded a bilateral agreement, it would appear reasonable to say that the agreement was concluded on behalf of, and in the name of, the line.

20. If it is considered that a conference is being created by virtue of the implementation of a bilateral intergovernmental agreement, such agreements have to be viewed as having the potential of being inconsistent with the treaty obligations assumed by each State in becoming a Contracting Party to the Code. The latent conflict between such bilateral agreements and the Code becomes apparent when one considers the provisions on trade participation of such agreements which tend to call for 50:50 cargo sharing and thereby could infringe on third party rights established under the Code. While the Code does not establish a specific percentage of the trade to be mandatorily allocated to third flag carriers, it certainly cannot be construed that the wording of the Code with regard to the principles of trade participation, qualified by the phrase "unless otherwise mutually agreed" (article 2, paragraph 4) may be interpreted as leaving open the possibility of excluding third flag carriers altogether.

21. A number of countries, however, have taken the position that liner services established on the basis of intergovernmental bilateral agreements do not constitute "liner conferences" as defined in the Code and are consequently not subject to its provisions. This interpretation takes into account some aspects in which such services differ from liner conferences. They are instituted to ensure adequate and reliable liner services for the implementation of contractual trade between two countries and the intergovernmental bilateral agreements on which they are based are an integral part of bilateral trade agreements or at least complementary to such agreements. All payments arising in connection with the operation of the lines concerned, including the payment of freight, are made according to the

terms and conditions of trade agreements. Such bilateral agreements also include provisions which cover many other aspects of the shipping operations concerned.

D. Application of the Code provisions to land-locked country trades and transhipped cargoes

22. Clearly, national shipping lines of land-locked countries have the right, under the Code, to participate in the carriage of their own national foreign trade. In order to secure such rights, the national shipping lines of a Contracting State which is a land-locked country and which is within the geographical scope of the conference, taking into account the provisions of article 2, paragraph 17, should ensure that their State is included in the geographical scope of the cargo-sharing arrangements of the conference concerned. If the land-locked country is outside the geographical scope of the conference itself, the Government concerned should negotiate with the conference to have the geographical scope of the conference extended to include its territory, in order to ensure that the rights of its shipping lines and of the shippers are protected in accordance with the provisions of the Code.

23. It may not always be clearly recognizable where, beyond the port of loading or discharge, the actual origin/destination of the cargo is. For practical purposes of implementing the Code provisions relating to trade participation, the determination of the ultimate origin/destination is possible, beyond any doubt, only in those cases where bills of lading or multimodal transport documents are issued naming the actual origin and/or the final destination of the cargo. The provisions of article 2, paragraph 8, which provide for the possibility of redistributing cargo shares among national shipping lines of a region at one end of a conference trade by mutual agreement, would be relevant in this context. Difficulties in determining the actual origin/destination of cargo for purposes of allocating cargo shares may be resolved by redistribution arrangements negotiated among the national lines concerned.

24. The above considerations relating to the determination of cargo shares of land-locked countries would apply to all transshipment cargoes, irrespective of whether the country of ultimate origin or destination is a land-locked country.

E. Application of the Code to co-operative agreements outside conferences

25. The Code, by its express terms, applies to liner conferences and therefore the question arises as to what the position is with respect to a group of shipping lines which operate under some form of co-operative agreement outside the conference serving a particular trade.

26. The advent of containerization has brought about new forms of co-operation among shipowners designed to share the financial burdens, the risks and the economies of scale involved in investments in container vessels and related equipment. A typical form of such co-operation is the consortium. Simply and broadly defined, a consortium is a temporary co-operation of several powers or large interests to effect some common purpose.

READERSHIP SURVEY

Questionnaire

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27. The Code provides a rather clear definition of liner conferences, and generally it can be stated that any co-operative agreement which fulfils the conditions laid down in the Code would be subject to its provisions, irrespective of the organizational form of co-operation chosen. For example, a joint service arrangement of the TRIO type - three major operators in the Europe/Far East service have entered into a joint service agreement under this name - if operated outside the scope of the presently existing conference would, for the purpose of determining the applicability of the Code, still fall under its provisions, as it does in itself fulfil the conditions stipulated in the Code definition to be classified as a liner conference, i.e.

A group of two or more vessel-operating carriers;

Provides international liner services for the carriage of cargo on a particular route or routes within specified geographical limits;

Has an agreement or arrangement, whatever its nature, within the framework of which they operate;

(Operates) under uniform or common freight rates.

28. The Code does, in fact, apply to consortia as well as to any other co-operative arrangements including rate agreements that fulfil the conditions of a liner conference stipulated in the Code definition.

F. Application of the Code to multimodal transport

29. The question of the application of the Code to multimodal transport relates more to issues of shipper/carrier relations, level of freight rates and dispute settlement machinery rather than to questions of trade participation.

30. Article 11, paragraph 1 on "Consultation machinery" states that there shall be consultations on matters of common interest between a conference, shippers' organizations, etc. Clearly, this involves also multimodal through rates established by the conference. Article 11, paragraphs 2 (a), 2 (b), 3 (b) and 3 (c) further support this interpretation. Actually, on the basis of Article 11, any conference decision affecting shippers' interests appears to be subject to consultation and thus to the provisions of the Code.

31. In the case of multimodal transport, the Code requirement for an observance of a 15-month rate freeze called for in article 14, paragraph 9 read in conjunction with article 14, paragraph 1 may give rise to certain difficulties, as inland transport charges could be subject to fluctuation. However, it may be noted that even on a port-to-port basis most cost items will not be stable over a 15-month period either. Extreme and unforeseen increases in inland transport costs could always be covered by an appropriate surcharge, which of course, would be subject to consultation with shippers in accordance with article 11, paragraph 2.

Chapter II

RESERVATIONS AND DECLARATIONS MADE BY CONTRACTING PARTIES

A. What is the effect of reservations to the Code?

32. The question of whether reservations to a convention are permitted and, consequently, of possible objections to such reservations, is governed in general by the Vienna Convention on the Law of Treaties (1969), which entered into force in 1980, and in particular by the Convention concerned. The Vienna Convention is not, however, as a whole, declaratory of general international law; it does not express itself so to be. Various provisions clearly involve progressive development of the law of treaties and the wording of the preamble affirms that questions not regulated by its provisions will continue to be governed by the rules of customary international law. Nevertheless, a good number of provisions are essentially declaratory of existing international law, and those provisions which are not certainly constitute presumptive evidence of emergent rules of general international law. Article 2 (d) of the Vienna Convention defines a reservation as a "unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State". Furthermore, Article 19 of the Vienna Convention states that a reservation may be formulated unless:

The reservation is prohibited by the treaty (as is the case in the Multimodal Convention and the Hamburg Rules);

The treaty provides that only specified reservations may be made, which do not include the reservation in question; or

The reservation is incompatible with the object and purpose of the treaty.

As the Code does not regulate the question of reservations in its text, except for article 53 on the functions of the depositary where it is stated that the depositary shall notify the signatory and acceding States of reservations to the present Convention and the withdrawal of reservations, the question of the admissibility of reservations may generally be based on Article 19 of the Vienna Convention. This means that States, upon becoming Contracting Parties to the Convention, may make reservations provided they are compatible with the object and purpose of the Code.

33. Again in the absence of specific provisions in the Code, the Vienna Convention would be generally applicable as far as the acceptance of and the objection to reservations is concerned. According to article 20, paragraph 5 of the Vienna Convention, a reservation is considered to have been accepted by a State if it has not raised any objections by the end of a period of 12 months after notification of the reservation by the depositary. The legal effects of reservations and of objections to reservations are such that the reservation modifies for the reserving Contracting Party in its relations with other Contracting Parties the provisions of the treaty to which the reservation relates, to the extent of the reservation, and modifies those provisions to the same extent for the other Contracting Parties in their

relations with the reserving Contracting Party. Objections to a reservation cause the provisions to which the reservation relates not to apply between the two Contracting Parties concerned, to the extent of the reservation.

B. The Brussels Package

34. EEC Council Regulation 954/79 of 15 May 1979 7/ containing the so-called "Brussels Package" has provided the basis for the reservations formulated by the Federal Republic of Germany, the Netherlands, the United Kingdom, Denmark and France at the time of their ratification of the Code and will similarly apply to subsequent ratifications by other EEC member States.

35. According to the reservations formulated, article 2 of the Code dealing with trade participation, article 3 dealing with conference decision-making procedures and article 14, paragraph 9 dealing with the minimum period of time between freight rate increases shall not be applied in conference trades between member States of the Community, nor on a reciprocal basis between such States and other OECD countries which are Parties to the Code. To the extent that this reciprocity is created by corresponding reservations to the Code by non-EEC Contracting Parties, which by no means is certain, some of the major provisions of the Code will not be applied on some important trade routes. For developing country shipping lines, however, it is relevant to note that the EEC reservations do not negate the rights accruing under the Code to non-EEC third flag shipping lines with regard to participating in intra-EEC trades and in trades between EEC member States and OECD countries.

36. The Code will be fully applied in trades between EEC member States and developing countries. However, some concern appears to have arisen concerning the EEC provision for the recognition of national shipping lines of the EEC member States, perhaps on account of the rather ambiguous wording of Council Resolution 954/79. The reservation itself provides for the recognition of shipping lines as national shipping lines by member States in accordance with the right of freedom of establishment granted under the EEC Treaty. In effect, this means that the same shipping line, through the establishment of wholly owned subsidiaries in the territories of EEC countries, could become a national shipping line of several EEC countries. Such a shipping line could thus acquire the national shipping lines' cargo rights, as well as third flag rights, in several EEC country liner trades with developing countries. To what extent this fact will actually have a bearing on the competitive situation of developing country shipping lines cannot be generalized but will have to be determined in the light of experience with the Code in the trades concerned.

C. Other reservations to the Code 8/

37. Upon ratification, accession or approval, a number of countries have made declarations and reservations, the most important of which relate to the scope of application of the Code. Countries members of Group D, as well as some developing countries, have made reservations to the effect that the Code provisions shall not apply to jointly operated liner services established on the basis of intergovernmental agreements to serve bilateral trade between the countries concerned. These reservations formally reflect differences in interpretation of the definition of "liner conferences", as discussed above. 9/

D. Declarations concerning non-conference shipping lines

38. Some Contracting Parties, namely, Denmark, Finland, Norway, Sweden and the United Kingdom, made an identical declaration on their accession to the Convention. This declaration relates to non-conference lines and sets out the following views of the Contracting Parties concerned:

(a) The Liner Code Convention affords the shipping lines of developing countries extended opportunities to participate in the conference system;

(b) It is essential for the functioning of the Code and conferences subject thereto that opportunities for fair competition on a commercial basis by non-conference shipping lines continue to exist and that shippers are not denied an option in the choice between conference and non-conference shipping lines;

(c) These concepts are reflected in a number of provisions of the Code itself, including its objectives and principles, and they are expressly set out in resolution No. 2 on non-conference shipping lines adopted by the United Nations Conference of Plenipotentiaries;

(d) Any regulations or other measures adopted by a Contracting Party to the Convention with the aim or effect of eliminating such opportunities would be inconsistent with the above-mentioned basic concepts and would bring about a radical change in the circumstances in which conferences subject to the Code are envisaged as operating;

(e) Nothing in the Code obliges other Contracting Parties to accept either the validity of such regulations or measures where conferences, by virtue of such regulations or measures, acquire an effective monopoly in trades subject to the Code;

(f) The Contracting Parties concerned do not consider themselves precluded by the Convention from taking appropriate steps in the event that another Contracting Party adopts measures or practices that prevent fair competition on a commercial basis in its liner trades.

39. The declarations which contain the above points set out the views of the Contracting Parties concerned on the interpretation and application of resolution No. 2 on non-conference lines adopted by the Conference of Plenipotentiaries and indicates that they do not consider themselves precluded from taking "appropriate steps" if any other Contracting Party takes measures that are seen as preventing "fair competition on a commercial basis" by non-conference lines. It should be noted in this connection that there could be differences of opinion between Contracting Parties as to what constitutes "fair competition on a commercial basis".

40. A particular point may be made regarding the contents of subparagraphs 38 (b) and (c) above. While there is no doubt a presumption in certain provisions of the Code that shippers would have the option of using non-conference lines, nowhere in the Code itself is it said that opportunities for fair competition by non-conference lines is an essential condition for the functioning of the Code.

41. Two other Contracting Parties, namely the Federal Republic of Germany and the Netherlands, have made a rather different declaration on the subject of non-conference lines. According to this declaration the Contracting Parties concerned "will not prevent non-conference shipping lines from operating as long as they compete with conferences on a commercial basis while adhering to the principle of fair competition, in accordance with the resolution on non-conference lines adopted by the Conference of Plenipotentiaries". The declaration goes on to confirm the intentions of the Contracting Parties concerned to act in accordance with the said resolution.

42. Reference to non-conference lines has been made also by two other Contracting Parties, namely Bulgaria and Czechoslovakia, in ratifying the Code. According to its declaration, Bulgaria "considers that the provisions of the Convention on a Code of Conduct for Liner Conferences do not cover the activities of non-conference shipping lines", while Czechoslovakia declared that "eventual one-sided regulations of the activity of non-conference lines by legislation of individual States would be considered incompatible ... with the main aims and principles of the Convention and would not be recognized as valid".

43. The subject of non-conference lines and the Code, including the implications and interpretation of resolution No. 2, and the concept of "fair competition on a commercial basis" are examined in chapter III.

Chapter III

THE CODE AND NON-CONFERENCE LINES

44. While the Code was intended to regulate liner conferences only, in article 8 it makes specific reference to the right of shippers to use non-conference lines. Further, article 18 specifically prohibits members of a conference from using fighting ships, "for the purpose of excluding, preventing or reducing competition by driving a shipping line not a member of the conference out of the said trade".

45. On the subject of non-conference lines vis-à-vis the Code, the Conference of Plenipotentiaries which elaborated the Code adopted Conference resolution 2 on non-conference shipping lines, which reads as follows:

"2. Non-conference shipping lines

The United Nations Conference of Plenipotentiaries on a Code of Conduct for Liner Conferences,

Having prepared the Convention on a Code of Conduct for Liner Conferences with a view to improving the liner conference system,

Bearing in mind that the Convention is applicable to liner conferences and their external relations,

Resolves that:

1. Nothing in that Convention shall be construed so as to deny shippers an option in the choice between conference shipping lines and non-conference shipping lines subject to any loyalty arrangements where they exist;

2. Non-conference shipping lines competing with a conference should adhere to the principle of fair competition on a commercial basis;

3. In the interest of sound development of liner shipping service, non-conference shipping lines should not be prevented from operating as long as they comply with the requirements of paragraph 2 above."

46. It should be noted that this resolution does not constitute an integral part of the Convention and is therefore - strictly speaking - not of a binding character in international law. Thus, it may not be inconsistent with its obligations under the Code for a Contracting Party to take measures to regulate the activities of non-conference lines if it deems it fit to do so. In fact, even in order to ensure that non-conference lines adhere to the principle of "fair competition on a commercial basis" it may well be necessary for their activities to be subjected to appropriate regulation.

47. The Group of 77 supported Conference resolution 2 on the "clear understanding that the non-conference shipping lines will not be permitted to operate in a manner which damages the smooth functioning and operation of liner conferences". The spokesman for the Group of 77 who made this statement at the conclusion of the Conference of Plenipotentiaries went on to add:

"While we have agreed that non-conference shipping lines have a place in liner shipping, in no circumstances can we accept a situation where through their operation the national shipping lines of developing countries are made to lose what, after great difficulty, they are entitled to get under the Code in respect of participation in trade. Should a situation arise in any trade where our Governments feel that the activities of non-conference lines should be curbed or regulated in any manner, our Governments will have full freedom of action to act suitably in the national interest. Our Governments also have full freedom of action to ensure that non-conference shipping lines operate on a commercial basis in fair competition with conference shipping lines". 10/

In dealing with non-conference lines, governments of developing countries may wish to be guided by Conference resolution 2 on non-conference shipping lines, qualified by the concluding remarks of the spokesman for the Group of 77.

48. In this context, the concept of operating "on a commercial basis in fair competition with conference lines" requires further examination. Whether a non-conference operator is competing with a conference or not depends on two factors, namely:

The type of service offered,

The type of cargo carried.

49. The Code does not define a liner service, but the essential characteristics of such a service (broadly defined to include multimodal transport) are generally recognized to be fixed sailing schedules between regular ports or other fixed terminals which are advertised in advance. Thus, there would probably be general agreement that a liner service would have the following functions:

To give a service on a particular trade route with the regularity and the frequency which the shippers need for carrying on their normal business,

To provide a service to shippers who ship little and often, or who ship commodities which will not fill a ship by themselves,

To serve shippers who want to be able to buy or sell large or small quantities with the knowledge that a shipping service will be available,

To provide suitable space to carry a varied assortment of cargoes, dry or liquid, dirty or clean, mineral or vegetable, at ordinary temperatures or chilled or frozen,

To provide the form of sea transport or multimodal transport which best suits the requirements of the traders and the products on the routes served, and

To accept, where law or custom demands, the obligation as a common carrier, or where no such obligation exists, nevertheless to respond to a general expectation that having advertised a sailing and calls at particular ports, all cargo offering will be accepted on a "first come - first served" basis, whether the cargo is attractive to the carrier or not.

50. A liner-type cargo is not defined in the Code. It is usually a cargo shipped by mark or count, with the distinction depending not on the type of product but on the character of the shipment. A number of products, for example jute, timber, grain and palm oil, may be shipped in parcels or containerloads on liner vessels as liner cargoes, while they may equally be shipped in bulk in full or part shiploads as non-liner cargoes.

51. Where a non-conference operator performs all of the functions of a liner service as listed in paragraph 49 above he may be considered as an operator who, *prima facie*, is entitled to the protection of the resolution on non-conference lines. If he satisfies only certain functions, the situation would not be clear and would require to be judged on a case-by-case basis.

52. Competition may not be fair and on a commercial basis if the non-conference operator:

Deliberately sets rates at a loss-making level which he does not have the ability to maintain in the long-term;

Does not accept an obligation to provide a regular service with adequate port coverage; or

Accepts only the attractive cargoes and leaves the less attractive cargoes to be served by the conference.

These three conditions for defining what is not fair competition in a liner service cover the essential points of the matter, although they are minimum conditions, as the list of functions of a liner service in paragraph 49 shows.

53. Where a conference operates inefficient and outmoded tonnage, non-conference lines entering the trade might be able to offer lower rates because of their genuinely lower costs. Such non-conference competition, which also complies with the conditions set out in paragraph 52 above, would be hard to stigmatize as unfair and non-commercial.

54. While the concept of "fair competition on a commercial basis" may appear clear enough in theory, its practical application would be far from simple. There are bound to be differences of opinion, and each case would require to be judged on its merits. Indeed, the concept of fair competition is one that has probably changed its meaning over time.

55. If a non-conference operator satisfies the conditions listed in paragraph 49 above and so qualifies for the protection of the resolution on non-conference lines, a Government, despite the importance it may attach to its national shipping line and to the conference service, may feel that the promotion of its overseas trade is of greater value and might prefer to permit such competition. On the other hand, there would be a case for protecting the national line and the conference if there is no reason to believe that the

non-conference line is providing a service which it could, or would, continue to offer in the long run at lower rates than the conference offers. In such a case, to sacrifice its national shipping line and established conference services for the sake of a short-term benefit to its shippers would not be economically justifiable. A decision, in either case, would be a difficult one, made more difficult by the lack of any real basis on which to judge the pretensions and plans of the non-conference operator.

56. In any event, developing countries may not be willing to accept the unrestricted growth of non-conference traffic at the expense of their national lines. As far as developing countries are concerned, one of the principal objectives of the Code was to ensure to their national lines a fair share of the liner cargo generated by their foreign trade. As the spokesman for the Group of 77 stated in his concluding remarks, quoted in paragraph 47 above, developing countries may not accept a situation where they "are made to lose what, after great difficulty, they are entitled to get under the Code in respect of participation in trade". Taking into account a country's long-term strategic economic interests, there may be a minimum level of participation in its liner trades by its national shipping lines which many a Government would wish to preserve.

57. Furthermore, the displacement of liner conferences, in which the national shipping lines at both ends of a trade play a key role and which are subject to an internationally accepted regulatory Code, by unreliable and untested operators or by a few monopolistic operators functioning on a world-wide scale (and possessing a monopoly power even greater than that enjoyed by conferences) without being subject to any regulatory disciplines imposed either unilaterally or bilaterally by Governments or by an international code, may not be acceptable to most countries, whether developing or developed.

58. It should be noted that there could be differences of opinion between Contracting Parties at the two ends of a liner trade as to the desirability and manner of regulating the activities of non-conference operators in the trade concerned as well as to what constitutes "fair competition on a commercial basis". Hence, unilateral actions in respect of non-conference lines by Contracting Parties may lead to conflicts with their trading partners. Governments which are interested in regulating non-conference operators may therefore find it useful to enter into discussions on the subject with their trading partners with a view to arriving at mutually acceptable positions.

Chapter IV

THE RESPONSIBILITY OF LINER CONFERENCES IN THE APPLICATION OF THE CODE

59. An important responsibility devolves upon conferences to ensure the effective application of the provisions of the Code. In fact, a considerable number of the provisions of the Code are specifically addressed to conferences and start with the phrase "A conference shall ...". In many other provisions the conference responsibility is implicit. While Governments would no doubt wish to ensure that conference behaviour conforms to the relevant provisions of the Code, conferences themselves are obliged to ensure that the requisite structural arrangements within conferences and the requisite conference relationship with shippers, shippers' organizations and Governments are established and that these function in conformity with the provisions of the Code.

60. Article 22 provides that "conference agreements, trade participation agreements and loyalty agreements shall conform to the applicable requirements of this Code and may include such other provisions as may be agreed which are not inconsistent with this Code". It is necessary that conference agreements should either set out the administrative structures required for the application of the Code provisions or refer to specific ancillary documents where the procedures are given in detail. The latter arrangement is to be preferred since the conference agreement is a basic document which should not be subject to other than occasional change, whereas administrative procedures need to evolve in the light of changing circumstances.

61. The matters that need to be covered in conference agreements are examined in greater detail in part two, which deals with the application of specific provisions of the Code, and a check list of items that should be covered in conference agreements is set out in chapter XVII.

62. The internal administration within the conference machinery of a full Code conference would need to cover many aspects, including, in particular:

Decision-making procedures;

Admission of new lines, particularly third-country lines;

Cargo sharing;

Freight rate increases, demands for the fixation of specific rates and requests for promotional freight rates;

Holding of consultations;

Dissemination of information;

Effective self-policing machinery; and

Provision of an independent recourse procedure.

The existing methods of handling these matters may need to be revised by the conference concerned in order to ensure effective implementation of the Code in a given trade. The need for transparency and consistency will demand that rather formal administrative procedures be adopted.

63. It is particularly important that the administrative structures of the conference should satisfy several criteria. These are:

The structure must be adequate to carry out the Code procedures, within the Code time limits, unless other procedures and time limits, which do not conflict with specific Code provisions have been agreed to;

The administrative procedures to be followed in each case should be clearly defined and should be available in documentary form to all interested parties;

The procedures should contain details of the information needed to enable decisions to be taken on questions such as the entry of third-country lines and applications for specific and promotional freight rates;

The organization, in the sense of who, or which committee, within the conference, is to be responsible for specific tasks, has to be clearly established although, as an internal arrangement of the conference, this does not need to be publicized; and

Recourse procedures, independent of, and external to, the conference to be used in the event of a dispute must be clearly set out.

64. The administrative procedures need to cover the various sets of relationships which are created by conference operations. The rules must cover the detection of malpractices and breaches of the rules. Insofar as the parties concerned are members of the conference, the conference procedures for self-policing and the imposition of sanctions may generally be satisfactory, subject to the provisions of the safeguards set out in article 5 of the Code. However, in relations between conferences and third parties, particularly shippers, recourse to an independent procedure for the resolution of disputes would be necessary. Even within a conference, there may arise disputes between member lines which may require to be settled outside the framework of the conference concerned. In order to deal with such situations, the Code provides a dispute settlement machinery which is examined in the next chapter.

Chapter V

DISPUTE SETTLEMENT WITHIN THE CODE

65. Arbitration and conciliation are the traditional methods of resolving disputes in the shipping industry and, in general, they have worked effectively. In arbitration a single arbitrator, or a panel of usually three arbitrators, would issue a ruling which the parties in dispute would have agreed in advance to accept. With conciliation, the conciliator(s) seek to find a compromise acceptable to both parties. The essential feature of both systems is the belief in the independence and the integrity of the arbitrator(s) or conciliator(s).

66. Liner conferences, however, have not generally used independent recourse procedures. In the deliberations that led to the elaboration and adoption of the Code, developing countries expressed the view that an independent system of dispute settlement was a fundamental need, as the absence of such procedures presented a serious disability for the users of conference services.

A. International mandatory conciliation

67. One of the compromises of the Code was the establishment of the system of international mandatory conciliation (IMC). The structure of the system is set out in articles 23 to 45 of the Code. The purpose of conciliation is to reach an amicable settlement of the dispute through recommendations formulated by independent conciliators.

68. The Code provides that the provisions for dispute settlement "shall apply whenever there is a dispute between the following parties:

- (a) A conference and a shipping line,
- (b) The shipping lines members of a conference,
- (c) A conference or shipping line member thereof and a shippers' organization or representatives of shippers or shippers, and
- (d) Two or more conferences." (article 23, paragraph 1).

69. Disputes between the parties mentioned above "relating to:

- (a) Refusal of admission of a national shipping line to a conference serving the foreign trade of the country of that shipping line,
- (b) Refusal of admission of a third-country shipping line to a conference,
- (c) Expulsion from a conference,
- (d) Inconsistency of a conference agreement with this Code,
- (e) A general freight-rate increase,

(f) Surcharges;

(g) Changes in freight rates or the imposition of a currency adjustment factor due to exchange rate changes;

(h) Participation in trade, and

(i) The form and terms of proposed loyalty agreements, which have not been resolved through an exchange of views or direct negotiations shall, at the request of any of the parties to the dispute, be referred to international mandatory conciliation ...". (article 23, paragraph 4).

70. The disputes have to be referred to international mandatory conciliation within precise time limits provided in article 24 of the Code. These time limits are:

In disputes relating to membership of conferences: 60 days from the date of receipt by the applicant of the conference decision, including the reasons therefor (article 24, paragraph 2(a));

In disputes relating to general freight rate increases: the date of expiry of the period of notice to be given by the conference (article 24, paragraph 2 (b));

In disputes relating to surcharges: 30 days after the receipt of the notice or, where no notice has been given, 15 days from the date the notice was put into effect (article 24, paragraph 2 (c));

In disputes relating to changes in freight rates or the imposition of a currency adjustment factor due to exchange rate changes: five days after the date of expiry of the period of 15 days from the date when the intention to apply a currency surcharge or to effect a freight rate change is announced (article 24, paragraph 2 (d));

Requests for conciliation in other disputes may be made at any time (article 24, paragraph 4).

The time limits specified in article 24, paragraph 2 (and mentioned above) may be extended by agreement between the parties.

71. If the parties to a dispute referred to international mandatory conciliation accept the recommendation of the conciliators, such a recommendation "shall constitute a final determination" of the dispute "except to the extent that the recommendation is not recognized and enforced in accordance with the provisions of article 39" (see article 38, paragraph 1). Under the provisions of article 40, paragraph 3, however, it is open to a party to a dispute not to accept a recommendation of conciliators. Article 40, paragraph 3 also provides that "each party may publish the recommendation and the reasons therefor and also its own rejection and the grounds therefor". It should be noted that IMC does not prejudice the right of an aggrieved party to have recourse to any other legal remedy available to it in the event that IMC does not yield an accepted solution for a dispute.

72. In order to enable the parties concerned to resort to international mandatory conciliation and enable the enforcement of the recommendations arising from international mandatory conciliation, each Contracting Party should make appropriate provision in its national legislation. These measures are examined in chapter VIII, paragraphs 125 to 131.

B. Other dispute settlement procedures

73. IMC is not the sole procedure suggested in the Code; in fact, IMC should be seen as a part of a process, and as one alternative tribunal of last resort. The Code makes these points clear in several ways. For example:

The parties to a dispute shall first attempt to settle it by an exchange of views or direct negotiation (article 23, paragraph 3);

Where the exchange of views or direct negotiation have failed to yield a mutually satisfactory solution, the dispute may be referred to IMC at the request of any one of the parties (article 23, paragraph 4);

Where the parties have agreed that disputes be resolved by other procedures, then those procedures may be used (article 25, paragraph 1) unless national legislation, rules or regulations preclude this choice (article 25, paragraph 2);

The parties to a dispute may at any time agree to have recourse to a different procedure for the settlement of their disputes (article 31, paragraph 4); and

Disputes between parties which belong to the same country shall be settled within the framework of national jurisdiction, "unless this creates serious difficulties in the fulfilment of the provisions of this Code" (article 23, paragraph 2).

74. Thus, the Code procedures are not rigid and recourse to IMC is to be considered a last resort to be used when all else fails. Developing countries should endeavour to establish through consultations with conferences a structure for independent review of conference decisions and local conciliation of disputes, as appropriate, so that alternative procedures, external to the conference, are available, as a prior step before consideration is given to invoking IMC. Specific instances of the need for such structures are examined in part two.

75. In certain cases, it may be desirable for the Contracting Parties concerned to hold consultations with one another and with the commercial parties concerned with a view to clarifying the issues and helping to resolve disputes.

Chapter VI

THE ROLE OF GOVERNMENT AS APPROPRIATE AUTHORITY IN THE CODE

76. The responsibility rests squarely upon the Governments of States, Contracting Parties, to take the necessary legislative or other measures as may be necessary to implement the Convention as provided for in article 47 of the Code. These measures are discussed in chapter VIII. The Code also provides for an appropriate authority to perform certain functions in the application of the Code provisions. This chapter examines the role of government as appropriate authority.

77. The Code defines an appropriate authority as "Either a government or a body designated by a government or by national legislation to perform any of the functions ascribed to such authority by the provisions of this Code". Clearly, an appropriate authority could be either the entire Government itself or an authorized organ of the Government or any body designated as such. The Code appears to allow all these possibilities.

78. It is clear, in particular from the definition of a shippers' organization, that a shippers' council is not regarded by the Code as an appropriate authority. If all problems of interpretation are to be avoided, governments should ensure that, whatever their precise legal form, shippers' councils are not designated as an appropriate authority, nor invested with any of the functions of an appropriate authority.

79. Two functions of an appropriate authority are to be found in chapter I of the Code. Firstly, the definition of a national shipping line includes recognition by "an appropriate authority" as a criterion for determining whether a shipping line is a national shipping line or not. Secondly, in the definition of a shippers' organization, recognition by an appropriate authority, if it so desires, is provided for. These two functions are discussed further in chapter VIII.

80. The body of the Code itself contains a number of provisions concerning the role of appropriate authorities. Appropriate authorities may, either if they so wish or on request, depending on which is relevant, do the following:

Have their views on the admission of a new member line to a conference taken into account (article 1, paragraph 5);

In association with the authorities at the other end of the route, take up the matter of a disagreement between their groups of national shipping lines and make their views known to the parties concerned for their consideration (article 2, paragraph 14);

Receive reports from conferences on actions taken in connection with malpractices and/or breaches, on a basis of anonymity (article 5, paragraph 1 (c));

Receive copies of the conference agreements, pooling or other sailing rights agreements and of other related documents (article 6);

Request information, copies of the annual reports of the conference and notice of intended action by the conference (articles 10, 14, paragraph 1, 15, paragraph 4);

Participate fully in consultations between conferences and shippers, but without a decision-making role (article 11, paragraph 1); and

Participate in conciliation proceedings in support of a party being a national of that Contracting Party, or in support of a party having a dispute in the context of the foreign trade of that Contracting Party or act as an observer in such proceedings (article 28).

81. Even though the appropriate authority is not assigned a decision-making role in consultations between shippers and conferences, through such participation, the appropriate authority, by virtue of its position, would be able to play an effective role in shaping the conclusions of consultations. The appropriate authority would also be able to influence the policies of conferences through its national shipping lines, particularly where they are State-owned. It is to be noted further that in many developing countries the ability of shippers' organizations to carry out effective consultations depends on the technical support given by government agencies responsible for shipping and freight studies.

82. It is relevant to note that, over the 10-year period between the adoption of the Code in 1974 and its coming into force in 1983, many developing countries instituted procedures and practices for direct consultations between Governments and conferences on freight rate matters. For the greater part, these procedures and practices have been accepted by liner conferences. It would be a pragmatic approach for conferences to continue to operate within the scope of such mutually agreed practices.

A. Periodic consultations with conferences

83. Apart from introducing the requisite legislative framework required for the implementation of the Code in the trades with other Contracting Parties, as mentioned in paragraph 76 of this chapter and discussed in chapter VIII, appropriate authorities may wish to invite the conferences concerned to inform them of the measures which are being taken by the conferences to conform to the provisions of the Code. If these measures are not found to be entirely satisfactory, a Government could invite the conference concerned to hold consultations with it on this matter. It would be desirable for shippers' organizations to be associated in such consultations. It may be equally desirable to consult with the appropriate authorities of the trading partners in order to reach common positions on the interpretation and implementation of the Code provisions.

84. In fact, it may be desirable that Governments and conferences hold periodic consultations on the application of the Code in the conference trades concerned. Such periodic consultations may be considered as falling within the "other measures as may be necessary to implement the present Convention" which Contracting Parties are obliged to take under article 47 of the Code. The periodic consultations may also be relevant for Governments wishing to assure themselves that "conference agreements, trade participation agreements and loyalty agreements ... conform to the applicable requirements of the Code" (article 22).

85. To the extent that conferences agree to co-operate with Governments in such consultations, Contracting Parties may be content with designing the national implementing legislation, concerning itself only with basic principles, leaving the modalities of application to be settled by mutual agreement with the parties concerned. On the other hand, if conferences do not co-operate with Governments, Contracting Parties may seek to protect their national interest by adopting detailed implementing legislation which may leave little scope for flexibility and compromise. There can be no doubt that the first course is the better one. The solutions to the problems of implementation are best found through consultation and negotiation.

86. Particular requests which might be made to conferences by the appropriate authorities to facilitate their monitoring role, and on which strong opposition is unlikely to be met from conferences, are:

Permanent inclusion on the distribution list of documents which the Code requires to be made available on request;

Inclusion of appropriate authorities in the list of those entitled to request that freight rate tariffs be made available;

Inclusion of appropriate authorities in the list of bodies entitled to request consultation in connection with a general freight rate increase; and

Inclusion of appropriate authorities in the list of those to be notified of the imposition of surcharges and currency adjustment factors.

These points are even more important in countries where national shippers' councils are weak, and in such countries they will help to strengthen the position of the national shippers' organizations vis-à-vis conferences.

87. A number of other matters which may be dealt with in the periodic consultations are discussed in part two, and a check list is included in chapter XVII.

Chapter VII

REGIONAL CO-OPERATION IN THE IMPLEMENTATION OF THE CODE

88. The importance of regional and subregional co-operation among developing countries in the elaboration of common policies and common negotiating positions in Code-related matters cannot be emphasized too strongly. Though regional co-operation is specifically referred to in the Code only just once, the effective scope for such co-operation is large and covers co-operative arrangements among national shipping lines, as well as among shippers' organizations, and should also involve Governments.

89. The specific reference in the Code is in article 2, paragraph 8 which provides for national shipping lines of a region at one end of a trade covered by a conference to redistribute among themselves by mutual agreement the shares in the trades allocated to them. Under this provision, within conferences covering several countries at each end of the route, services can be rationalized by the redistribution of cargo shares among the national lines at one end of the route. Such redistribution may need to take into account in particular the interests and particular problems of national shipping lines of land-locked countries. Such redistributive arrangements would help to improve the economic viability of all the lines concerned and is particularly important in the context of the increase in the scale of shipping operations arising from containerization.

90. The introduction of cellular container ships to a route usually spells great difficulties for developing countries, because of the large size and the high cost of ships required for commercially viable operations. One solution to the problem of economies of scale required for the viable operation of container ships would be for the national lines of several countries at one end of a trade to co-operate in the acquisition or chartering of one or more container ships and to operate as a consortium.

91. Co-operation enabling a rationalization of services and of loading and discharging ports can lead to improved load factors, speed up turn-round times and generally lead to more efficient and profitable services. Regional co-operation by national shipping lines in the use of common agencies at both ends of a trade route can also yield substantial operational economies.

92. On the side of shippers' consultations with conferences, too, the scope for a joint approach by the shippers' councils of neighbouring countries may be explored. Freight rate consultations held on a regional basis are likely to be more effective than if held on a national basis. Many developing countries' shippers' organizations are small and individually have little bargaining power against, or leverage with, the conferences. The experience of subregional groupings such as the Federation of ASEAN Shippers' Councils, the West and Central African Ministerial Conference on Maritime Transport, and the Inter-Governmental Standing Committee on Shipping of certain Governments of Eastern Africa, illustrate how developing countries can collectively negotiate with conferences.

93. When regional co-operation among shippers' organizations is based on the conference area, many of the data requirements will be the same for all countries. This points to the possibility of reducing costs by centralizing the data collection and processing in a regional freight investigation unit. Regional consultations necessitate regional information, since all those on the developing country side of the table must have the same information before them.

94. It must be stressed that solutions need to be sought in a constructive dialogue, in association with conferences, and not in confrontation. In such a spirit, conferences would normally welcome and find it in their own interests to engage in consultations on a regional basis rather than having to deal individually with many - and sometimes conflicting - national interests.

95. For the effective application of the Code to liner conference services, the appropriate geographical region for co-operation would be the zone covered by the conference. It may be useful in some cases to raise with the conference the question of enlarging the zone in order to bring the conference zone more into harmony with economic or political realities and so increase the scope for regional co-operation. It may even be that the conference zones, which are often legacies of the past, are structured on former political or colonial ties and may not represent the best zones from the point of view of economic efficiency. Certain lines with established interests might resist such moves towards a rationalization of services, but eventually such resistance could be overcome if there is sufficient determination and unity on the part of the developing countries concerned.

96. The real difficulties of instituting regional co-operation should not be overlooked. Every act of co-operation requires that those co-operating are willing to make compromises and to cede a measure of their sovereignty in the area of co-operation. This is rarely easy. It is important, therefore, that, in launching upon a scheme of regional co-operation the parties concerned should be modest and attempt to cover initially some selected areas only and thus create a base for expanded co-operation at a later date. Overenthusiasm in the beginning usually leads to failure, with subsequent difficulty in retreating to a more modest programme of co-operation which, had it been adopted in the beginning, would have been fully realizable.

Chapter VIII

LEGISLATIVE AND OTHER MEASURES REQUIRED TO BE TAKEN BY CONTRACTING
PARTIES TO ENSURE THE IMPLEMENTATION OF THE CODE

97. The legislative measures which a Contracting Party will need to adopt in order to implement the Code will depend, on the one hand, on existing legislation and, on the other hand, on the national legal system. Existing legislation does not refer only to legislation directly concerned with maritime transport affairs. In the case of the Code it may include legislation regarding competition and restrictive practices, for example, and general commercial law.

98. This chapter concentrates on particular needs which have been identified. It includes issues which could be made the subject of legislation or be handled in other ways. It would be for each Contracting Party to decide on the extent to which it wishes to enact national legislation or to deal with matters in other ways.

99. The basic Code reference to the legislative action needed is to be found in article 47, which says: "Each Contracting Party shall take such legislative or other measures as may be necessary to implement the present Convention". It clearly means that each Contracting Party shall take such legislative, administrative or judicial measures as may be necessary to implement the Code. It is the duty of the Governments of the Contracting Parties to take the necessary measures which would enable the parties concerned to act within the framework of the Code. These measures would include the enactment of legislation or the amendment of existing legislation to give legal effect to the Code at the national level and ensuring that the executive and judicial organs are properly equipped with the powers required for implementing the Code.

100. Existing legislation which may be incompatible with the Code would require to be repealed or modified or the paramountcy of the Code over such legislation established. Similarly, intergovernmental bilateral agreements which are in contradiction with the provisions of the Code should, from the point of view of international public law, be amended or repealed, unless specific reservations in this respect have been made. 11/ The character of the implementing legislation has to be decided by each Contracting Party. The choice is between a rather general act dealing only with the general principles which can be applied through regulations as appropriate to particular situations or an elaborate enactment setting out provisions in detail. This may depend partly on the national legal system and legal tradition of each Contracting Party.

101. It needs to be borne in mind in this connection that there is likely to be considerable diversity in the conference trades to which the Code applies, requiring a flexible approach to the application of the Code. The drafters of the Code understood the need for flexibility, which they built into the Code in almost every possible way. Contracting Parties, through their legislation, should avoid imposing a rigid structure which does not allow for the existence of variations between conference trades and the possibility of adapting the application of the Code to those variations in order to gain the maximum benefit from it.

102. The following is a list of subjects which may require to be dealt with by national legislation and/or other measures:

The scope of application of the Convention;

Designation of appropriate authority or authorities;

Designation of national shipping lines;

Recognition of shippers' organizations and shippers;

Provision for the filing with the appropriate authority of all agreements specified in article 6 of the Code;

Filing of annual reports;

Granting of legal capacity to conferences and shippers' organizations for purposes of dispute settlement;

Precedence for conciliation proceedings over remedies available under national law;

The enforcement of awards of conciliators in the event of disputes referred to international mandatory conciliation;

National dispute settlement machinery;

Designation of local representatives by conferences;

Provision for the implementation of amendments to the Convention under articles 51 and 52;

Provision for the nomination of persons to the panel of conciliators.

A. Scope of application of the Convention

103. As has been stated in Chapter I, the Liner Code Convention does not contain any specific provision which sets out the scope of application of the Code. Contracting Parties may wish to determine by enactment the scope of application of the Code. It should be noted in this connection, as explained in chapter I, that the practical applicability of the Code will be to conference trades serving the territories of Contracting Parties. Within any such conference trade, the provisions of the Code should apply to all commercial parties concerned, irrespective of nationality.

104. Contracting Parties may wish to include in their national legislation a definition of the term "liner conference". They should guide themselves by the following definition of a liner conference provided in the Code:

"A group of two or more vessel-operating carriers which provides international liner services for the carriage of cargo on a particular route or routes within specified geographical limits and which has an agreement or arrangement, whatever its nature, within framework of which they operate under uniform or common freight rates and any other agreed conditions with respect to the provision of liner services".

It should be noted that any agreement or arrangement within a group of two or more vessel-operating carriers that satisfies the minimum criteria laid down in this definition would constitute a liner conference for the purposes of the Code, irrespective of what it calls itself. There may be provision for the appropriate authority to publish the names of conferences which fall within the scope of the Code, as far as each Contracting Party is concerned. Contracting Parties may also wish to make it clear that multimodal services provided by liner conferences fall within the scope of the Code.

105. Where Contracting Parties have made reservations limiting the scope of application of the Code, such reservations may be reflected in the national legislation.

B. Designation of appropriate authorities

106. The Code provides for certain functions to be performed by an appropriate authority of the Government. These functions of the appropriate authority are examined in chapter VI. In part one, chapter I of the Code, an appropriate authority is defined as "either a government or a body designated by a government or by national legislation to perform any of the functions ascribed to such authority by the provisions of this Code".

107. It may be pointed out that it is open to a Contracting Party to designate more than one appropriate authority. The designation of more than one appropriate authority may become necessary if the responsibilities of government relating to shipping are distributed between several ministries or departments of government. This is frequently the case. For example, the subject of national shipping lines may be assigned to a ministry or department of shipping, transport or communications, while the subject of shippers' councils may be assigned to a ministry or department of trade or commerce. Where more than one appropriate authority is designated, which specific function or functions ascribed to the appropriate authority by the provisions of the Code is or are assigned to each of the appropriate authorities so designated should be clearly indicated.

108. Apart from assigning to appropriate authorities specific functions as prescribed in the Code, national legislation may authorize the appropriate authority or appropriate authorities to take such administrative actions as are necessary to set in motion and to make effective the implementation of the Code.

C. Designation of national shipping lines

109. Part one, chapter I of the Code gives the following definition of a national shipping line:

"A national shipping line of any given country is a vessel-operating carrier which has its head office of management and its effective control in that country and is recognized as such by an appropriate authority of that country or under the law of that country.

Lines belonging to and operated by a joint venture involving two or more countries and in whose equity the national interests, public and/or private, of those countries have a substantial share and whose head

office of management and whose effective control is in one of those countries can be recognized as a national line by the appropriate authorities of those countries."

110. According to the above definition, national lines could be recognized as such by an appropriate authority of that country or under the law of the country. Governments of developing countries may, for sound economic reasons, wish to limit the number of national shipping lines which are recognized for purposes of the Code. Such Governments may wish to provide for recognition of specific national shipping lines by an appropriate authority in accordance with established criteria.

111. It is desirable that the national legislation or regulations clearly set out the criteria which national shipping lines which seek recognition should be required to fulfil. In this connection, Governments may consider that the privileges and rights which flow from the designation of "national shipping line" should be balanced by corresponding obligations. Such obligations may include conditions relating to the registration of the vessels of the line under the national flag and the employment of nationals as seafarers in order to ensure that the "effective control" referred to in the definition can be genuinely exercised. 12/

112. Apart from the criteria for determining whether a line's head office of management and its effective control is in that country, a Government may also lay down by regulation such other conditions as it deems to be relevant. There may also be provision for adding further conditions or deleting existing conditions by subsequent regulations made by an appropriate authority. There may also be provision for the gazetting of the names of recognized national shipping lines.

113. The recognition of a national shipping line may be general for all liner conferences serving the trade of a Contracting Party and to which the Code applies, or it may be made geographically specific to one or more conferences.

114. A final point to note with regard to national shipping lines is that the Code definition refers specifically to a "vessel-operating carrier", although its fleet, pursuant to article 1, paragraph 2, may include "chartered tonnage". In today's context, where only large container ships would be commercially viable on certain routes, the national shipping line of a country may find that the commercially most desirable option would be to function exclusively as a purely slot charter operator, the slots being chartered from another line or from a consortium of lines. Countries which envisage such a situation may find it appropriate to make it explicit in the national law that shipping lines operating only slot charters and not entire vessels would be entitled to recognition as national shipping lines for the purposes of the Code, although the "appropriate authority" may need to lay down certain specific criteria. Consultations and negotiations with the relevant conference(s) may be appropriate to arrive at an acceptable solution in this respect.

D. Recognition of shippers' organizations and shippers

115. Under the provisions of article 11 of the Code, shippers' organizations, representatives of shippers, and, where practicable, shippers, have the right to consultations with conferences on matters of common interest.

116. However, in a situation where there are several representative bodies of shippers, perhaps specialized bodies representing specific commodity groups, all of which wish to participate in consultations, and where individual shippers too wish to participate in consultations, the question of practicability could arise. In such situations the practicability or otherwise of consultations with specific shippers' bodies or with individual shippers may be unilaterally determined by conferences. In order to avoid such unilateral determination by conferences, national legislation may make provision for the relevant appropriate authority to designate by regulation the shippers' organizations and individual shippers which would have the right to consultations with conferences. There could be administrative arrangements for the relevant appropriate authority to reconcile any differences which may arise between different shipper interests.

117. Where it is decided that individual shippers and representative shipper bodies should be designated for purposes of consultation under article 11, the criteria to be adopted for such purposes may be set out by the relevant appropriate authority in regulations framed under the national law. Alternatively, the designation may be left entirely to the discretion of the relevant appropriate authority.

118. In countries where freight forwarders play an important role in freight consolidation and/or in handling shipments on behalf of numerous small shippers, there may be a need for provision in the national legislation for such freight forwarders to have the right to become members of shippers' organizations and for associations of freight forwarders to have the right to participate in consultations with liner conferences.

119. In the case where shippers' organizations of a subregion have set up a regional body, such as a federation of shippers' councils, for the purposes of consultations with conferences on a regional basis, it is desirable that provision be made in the national legislation for national shippers' organizations to delegate to such regional bodies the right to act on their behalf in consultations with conferences under article 11 of the Code and for agreements reached by regional bodies with conferences to be binding on national shippers' organizations.

120. Similarly, where necessary, national legislation should explicitly provide for regional intergovernmental committees representing a number of Governments to participate in consultations with conferences on a regional basis.

E. Filing of conference agreements with appropriate authorities

121. Article 6 of the Code provides that "all conference agreements, pooling, berthing and sailing rights agreements and amendments or other documents directly related to, and which affect, such agreements shall be made available on request to the appropriate authorities of the countries whose trade is served by the conference and of the countries whose shipping lines are members of the conference". The contents of conference agreements referred to above will reflect whether the conferences are conforming or not to the provisions of the Code (see article 22). Governments of Contracting Parties may wish to ensure that such agreements contain all provisions required for the effective implementation of the Code and do not contain clauses which conflict with the

Code provisions. Accordingly, national legislation may expressly provide for the agreements referred to in article 6 to be filed with the appropriate authorities whether requested or not. In addition, the law could contain provisions providing that stipulations of conference agreements which do not comply with the requirements of the Convention may be declared null and void to the extent that they are inconsistent with the Code. Similar provisions could apply to trade participation and loyalty arrangements.

122. It should be noted that the mandatory filing requirement could be applied only to conferences serving the trade of a Contracting Party. In the case where the shipping line of a Contracting Party is a third country member of a conference serving the foreign trade between two other countries which are Contracting Parties, a agreement should be sought with the conference concerned for regular submission to it of the relevant conference agreements, if this is desired.

F. Filing of annual reports

123. Article 10 requires conferences to provide shippers' organizations with annual reports of their activities. Such annual reports shall be submitted, on request, to the appropriate authorities of the countries whose trade is served by the conference concerned. Contracting Parties may wish to make it mandatory for such annual reports to be submitted to their appropriate authorities.

124. The contents of such annual reports is a matter to be agreed between the respective conferences, shippers' organizations and appropriate authorities, taking into account the provisions of article 10 of the Code.

G. Granting of legal capacity to conferences and shippers' organizations

125. Article 26 of the Code requires Contracting Parties to confer upon conferences and shippers' organizations such legal capacity as is necessary for the application of the provisions of the Code relating to the settlement of disputes. In particular the national law should provide that:

A conference or a shippers' organization may institute proceedings as a party or be named as a party to proceedings in its collective capacity;

Any notification to a conference or shippers' organization in its collective capacity shall also constitute a notification to each member of such conference or shippers' organization.

126. With regard to the legal capacity of shippers' organizations, if shippers' organizations already enjoy a legal corporate status, no further action would be required. If this is not the case, there should be a provision in the national legislation expressly conferring on the shippers' organizations the capacity to be a party to legal proceedings. Further provision may need to be made governing the responsibility of members of such organizations for obligations incurred by the organization itself, in particular for costs arising from proceedings as well as for any fines or money judgements.

127. Liner conferences, given the manner in which they are organized, would normally not have a corporate legal status. Accordingly it is incumbent upon Contracting Parties to confer, by national legislation, legal capacity to conferences serving the national trades. Similar provisions as proposed above with regard to shippers' organizations would be required to make the legal obligations of conferences binding collectively upon all the member lines of a conference. For the purposes of this law, conferences operating in trades between the Contracting Party and other Contracting Parties may be required to register their names, addresses, list of members and names of conference office bearers with a relevant appropriate authority, with further provision for the appropriate authority to publish such information.

H. Precedence for conciliation proceedings over remedies available under national law

128. Under the national laws of most countries, remedies are available for disputes between commercial parties, even in the case where one of the parties is not a national. Article 25, paragraph 3 of the Code provides that international mandatory conciliation, if invoked, will have precedence over remedies available under national law. The national legislation should clearly establish such precedence, as provided for under article 25, paragraph 3, and should include provision for staying ongoing proceedings under national law where a respondent wishes to resort to international mandatory conciliations. Where the recommendation of the conciliators is rejected by one of the parties, access once again to national law remedies may be relevant in some cases and this position may be made explicit in the legislation.

129. Where a recommendation has been made by conciliators in resolution of a dispute and this recommendation has been accepted by the parties concerned, a procedure is required for the enforcement of such recommendation. The national legislation should designate the court or other competent authority to which application may be made for the enforcement of such a recommendation. The procedures required to be followed in such applications may be detailed in the legislation or in subsequent regulations under the enactment.

130. Where a conciliation award is made against a conference, there should be legal provision for such award to be enforced against all conference lines, in proportion to their individual responsibilities, irrespective of whether any particular member line is a national entity of a Contracting Party or not.

131. There should also be legal provision for a recommendation of conciliators not to be recognized or enforced by courts if such a recommendation is affected by any of the matters mentioned in subparagraphs (a) to (d) of article 39, paragraph 2, namely, disability, fraud, coercion, public policy or irregularity of composition or procedure of the conciliators. If the affected part of the recommendation can be severed as mentioned in article 39, paragraph 3, the remainder of the recommendation may be recognized and enforced.

I. National dispute settlement machinery

132. Article 23, paragraph 2 of the Code provides that "disputes between shipping lines of the same flag, as well as between organizations belonging to the same country, shall be settled within the framework of the national jurisdiction of that country, unless this creates serious difficulties in the fulfilment of the provisions of this Code".

133. Depending on the juridical system prevailing in the country, the Contracting Party may give to shipping lines, shippers' organizations and shippers the right of access to national courts for the settlement of such disputes. The national legislation or subsequent regulations should set out the classes of disputes which may be referred to national courts or to the appropriate authorities for settlement.

J. Local representation by conferences

134. Article 21 of the Code provides that conferences shall establish local representation in all countries served, except that where there are practical reasons to the contrary the representation may be on a regional basis. Since the availability of a local conference representative would be of great benefit in facilitating consultation and maintaining harmonious relations between shippers and conferences, in certain cases Contracting Parties may wish to make it obligatory for conferences to appoint local representatives.

K. Amendments to the Code under articles 51 and 52

135. Article 51 provides for Contracting Parties to propose amendments to the Code. Depending on the legal system of the country, such proposed amendments may require to be tabled in the legislature for information or be submitted to the legislature for approval before they become binding on the Contracting Party. The national legislation should provide for such proposed amendments to be considered in accordance with national legislative practice and for those amendments which have been accepted and which subsequently have come into force to be entered into the law of the country.

136. Provision should also be made for the consideration and possible adoption and implementation of amendments adopted at a review conference held in accordance with article 52.

L. Nomination of conciliators

137. Article 30 of the Code provides for the establishment of an international panel of conciliators. Article 30, paragraph 2 specifically provides that "each Contracting Party may at any time nominate members of the panel up to a total of 12, and shall communicate their names to the Registrar". Such nominations could be more expeditiously dealt with if provision is made in the national legislation for an appropriate authority to deal with the subject.

Part Two

THE APPLICATION OF SPECIFIC PROVISIONS OF THE CODE

Chapter IX

CONFERENCE MEMBERSHIP

138. In "open" conferences of the United States style, any line having the ability and the intention to offer a regular liner service which accepts to abide by the internal conference agreement has the right of admission to the conference. In "closed" conferences, however, there is no right of admission and the decision as to whether or not to admit a new line is taken by the existing members who may or may not act on the basis of a set of stable criteria. The criteria used, and the reasons for the decision taken, are considered confidential internal conference matters.

139. Though the Code definition of a liner conference does not distinguish between "open" and "closed" conferences, it is primarily concerned with "closed" conferences. In the case of a national shipping line which has the right of membership in conferences serving its home trades, recognition is placed in the hands of national authorities and only the question of "ability and intention" is left in the power of the conference. The conferences are thus "open" to all lines which have passed the hurdle of recognition as national lines and are seeking to operate in their national trades. In the case of third-country shipping lines, the criteria for entry are similar to those used by "closed" conferences in the past, subject to two major differences, namely:

The criteria are published, and

A right of appeal to an independent tribunal is provided for in case of refusal of admission, the grounds for which have to be specified.

A. Definitions

140. The essential elements of the Code definition of a national shipping line are:

It is a vessel-operating carrier,

Its head office of management and its effective control are in the country, and

It is recognized as a national shipping line by an appropriate authority in, or under the law of, that country.

The definition goes on to cover the joint venture case, which may be important in particular circumstances, but which does not affect the principle of the definition. It is to be noted that ownership of vessels itself is not necessary, the operation of vessels being a sufficient condition. In the case of a national shipping line which is exclusively a slot-charter operator, its right to become a conference member may require to be negotiated with the conference concerned by the appropriate authority of that country. 13/

141. The overriding condition in the definition is recognition by an appropriate authority or under the law. Thus, it is the relevant law or the Government of the country which decides whether the head office of management and the effective control are in its country or not (as made clear by the use of the expression "as such" in the definition). The decision is not a conference decision. It may be noted, in this connection, that according to EEC Council Regulation No. 954/79 of 15 May 1979, as far as EEC States which become Contracting Parties are concerned, the shipping lines of the same nationality shall determine by commercial negotiations which of them may participate as a national shipping line in any conference. 14/

142. It is clear that each Contracting Party must establish, by whatever are the appropriate procedures, the legal basis for the shipping lines to be recognized as national shipping lines and in which trades each can operate. Criteria for recognition may be established by national legislation so that recognition is then a purely administrative procedure, or the question of recognition may be left to be handled on a case-by-case basis by the appropriate authority. 15/

143. The definition of a third-country shipping line in the Code is simple: it is a vessel-operating carrier in its operations between two countries of neither of which it is a national shipping line. This definition means that a shipping line of a country which is not, however, recognized as a national shipping line under the law or by the Government of that country for the purposes of the Code would be considered as a third-country line even in its home trades.

B. Membership of national shipping lines

144. Article 1, paragraph 1 states that "any national shipping line shall have the right to be a full member of a conference which serves the foreign trade of its country, subject to the criteria set out in article 1, paragraph 2". Article 1, paragraph 2 provides that any line applying for membership shall furnish evidence of its ability and intention to operate a regular, adequate and efficient service on a long-term basis, as defined in the conference agreement, and this may include the use of chartered tonnage. It is to be noted that the right to use chartered ships to "fulfil their conference obligations" is also provided in article 2, paragraph 11, and the wording is such as to imply that the use of chartered tonnage only would be accepted.

C. Membership of third-country shipping lines

145. The Code provides a set of five criteria which should be taken into account, inter alia, in considering an application for admission from a third-country line. The criteria are to be found in article 1, paragraph 3 of the Code.

146. What needs to be noted in particular is the rider to the criteria which states that they "shall not be applied so as to subvert the implementation of the provisions relating to participation in trade". 16/ Presumably, the sense of the rider is that the criteria should not be used in such a fashion as to eliminate third-country lines, or to leave their representation so weak that it would be impossible for them to "acquire a significant part, such as 20 per cent, in the ... trade". The rider may, therefore, be regarded as a

warning to the two groups of national shipping lines not to seek to reconcile intra-group rivalry over the division of the country trade shares by increasing them at the expense of the third-country carriers.

D. Other provisions concerning admission

147. Article 1, paragraph 4 provides that an application for admission or readmission "shall be promptly decided upon", with a prompt communication of the decision to the applicant, which shall occur "in no case later than six months from the date of application". In the case of a negative decision, the conference "shall, at the same time, give in writing the grounds for such refusal". This provision is one of the few where the mandatory "shall" is used without any qualifying expression. The time frame is the same for national as for third-country lines, although this does not preclude a more expeditious treatment of applications from national shipping lines, whether for admission or for readmission, since these clearly must have the support of the other members, if any, of the same group in the conference.

148. Article 1, paragraph 5 provides for the views put forward by shippers and shippers' organizations to be taken into account in considering an application for admission, "as well as the views of appropriate authorities if they so request". Nothing is said concerning the manner in which these views are to be solicited. Hence, appropriate authorities should decide on the question of whether they wish their views on questions of admission to be sought, which does not imply that a Government must have views in each particular case. If a Government wishes to be consulted, it must ensure that the conference establishes the administrative provisions for such consultation before decisions are taken.

149. Since admission and readmission are treated together in article 1, paragraph 4 it seems appropriate that in practice they should be regarded together in article 1.5. In particular, shippers and appropriate authorities are more likely to have views on the fitness for conference membership of a line which has left or has been expelled from the conference or is serving as an outsider or as a member of another conference serving the country's trade than they are to have views on the fitness of a line with which they have had no experience. In giving "special scrutiny to the circumstances under which the line left the conference" (article 1, paragraph 6) in deciding on an application for readmission, the conference itself may want to have the views of shippers and appropriate authorities.

E. Conference procedures regarding admissions

150. It is clear that the conference will need to establish in the conference agreement a clear procedure for dealing with applications for admission and for readmission within the time frame laid down in the Code. This is not something which normally would require any authority from the Government. However, the authorities would be interested in this for four reasons, namely:

To ensure that in this respect the agreement conforms to the applicable requirements of the Code (article 22);

To check that no provisions inconsistent with the Code provisions for third-country carriers and for their participation in the trade are included;

To ensure that adequate provision is made for soliciting the views of shippers and appropriate authorities on questions of admission and readmission; and

To ensure that the agreement and "other documents directly related to, and which affect," the agreement (see article 6) are made available to the authorities.

151. The conference agreement should also provide that disputes relating to admission, whether of a national line or of a third-country line, and to expulsion "which have not been resolved through an exchange of views or direct negotiation shall, at the request of any of the parties to the dispute, be referred to international mandatory conciliation", (article 23, paragraph 4).

F. Sanctions

152. One particular question related to membership concerns the position of a line which wishes to leave the conference, or which is expelled from the conference. Article 4, paragraph 1 provides that a member line "shall be entitled, subject to the provisions regarding withdrawal which are embodied in pool schemes and/or cargo-sharing arrangements, to secure its release, without penalty, from the terms of the conference agreement". Article 4, paragraph 2 provides that "upon notice to be specified in the conference agreement", a member may be suspended or expelled for "significant failure to abide by the terms and conditions of the conference agreement". Article 4, paragraph 4 provides that upon withdrawal or expulsion "the line shall be required to pay its share of the outstanding financial obligations of the conference". Further, it will "not be relieved of its own financial obligations under the conference agreement or of any of its obligations towards shippers". Article 1, paragraph 6 provides that if a line which has withdrawn or been suspended or expelled, applies for readmission, it shall "give evidence of having fulfilled its obligations in accordance with article 4".

153. The Code makes no provision for fines or forfeits for a line on leaving a conference. Nor is there any requirement for a line to pay a severance charge to the conference to cover any cost or inconvenience which its withdrawal imposes. However, such a requirement could be included in the conference agreement if all parties so wish, but the level of the charge would need to be clearly specified.

Chapter X

PARTICIPATION IN TRADE

154. One of the principal questions raised by developing countries during the Code deliberations relates to the effective participation of their national shipping lines in conferences serving their foreign trades. When admitted to a conference, national lines of developing countries frequently found that the trade shares allocated to them by existing members were too small for economic operation. There was also no built-in provision for an increase in such shares and no reasons were given for their limited size. When the conference operated a pool, admission to the conference did not automatically entail admission to the pool and, if admitted, the pool share might have been quite small with no provision for increase. Though changes in pool shares over time were subject to negotiation among the pool members, persistent over-carrying, as might easily occur in the case of an efficient new entrant given a small share, was not generally regarded as grounds for increasing the new entrant's share.

155. The sharing of the conference trade and the question of admission to the pool are frequently seen as separate issues. However, in the Code they are brought together as a single question. This means that if a conference takes any action to control or limit the shares of member lines in the overall carryings, it is regarded by the Code as operating a pooling, berthing, sailing or other participation agreement. This chapter, therefore, deals with all types of such agreements, although the main interest is in the question of the operation of pools. The expression pool is nowhere defined in the Code. It will be important that agreement is reached between the parties concerned on the meaning to be attached to the word "pool" in the trades concerned. It should be noted, of course, that if member lines have mutually agreed, the conference may operate without any form of cargo sharing agreement whatsoever and trade shares would then be market shares gained in competition. This would exclude price competition, since the essence of conference operation is uniform freight rates.

A. The Code principles

156. Participation in trade is covered in article 2 of the Code, which has 17 paragraphs. This chapter occupies itself with paragraphs 1-4, 10, 12-15 and 17 of this article. Paragraphs 5-9 dealing with reallocation and redistribution of cargo shares are discussed in Chapter XI, paragraph 11 dealing with the use of chartered ships has already been covered in chapter IX, paragraph 16 dealing with overcarrying and shut out cargo is dealt with in chapter XVI, paragraph 248.

157. Three rules of application are contained in the first three paragraphs of the article. These are that:

Any shipping line member of the conference shall have sailing and loading rights in the trades covered and shall have the right to participate in the pool;

Unless otherwise mutually agreed, the allocation of pool shares or berthing and sailing rights shall be made within internationally agreed principles as contained in article 2, paragraph 4, and

The national shipping lines of each country, whether one or many, shall be regarded as a single group of shipping lines.

158. The two principles in article 2, paragraph 4, which provide the key to cargo sharing and which "shall be observed, unless otherwise agreed" are:

The equality of the rights to participate of the two groups of national lines, and

The right of third-country lines "to acquire a significant part, such as 20 per cent".

159. The provision in the Code refers to the "rights to participate in (both) the freight and volume of traffic" (article 2, paragraph 4 (a)). Experience has shown that the double condition is necessary to provide an incentive for the lines concerned to:

Lift cargoes which yield low profits, either because of low freight rates or high handling costs, and

Refrain from adopting measures to attract an excessive share of the more profitable cargoes.

The double condition should not present any operational problems if a well thought out and drawn up pooling scheme is decided upon.

B. The mechanism for cargo sharing

160. The Code has nothing to say concerning the mechanism of cargo sharing, but clearly some arrangements need to be made if it is decided to operate a cargo sharing scheme. There are two separate decisions to be made with regard to the application of a scheme of cargo sharing:

What type of system to adopt, and

How to carry out the various administrative tasks involved.

161. With regard to the type of system, traditionally, the conferences which have operated a system of cargo sharing have preferred the a posteriori system, whereas in recent years some developing countries have instituted the a priori system through State-sponsored cargo sharing schemes. It may be noted that these a priori systems were established before the entry into force of the Convention.

162. In the traditional conference-operated a posteriori system, efforts are made to get as close as possible to the allocated shares at loading, but complete accuracy is not expected. Records of loadings, in terms of tonnage and freight earnings, are maintained by the pool secretariat. At the end of a predetermined period, cash adjustments are made between the lines, the over-carriers paying the under-carriers, minus a standard cargo handling

charge, if the pool is one that covers both freight and volume of traffic. In principle, all lines are then placed in the same financial position which they would have enjoyed had the initial allocations been absolutely correct.

163. With an a priori system loading is done strictly in accordance with allocations. It requires to be designed so as to ensure, by continuous monitoring, that the agreed cargo shares are respected since there are no subsequent adjustments of revenue between lines. Such a system would be both difficult to operate and quite inconvenient to shippers when there is a large variety of cargoes with different freight rates and handling costs or when there are many lines involved. Any a priori system where the allocation is based on freight and volume is bound to lead to discrepancies. On a route where sailings are frequent, daily monitoring of the statistics may permit the correction of discrepancies so that a correct allocation over a period may be possible. However, on a route where sailings are infrequent, an a priori system covering both freight and volume would be extremely difficult to operate. Under certain circumstances it would be possible to design a scheme which combines both a priori and a posteriori elements.

164. The various administrative tasks to be performed with regard to a pool can be divided into the preliminary tasks and the operational tasks. The preliminary tasks are to:

- Settle the three group shares (for example: 40-40-20);
- Settle the line shares, and
- Decide who will administer the system.

C. Settling the shares

165. Settling the shares of the three groups is fundamental. The basis for it must be present carryings, but future intentions need to be taken into account, particularly in the case where one of the two groups of national shipping lines is carrying less than the other. Furthermore, even if currently there are no third-country lines in the trade, opportunity must be left for them "to acquire a significant part, such as 20 per cent".

166. There are no rules which can be given as to what would be right or wrong in any situation. What has to be done is to decide what "such as 20 per cent" should mean in the particular situation of each trade. In doing this, it must always be borne in mind that provision exists in the Code for:

The reallocation of shares where one group of lines cannot, or does not wish to, carry its full allocation: 17/ and

A transition period which in no case shall be longer than two years between the commencement and the completion of the application of the cargo sharing arrangements (article 2, paragraph 10).

167. The appropriate authorities of each country may have to concern themselves with sharing the national quota between the national lines, if there is more than one line. This does not mean that the division between lines is to be done by government directive, but that Governments which have accepted the responsibility for the Code being applied in their trades and

passed the necessary implementing legislation should ensure that the division between the lines is carried out on a fair basis, whether through regular commercial negotiations or otherwise.

D. Who will administer the system

168. The administration of cargo sharing is part of the general administrative structure needed for the application of the Code. The implicit assumption in the Code is that conferences would administer the cargo sharing system. Alternatively, by mutual agreement of the parties concerned, an allocation mechanism may be devised which involves an external entity, such as a "neutral body". What is important is that the system should do four things, namely:

Ensure that cargoes are allocated in accordance with policy decisions taken;

Do this without hindrance or inconvenience to the trade;

Ensure that cargo which is "shut out" from the next sailing for quota reasons is given priority and reaches its destination in due time, and

Operate at minimum costs.

169. In some developing countries shippers' councils have been charged with the responsibility of administering cargo sharing systems. It does seem, however, that to involve bodies charged with protecting the interests of shippers in the controversies and difficulties which are likely to surround cargo sharing is likely to produce a serious conflict of interests.

170. Many conferences or freight or rate agreements are little more than sailing agreements with rate-fixing functions, with all the administration handled by one of the member lines. Such conferences may not be able to handle a cargo sharing system. However, the specific administrative tasks placed on conferences by the Code do seem to demand that many conferences will need to be restructured in order to apply the provisions of the Code. This restructuring could then cover cargo sharing arrangements as well.

E. Other forms of cargo allocation

171. Most of article 2 speaks of cargo allocation within a pool, but it is made clear that the criteria for setting and revising shares apply when "in the absence of a pool, there exists berthing, sailing and/or any other form of cargo allocation agreement" (article 2, paragraph 12). However, it should be admitted that a control of the frequency of sailings or of the number of ships which can be put on berth over a period is different from a precise control of liftings by "freight and volume of traffic". Such agreements can give the opportunity to acquire or to participate, but they cannot give rights to participate in accordance with a mathematical formula. Under such agreements there is normally no system for monitoring cargo liftings, although the number and frequency of sailings and, sometimes, the capacity and the speed of the vessels are controlled. On the other hand, under such agreements competition between lines in service to customers is stronger than is the case with pooling.

172. It is provided that where no pooling or other agreement exists, either group of national shipping lines may require that pooling arrangements be introduced or sailings be so adjusted so as to provide "an opportunity to these lines to enjoy substantially the rights to participate in the trade" as they would have enjoyed under article 2, paragraph 4. The conference shall decide on the request, but if the two groups of national shipping lines are in agreement they "shall have a majority vote in deciding to establish such a pool or adjustment of sailings" (article 2, paragraph 13).

173. In the event that the two groups of national shipping lines cannot agree on the introduction of pooling, they may require an appropriate adjustment of sailings. If this cannot be agreed, "the dispute shall be dealt with in accordance with the procedures established in this Code" (article 2, paragraph 14). It should be noted that it is only in this specific case of disagreement between the two groups of national lines with regard to cargo sharing that the Code provides a role for the relevant appropriate authorities who "may take up the matter if they so wish and make their views known to the parties concerned for their consideration" (article 2, paragraph 14). The general presumption is that such matters will be resolved by the lines concerned within the conference framework. Third-country lines "may also request that pooling or sailing agreements be introduced" (article 2, paragraph 15).

174. The matters considered in the preceding paragraph are not matters which need concern a Government directly unless there is disagreement between the two groups of national shipping lines. It is important, however, that the conference agreement should make provision for both a full pooling system, as well as for other types of cargo sharing agreements, where appropriate.

F. The cargo covered

175. In the case of a conference which is not subject to the provisions of the Code (for instance, in a trade between non-Contracting Parties), by mutual agreement of the lines cargo sharing may exclude certain categories of cargo. For example, government cargoes may be reserved for the national lines of the countries concerned. However, with respect to conferences to which the Code applies, cargo sharing would apply to all cargoes "with the exception of military equipment for national defence purposes" (article 2, paragraph 17).

176. As has been stated in chapter I, paragraph 17, it should be noted that a number of developing countries, interpret the expression "all goods" in article 2, paragraph 17 to refer to all liner cargoes moving in the trades concerned, including the cargoes carried by non-conference vessels. As other countries do not accept such an interpretation, this matter may need to be considered at the international level, in particular at the Review Conference scheduled to be held in 1988.

177. The provisions of article 2, paragraph 17 may also create some difficulties in respect of transhipped cargoes and cargoes of land-locked countries. As has been suggested in chapter I, paragraphs 22 to 24, the national shipping lines and/or the Governments concerned should seek to resolve these difficulties through consultations with the relevant conferences.

Chapter XI

REALLOCATION AND REDISTRIBUTION OF CARGO SHARES

A. The Code provisions

178. In article 2, the Code provides rules covering three cases of redistribution, namely:

One of the countries whose trade is carried by the conference has no national shipping lines participating in the carriage of that trade (article 2, paragraph 5);

The national shipping lines of one country decide not to carry their full share of the trade (article 2, paragraph 6); and

Neither of the two countries have national shipping lines participating in the trade (article 2, paragraph 7).

With slight differences in wording in each case, the Code provides for the uncarried trade to be divided between the lines participating in the trade "in proportion to their respective shares". In this connection, it may be noted that the national group which is not carrying its full share is given no say in how the part it cannot carry is to be distributed.

B. The transition period and the review of shares

179. Article 2, paragraph 10 provides for:

The application of cargo-sharing to commence "as soon as possible", and

A transition period between the date on which the application of the article commences and the date on which that application is completed, "which in no case shall be longer than two years, taking into account the specific situation in each of the trades concerned".

180. Article 2, paragraph 9 provides for the pool or trade-sharing agreements to be reviewed by the conference periodically, at intervals to be stipulated in those agreements. Common sense would suggest that the original distribution of shares should be established at least for the agreed transition period, during which no review would be held.

181. The periodic review of shares shall be "in accordance with criteria to be specified in the conference agreement". To prevent problems regarding national country shares in the event that one carrier persistently carries less than its share, appropriate criteria may need to be incorporated in the conference agreement providing for the adjustment of the shares of the other two groups of carriers.

C. Reallocation of the third-country share

182. In article 1, paragraph 3 it is provided that the criteria for the entry of third-country lines "shall not be applied so as to subvert" the provision of article 2 on participation in trade. In respect of article 2, paragraph 4 (b) (which uses the expression "shall"), this must surely mean

that from the outset, and even if no third-country lines are engaged in the trade, provision must be made to make it possible for such lines "to acquire a significant part, such as 20 per cent" of the trade. Even if they are not already carrying such a part, such a part must first be allocated to the third-country line group and then reallocated as appropriate. At the first review of shares, depending on the criteria specified in the conference agreement, the third-country share may be reduced or even eliminated if no third-country lines have been admitted or the existing third-country lines have not increased their carryings. But initially, a specific "significant part" must be reserved for third-country lines, and provision must be made for the two groups of national shipping lines to give up a part of their shares, up to a specified level, in the event that third-country lines obtain admission to the conference.

D. The absence of national lines in a trade

183. Where a country has no national lines participating in a trade, their share shall be redistributed among the lines participating in the trade in proportion to their respective shares. Where both groups of national lines do not exist, their shares shall be allocated between the participating member lines of the third countries by commercial negotiations between those lines. It should be noted that in such a situation there is no provision in the Code for the Government of a Contracting Party to determine which lines shall carry its national lines' entitlement.

E. Redistribution by mutual agreement

184. Once the allocation and the reallocation procedures are completed, "the national shipping lines of a region, ... at one end of the trade ..., may redistribute among themselves by mutual agreement the shares in trades allocated to them" (article 2, paragraph 8). This redistribution does not affect the allocations made with respect to the three groups at the conference level. It does provide that within any conference covering several countries at each end of the route, services can be rationalized by trade-offs between lines. For countries served by conferences which cover other adjacent countries as well, the possibility of a regional redistribution of cargo shares should always be borne in mind. The scope for regional co-operation in this context is examined in chapter VII.

Chapter XII

SELF-POLICING

A. The Code provisions on policing

185. Article 5, paragraph 1 provides that a conference "shall adopt and keep up to date an illustrative list, which shall be as comprehensive as possible, of practices which are regarded as malpractices and/or breaches of the conference agreement ...". It is also provided that the conference shall establish "effective self-policing machinery", but no indication is given of the nature of such machinery. In article 5, paragraph 2 it is stated that conferences "are entitled to the full co-operation of shippers and shippers' organizations in the endeavour to combat malpractices and breaches".

186. The most important element of self-policing is the identification of malpractices. While the provision of a comprehensive list is useful, it needs to be combined with a conference agreement which contains broad positive rules of good behaviour for member lines, commencing with a blanket exhortation to good behaviour. It needs to be borne in mind that a list of specific malpractices may imply that anything not mentioned in the list is not a malpractice. However, an illustrative list of malpractices which is to be seen alongside a list of positive rules of good behaviour would be more powerful.

187. The second element of importance is the machinery needed to detect and report upon malpractices and breaches. The administrative structure to be established to apply the Code needs to include appropriate provisions in relation to self-policing.

B. The Code provisions on punishing offenders

188. While self-policing is the traditional way in which the behaviour of member lines is regulated, the system and the punishments administered have also traditionally lacked transparency. Where the Code breaks with tradition is in its insistence on transparency. There are three important provisions in article 5 in this regard.

189. Article 5, paragraph 1 (a) provides that penalties shall be fixed and shall be "commensurate with" the seriousness of the malpractices or breaches concerned. Then in subparagraph (b), provision is made for an "examination and impartial review of an adjudication of complaints" by "a person or body unconnected with any of the shipping lines members of the conference or their affiliates". The inclusion of "affiliates" in subparagraph (b) is important and needs to be retained in any reproduction of the provision in a conference agreement. Third, subparagraph (c) provides for the reporting to appropriate authorities of the circumstances of a complaint and of the action taken in respect of it.

190. A dispute related to the expulsion of a member line may be taken to international mandatory conciliation (article 23, paragraph 4), but for other disputes article 5, paragraph 1 (b) provides for "examination and impartial review" by a person or body unconnected with any of the shipping lines members of the conference. It is desirable that appropriate authorities agree with conferences on the modalities of such impartial review, as well as of the modalities of the reporting of the actions taken provided for in article 5, paragraph 1 (c).

Chapter XIII

CONSULTATIONS

A. The Code provisions

191. In its determination to strengthen consultation procedures and make them more effective, the Code institutionalizes the system and makes the use of the machinery mandatory on all parties. Article 11, paragraph 1 commences with the words: "There shall be consultations on matters of common interest ...". Such consultations shall take place whenever requested by one of a group of designated parties, which include a conference, shippers' organizations, representatives of shippers, and where practicable, shippers.

192. This chapter is devoted to four topics which arise in article 11, namely:

The objectives of consultation,

The role of government,

The parties involved, and

Structural arrangements.

B. The objectives of consultation

193. Paragraphs 2 and 3 of article 11 set out a comprehensive range of issues which may be the subject of consultation. These are all subjects which are of relevance to the cost, adequacy and efficiency of liner services and which are also the frequent cause of disputes between conferences and shippers. The list of subjects set out in article 11 could be added to by mutual agreement between the parties concerned, as well as at the request of the appropriate authorities.

194. Paragraph 6 of article 11 states that parties to consultation shall:

Use their best efforts to provide relevant information, to hold timely discussions and to clarify matters,

Take account of each other's views and problems, "for the purpose of seeking solutions to the issues concerned" and "to reach agreement consistent with their commercial viability".

195. In the event of a failure to reach agreement, despite the efforts of all parties, the Code provides for the conference to decide, subject to the invocation of international mandatory conciliation. Article 23, paragraph 4, which lists the classes of disputes which may be referred to international mandatory conciliation includes four subjects which are fundamental issues relating to conference-shipper relations. They are:

A general freight-rate increase,

Surcharges,

Changes in freight rates or the imposition of a currency adjustment factor due to exchange rate changes; and

The form and terms of proposed loyalty agreements.

196. In the case of the other matters which may be the subject of consultation, listed in article 11, paragraphs 2 and 3, if there is no agreement after views are exchanged there is no specific right of recourse to international mandatory conciliation on the part of shippers against a conference decision. It is desirable that appropriate authorities explore with conferences and shippers' organizations the possibilities of using local conciliation both in respect of disputes which may not be referred to international mandatory conciliation and in the case of disputes which may be referred to international mandatory conciliation.

197. It should be noted in this connection that resolution 3, annexed to the Code, requests the Review Conference "to give priority consideration to the subject of local conciliation, taking into account the views expressed by the Contracting Parties to the Convention on whether or not the absence of local conciliation has hampered the effective settlement of disputes and, if so, which subjects should be considered appropriate for local conciliation and what procedures should be applied for resolving such disputes."

C. The role of government

198. Article 11, paragraph 1 provides that "appropriate authorities shall have the right, upon request, to participate fully in the consultations, but this does not mean that they play a decision-making role".

199. Even though appropriate authorities are not cast in a decision-making role, by virtue of their position, as has been explained in chapter VI, they could nevertheless play an effective role in shaping the final decisions in consultations. Some matters pertaining to consultations that appropriate authorities may take up with conferences have also been discussed in chapter VI.

D. The parties involved

200. Article 11, paragraph 1 specifies that consultations shall be "between a conference, shippers' organizations, representatives of shippers and, where practicable, shippers, which may be designated for that purpose by the appropriate authority if it so desires". These parties may request consultations. Appropriate authorities have the right, upon request, to participate in the consultations, but not to request that they be held.

201. The precise meaning to be attached to the first sentence of article 11, paragraph 1, particularly as to who determines the practicability of individual shippers participating in consultations, is not clear. If the appropriate authority does not intervene in this matter, the conference may unilaterally determine which shipper or shippers' organization would be entitled to participate in consultations. Accordingly, appropriate authorities may agree with the conference as to which shippers and shippers' organizations would have the right to participate so that no future uncertainty can arise. For example, it may be established that only shippers'

organizations or individual shippers recognized by the appropriate authority would be entitled to participate in consultations. Specific criteria for such recognition may be laid down. 18/

202. It should be noted, however, that for certain specific topics, additional participants could be usefully brought in as technical experts on the shipper side of consultations. For example, for some subjects port authorities could be usefully represented, while for others representatives of Customs might be present. In the case of a land-locked country, depending on the arrangements for transit, representatives of the transit country and of the transit authority, if one exists, might also be present. The participation of such parties would probably need to be raised and agreed in advance with the conference.

E. Structural arrangements

203. The arrangements needed for consultations may include, but are not restricted to, arrangements with the conference concerning place of meetings and similar subjects. In this connection, any arrangements arising from regional co-operation, for example, regional consultations on particular subjects in place of national consultations, need also to be covered.

204. Other arrangements needed cover the shippers' side of the consultations and are concerned both with participation in the consultation procedures and with preparations for the consultations. To the extent that consultations are on a regional basis, the structures needed may be both regional and national. Although these structures are listed below as national, the desirability of regional co-operation should not be overlooked.

205. The structures needed on the shipper's side are:

Designated shippers' bodies and individual shippers which are authorized to participate in consultations;

Channels of communication and local subcommittees through which the views of shippers can be solicited on matters which are due to arise in consultations, in addition to shippers' views on matters of concern which might appropriately be included in the agenda of consultations;

A freight investigation unit, or other appropriate body, to establish and maintain a data bank able to produce comprehensive and up-to-date analytical information on all matters relevant to the consultations; and

A unit, either part of a freight investigation unit or within the shippers' council and working in close association with the freight investigation unit, able to produce the necessary briefing papers for all consultation meetings, as well as regular reports on matters of interest to shippers.

206. The vital importance of the availability of up-to-date data to the shippers' side of the consultation proceedings needs to be stressed. If shippers' representatives are insufficiently armed statistically and inadequately briefed to discuss with the conference representatives, they must

perforce accept the conference-supplied data without any possibility of checking it and, in addition, may be obliged to accept also the conference interpretation of the data. If full advantage is to be gained from the application of the Code, shippers' organizations and appropriate authorities must undertake the task of seeing that their representatives at all consultations, particularly those on freight rate matters, are properly briefed and informed. This is an area where regional co-operation can lead to significant benefits. 19/

Chapter XIV

POLICY ASPECTS OF FREIGHT RATE QUESTIONS

207. The Code, in its provisions concerned with freight rate questions, sets out to resolve certain specific issues, of which the most important are:

Lack of defined procedures for consultation before changes in freight rates are put into effect,

Absence of any published criteria for determining freight rates,

Lack of information concerning the revenue and cost factors underlying a demand for a freight rate increase,

Notice periods for rate increases and the stability of rates, and

Structure of conference tariffs and secrecy regarding rates.

208. The question of consultation between shippers and conferences has been treated in chapter XIII. The specific procedures to be adopted in respect of general freight rates increases, surcharges, etc. are examined in Chapter XV. This chapter deals with certain policy aspects relating to freight rate questions.

A. The Code criteria for determining freight rates

209. The three criteria which are to be taken into account in the determination of freight rates are to be found in article 12, together with an introductory "chapeau".

210. In the "chapeau", the words "unless otherwise provided" in relation to the application of the criteria need to be clarified. If the conference can make a provision unilaterally to set aside the criteria or to replace them by others, then the criteria as contained in the Code become irrelevant. Agreement should be reached with the conference that only the conference and the shippers in agreement can so act.

211. The first criterion is clear. The full text is: "Freight rates shall be fixed at as low a level as is feasible from the commercial point of view and shall permit a reasonable profit for shipowners." The criterion permits, but does not ensure, a reasonable profit, in fact, during the deliberations on the Code the word "ensure" was replaced by the word "permit", which indicates clearly that its use is not accidental. Over what period are shipowners to be permitted to earn a reasonable profit? Nothing is said in the Code, but the usual interpretation of such a notion in commercial relations is that the level of profit should be an average taken over a period of several years. If this is accepted, then the commercial feasibility condition needs to be viewed in the same way. Coherence of the time horizons in the two parts of the criterion is essential.

212. The freight investigation unit or other body producing information to use in freight rate consultations must always be conscious, in considering the reasonableness or otherwise of the profit level earned, that any accountant's report will certify only as to the level of costs actually incurred during the accounting period under consideration and to the increases/decreases as compared with the previous period. It will not touch on the questions of whether the recorded cost increases were inevitable nor of whether, although unavoidable, they could have been absorbed or compensated. It is for the shippers' side at the consultations to have such information, which underlines the need for organized data collection and research.

213. One final point regarding the first criterion is that it presents an oversimplified view of the question of freight rate determination and it might indeed be difficult to find a single schedule of rates which can satisfy the criterion. However, the simpler the rate schedule in terms of a reduction of product differentiation and the fewer the number of different rates, the smaller the number of permutations which can be found. Shippers' councils and Governments may, therefore, wish to take up with the conference the question of the provisions of article 13, paragraph 2 and seek a simplification of the conference tariff.

214. The second criterion contains two elements which are not related. The first of these elements is both difficult and important. It is concerned with the calculation of the operational costs of a conference. The criterion states that "the cost of operations of conferences shall, as a rule, be evaluated for the round voyage of ships, with the outward and inward directions considered as a single whole. Where applicable, the outward and inward voyages should be considered separately". Thus, although the word "shall" is used, there is considerable flexibility to permit taking into account the specific circumstances of a given trade.

215. The round-voyage concept appears in the Code in order to ensure that shippers can see how costs, including overheads, are allocated between the different parts of the voyage and to ensure that freight rates on one leg are not fixed in isolation from those on another. Special arrangements regarding cost allocations between different parts of the voyage may be required in the case of round-the-world services which operate in one direction only.

216. The second element of the second criterion reads: "The freight rates should take into account ... the nature of cargoes, the interrelation between weight and cargo measurement, as well as the value of cargoes." There is no problem about this; conferences do it now.

217. The third criterion refers to promotional freight rates, which are discussed in chapter XV.

B. Information concerning costs and revenue

218. In order to deal with the problems which the lack of information concerning costs and revenue give to the shippers' side in consultations on freight rate matters, the Code provides that a "conference, in an effort to expedite consultations, may or upon request ... shall, where practicable, reasonably before the consultations, submit to the participating parties a report from independent accountants of repute, including, where the requesting

parties accept it as one of the bases of consultations, an aggregated analysis of the data regarding relevant costs and revenues which in the opinion of the conference necessitate an increase in freight rates" (article 14, paragraph 3).

219. There are several points of substance to be noted in this provision:

All the parties entitled to participate in consultations shall receive the report prepared by the independent accountants,

The report will be received "reasonably before the consultations", this would ensure that shippers have the report in their hands in time to have it thoroughly analysed by their own accountants before the consultations,

The meaning of an aggregated analysis needs to be clearly defined and its main elements should be agreed upon with the conference, and

It is the conference which selects those cost and revenue figures which in its judgement necessitate an increase in freight rates, although this could of course be negotiated with the conference.

220. As far as the report itself is concerned, it is inevitable that it will contain many implicit assumptions concerning the way in which different items are treated, including the division of overheads and other costs over the different parts of a round voyage and the estimated economic life of the ships used in calculating depreciation charges. On this latter point, the accountants will probably use the rules set down by the taxation authorities for calculating depreciation, but this may not correspond to economic realities. A shippers' council may need a report from its own accountants in order to elucidate the implicit assumptions lying behind the calculations and the allocations. This poses two problems, namely:

Such a report takes time to prepare and the Code timetable for consultations on a general freight rate increase simply does not allow sufficient time, and

Reports from independent accountants of repute are very costly. It would be more appropriate for a freight investigation unit set up by the shippers' council or by the Government or jointly by them to carry out this task.

221. An aggregate analysis, to be meaningful, should provide for the weighting of the cost data of different lines according to the extent of their participation in the conference traffic. The more complicated the trade routes of some of the lines and the greater the number of lines in a conference, the more complicated becomes such an aggregation exercise. There are other problems, as well, relating to aggregated cost analyses:

The variation of costs around the average,

The extent to which cost increases must lead to price increases or may be absorbed or compensated by different operational patterns or procedures,

The extent to which low-cost shipping lines can expand their operations to replace high-cost shipping lines without themselves incurring increasing costs;

The concept of averaging cost changes and earnings over a period of time and the relevant time periods to be considered.

222. The habits of years have given conferences a largely cost-plus mentality, although this is less apparent today than formerly. Such a mentality is dangerous in a monopolistic situation for two reasons:

Where profit is seen as a percentage addition to costs, rising costs increase, rather than reduce, profits; and

Insufficient importance may be given to seeking ways to prevent increases in prices of inputs from leading to increases in prices of outputs.

C. Notice periods for rate increases and stability of rates

223. "A conference shall give notice of not less than 150 days, or according to regional practice and/or agreement, ..., of its intention to effect a general increase in freight rates ..." (article 14, paragraph 1). Since there is a clear reference to regional practice and/or agreement, the question of the notice period to be adopted in each trade must clearly be taken up by shippers' organizations and Governments with the conferences. The period proposed in the Code is long in relation to past practice, which at its best was generally 90 days. Conferences may not easily agree to any extension of this period and might seek to retain current practices and a notice period of no more than 90 days.

224. Allied to the question of notice is that of freight rate stability. Article 14, paragraph 9 provides that "unless otherwise agreed between the parties concerned during the consultations, the minimum period of time between the date when one general freight-rate increase becomes effective and the date of notice for the next general freight-rate increase ... shall not be less than 10 months". Given the notice period of five months, this creates a freight-rate freeze of 15 months, "subject always to the rules regarding surcharges and regarding adjustment in freight rates consequent upon fluctuations in foreign exchange rates". If a notice period shorter than 150 days is agreed upon, the period of the freeze would be correspondingly shortened.

225. The 15-month freight-rate freeze period was instituted at the request of developing countries which were anxious to protect their fragile economies from the adverse effects on net export earnings of frequent increases in freight rates. However, the freeze would be highly unpopular with conferences and may encourage undue reliance on surcharges as a means of securing revenue increases for conference members. Resort to such surcharges may take away from developing countries the freight rate stability they need. Further the freight-rate increase required to cover a longer period in the future would tend to be higher than an increase intended to cover a shorter period.

D. Structure of conference tariffs and secrecy regarding rates

226. Reference has already been made in paragraph 214 above to the simplification of conference tariffs. Article 9 provides that "tariffs, related conditions, regulations and any amendments thereto shall be made available upon request to shippers, shippers' organizations and other parties concerned at reasonable cost and they shall be available for examination at offices of shipping lines and their agents". Appropriate authorities and shippers' organizations may wish to register a standing request to this effect with conferences. The freight investigation unit may also be included in the list of those entitled to receive the documents.

Chapter XV

PROCEDURAL ASPECTS OF PROPOSALS FOR FREIGHT RATE INCREASES,
SURCHARGES AND PROMOTIONAL FREIGHT RATES

227. The major policy questions which arise in articles 14, 15, 16 and 17 such as the report from independent accountants and the freight-rate freeze have already been discussed in the previous chapter. This chapter deals with the procedural aspects of these articles.

A. General freight-rate increases

228. Two topics in article 14 need particular attention, namely, the timetable given and the question of rate increases for key products.

229. The timetable of actions which is proposed in the Code is as follows:

The conference gives not less than 150 days' notice of the proposed increase (article 14, paragraph 1);

Consultations regarding this proposal may be requested within an agreed period (article 14, paragraph 2), presumably not exceeding 30 days;

These consultations shall commence within 30 days (article 14, paragraph 2);

If agreement is reached in the consultations, that is, if the shippers accept the proposals of the conference, whether modified by the consultations or not, the increase will go into effect 150 days after the original notice (article 14, paragraph 4); and

If no agreement is reached within 30 days of the giving of notice, the matter shall be submitted immediately to international mandatory conciliation (article 14, paragraph 5).

230. The problem in the above timetable is evident. An unspecified period after receipt of the notice of the increase is to be allowed for the shippers to request consultations. These consultations "shall commence ... within a stipulated period not exceeding 30 days," (article 14, paragraph 2). Presumably this 30-day period commences after the receipt of the notice. Since time has to be allowed for the preparations for the consultations, which may include the preparation of a report from independent accountants and its study by the shippers, the 30 day period allowed in the Code from the giving of the notice in the first place to the submission of the matter to international mandatory conciliation in the case of a failure to agree (as provided for in article 14, paragraph 5) would appear to be totally inadequate. There is a clear difficulty here which will need to be resolved through negotiations with the conferences.

231. The following procedures may be agreed upon with conferences for the case of general freight rate increases;

The conference accompanies the 150-day notice with a proposal for consultations on a national or regional basis, as appropriate, to be held within an agreed period of time after receipt of the notice which would, in any case, be no less than 30 days;

The report from independent accountants concerning the cost and revenue position of the conference would be delivered to the shippers' council or other body designated to receive the notice at the same time as the notice is given, this being a part of the function of the national or regional conference representative; and

In the event that the proposed rate increase is accepted after study, the shippers' council could notify the conference that consultations on the matter were not needed;

Consultations, if necessary, would be held within the agreed period;

If consultations do not result in an agreement, the issue may be submitted to international mandatory conciliation or other form of agreed dispute settlement procedure within some reasonable maximum period which could be agreed upon, such as 14 days after the expiry of the period for consultations.

232. It should be noted that article 14, paragraph 8 provides that if the trade of a country carried by the conference consists "largely of one or few basic commodities", a rate increase on one of these shall be treated as a general rate increase and so be subject to the provisions of article 14 as a whole.

B. Freight rates on new cargo items

233. The Code does not contain procedures for fixing a freight rate on a new cargo item or for reducing the rate on a specific product. Most conferences have procedures for handling requests from shippers on these matters, but these procedures are open to two criticisms:

For new products, the high general cargo rate, the use of which is not appropriate for continuous shipments and which may inhibit the growth of the trade in the cargo item concerned, is frequently applied, and

The procedures which exist are usually slow and involve reference to conference headquarters, whereas it should be possible for the local representative of the conference to give a provisional decision, valid for 90 days, on the appropriate class rate to apply.

234. It should be noted, in this connection that the request for a class rate for a new cargo item is not a request for assistance, but a request not to be handicapped by the imposition initially of a rate which is above the long-term rate. Although the questions raised in this paragraph are not covered in the Code, they are of relevance to the operations of the conference in serving a trade, and they could appropriately be raised with the conferences with a view to an appropriate inclusion in the conference agreement.

C. Promotional freight rates

235. Article 15 provides for certain information to be submitted to a conference by the shipper seeking a promotional freight rate for a non-traditional export. The non-traditional export for which a promotional rate is sought is to be distinguished from the new cargo item for which a specific class rate is sought. An especially low rate during an introductory period may be granted in order to assist the new product to establish itself in a market; the promotional rate is always for a period of limited duration and represents the contribution of the conference to reducing the costs of launching the product in the new market. The appeal is to the conference to help the exporter in the long-term interest of the conference which, after a successful promotion, will benefit from increased carryings at a profitable rate.

236. The information to be furnished is defined in terms of "all necessary and reasonable information justifying the need" (article 15, paragraph 2). The conference should, in the document it needs to prepare giving information about the procedure to be followed in making application for a promotional rate (article 15, paragraph 4), also specify the information which it considers necessary and reasonable to demand.

237. Governments may wish to take up the question of promotional freight rates with conferences and agree that the information document will be prepared in consultation with an appropriate authority. This is necessary in order to ensure that a conference based in a developed country does not demand from a small exporter in a developing country the same amount of information which a major corporation in a developed country could reasonably supply.

D. Surcharges

238. "Surcharges imposed by a conference to cover sudden or extraordinary increases in costs or losses of revenue shall be regarded as temporary" (article 16, paragraph 1). The Article provides for notice of the intention to impose a surcharge and for consultation, but only 15 days are allowed for reaching agreement before the matter is referred to the dispute settlement machinery of the Code. Article 23, paragraph 4 provides that a dispute on a surcharge may be referred to international mandatory conciliation. Clearly, a measure imposed as a matter of urgency cannot be delayed awaiting the outcome of the conciliation proceedings, so provision is made for imposing the surcharge if the dispute still remains unresolved 30 days after the notice was given.

239. Shippers' organizations and conferences should agree on the formulae to be used for the imposition of currency surcharges and the guidelines to be used for the regular monitoring of such surcharges. There are well established formulae for currency surcharges widely used by conferences, and an appropriate one may be selected and, if necessary, adapted to the specific needs of the conference trade concerned. There should be provision for the periodic review of such formulae, including the base periods, base exchange rates and currency compositions involved. An appropriate formula and procedure may also be agreed to in respect of bunker surcharges 20/. Similarly, principles may be agreed upon with regard to the imposition and monitoring of port congestion surcharges 21/.

Chapter XVI

OTHER ISSUES

240. In addition to the issues which have already been examined, there are a number of other points in the Code which may need to be taken up by governments, shippers' organizations or national shipping lines, as appropriate, with the conferences serving their trades:

Decision-making procedures,

Loyalty arrangements,

Dispensation,

Annual reports,

Adequacy of service, and

Representation.

These six topics are discussed in this chapter.

A. Decision-making procedures

241. This topic is covered in article 3 of the Code. Since the procedures to be established will be embodied in the conference agreement, they will need to be examined in order to ensure that they are in conformity with the Code. Particular points to note are:

The procedures "shall be based on the equality of all the full member lines",

The matters on which decisions will be made by unanimity are to be defined, and

A decision on a matter relating to the trade between two countries cannot be made without the consent of the national shipping lines of the two countries.

242. It is usual for developing countries to have only one line serving a particular trade, whereas the trading partner in a developed country may have several lines handling the same volume of the trade; it is important to ensure that the single national lines cannot be outvoted by the more numerous lines of their trading partners on fundamental matters.

243. The matters relating to the trade between the two countries regarding which decisions require the consent of both groups of national shipping lines would require to be specified and agreed upon.

B. Loyalty arrangements

244. Loyalty arrangements were devised by conferences in order to ensure that shippers would not take advantage of cheaper rates when offered by outsiders, but would support the conference carriers. Loyalty or fidelity contracts are less and less relied on by conferences. However, since the Code explicitly authorizes the continuation of such arrangements (article 7, paragraph 1), they need to be considered.

245. Article 7 provides that the arrangements "shall be based on the contract system or any other system which is also lawful". In fact, there are three forms of loyalty tie in operation, namely the deferred rebate system, the contract system and the dual-rate contract. As the name implies, with the deferred rebate system the discount for loyalty is not paid at the time of shipment but is retained by the conference and paid later. This is a highly unsatisfactory form of tie from the shippers' point of view, and loyalty should preferably be based on one of the other forms in which the rebate is immediate.

246. Governments or shippers' organizations may seek to exclude the deferred rebate system altogether from their trades. The choice, then, would be between the contract system and the dual rate system. The precise terms should be settled between conferences and shippers.

C. Dispensation

247. Article 8 deals with dispensation, that is, the permission given to shippers to use non-conference shipping opportunities without being held in breach of the loyalty contract. This the conference should be willing to do when no conference sailing within an agreed period is scheduled or when, although a sailing may be scheduled, the vessel will arrive at the destination too late to meet the requirements of the shipper because, for example, of the number of intermediate port calls. It is important to take care that, when the conference agreement is established, the appropriate provisions on this matter are included. It must be recognized that dispensation is a contentious issue because shippers may abuse it by holding back shipments deliberately. The actual provisions to be made have, therefore, to be strict enough to protect the conference from shipper abuse while being flexible enough to ensure that shippers do not lose their market because of the unavailability of a conference sailing at the required time.

248. Note should also be taken of article 2, paragraph 16 dealing with cargo shut out by a member line for any reason. Strictly speaking, this is not a matter of dispensation, as the provision envisages that the cargo will remain within the conference. Where there is pooling, it is important that the pooling agreement covers this matter. In particular, due flexibility must be allowed in the pooling agreement for over-carrying to ensure that shut-out cargo is lifted without delay.

D. Annual reports

249. The content of the annual report which the conference shall provide under article 10 is also an appropriate subject to be discussed. It should be agreed at the outset that appropriate authorities will receive the report

regularly without a specific request being made every year. Every effort needs to be made to ensure that the report is as comprehensive as possible. However, it should be borne in mind that:

The report will have a circulation such that it cannot contain information reasonably judged to be of a commercially confidential nature, and

Conferences are not generally in a position to collect and publish information of general economic interest.

E. Adequacy of service

250. Article 19 of the Code imposes a specific duty on conferences "to ensure that their member lines provide regular, adequate and efficient service of the required frequency on the routes they serve". Clearly, to comply with the provisions of the Code, conference oversight of the activities of member lines has to go beyond the detection of malpractices and breaches and to concern itself with the quality of the service.

251. The possibilities of rationalising services in order to increase efficiency and reduce costs are also covered in article 19. Experience has shown that significant economic gains can be achieved through a rationalization of sailings. Governments and shippers' organizations may wish to raise this question with the conferences and have a study undertaken on the scope for rationalization in the trades concerned.

F. Conference representation

252. "Conferences shall establish local representation in all countries served, except that where there are practical reasons to the contrary the representation may be on a regional basis" (article 21). The representative in a country will act as a channel of communication between shippers and the conference and may have delegated powers of decision-making if the conference considers it suitable.

253. Governments may wish to press on two points in this regard, namely:

The local or regional representative should not be a shipping agent in view of the inherent conflict of interest, although a representative might act for more than one conference; and

The representative should have adequate delegated powers, to be specified in the conference agreement. 22/

254. Article 20 concerning the head office of the conference needs also to be noted in this connection.

Chapter XVII

CONTENTS OF CONFERENCE AGREEMENTS - A CHECK LIST

255. The examination in chapters IX to XVI of the issues raised by the application of the Code has identified a number of points which need to be covered in conference agreements. In the majority of cases these points may not appear in the Code as specific points which need to be found in conference agreements but, as has been explained in the previous Chapters, would be required to be included or clarified in conference agreements in order to ensure the effective application of the Code.

256. The check-list in the following paragraph is not an exhaustive list of the subjects which should be covered in conference agreements. Governments, conferences and shippers will need to study the Code carefully to determine which other points need to be included in consequence of specific Code provisions and which other points, if any, they may wish to see covered, even if no provision is made in the Code nor suggested in this guide.

257. The specific references in this guide to points which it is considered should be included in the conference agreement are:

Establishment of criteria for the definition of "a regular, adequate and efficient service" - see chapter IX, paragraph 144,

Procedures for dealing with applications for admission and readmission, including provision for soliciting the views of shippers and appropriate authorities - see chapter IX, paragraph 148,

Possibility of a severance charge when a line leaves the conference - see chapter IX, paragraph 153,

Definition of, and provision for, a pool - see chapter X, paragraph 155.

Administration of cargo sharing, - see chapter X, paragraphs 160 to 164 and 168 to 170,

Criteria for fixing cargo shares, - see chapter X, paragraphs 157 to 159 and 165 to 167,

Decision-making procedures, especially in regard to the voting position of a single national shipping line - see chapter XVI, paragraphs 241 to 243,

Self-policing provisions, in particular, rules of good behaviour - see chapter XII, paragraphs 185 to 190,

The parties entitled to request and participate in consultations - see chapter XIII, paragraphs 200 to 202,

Timetable relating to general freight rate increases - see chapter XV, paragraphs 229 to 231,

Procedures for establishing specific freight rates on new cargo items - see chapter XV, paragraphs 233 and 234,

Procedures and information document regarding promotional freight rates - see chapter XV, paragraphs 235 to 237,

Procedures for obtaining dispensation and for dealing with shut-out cargo - see chapter XVI, paragraphs 247 and 248,

Conference representation - see chapter XVI, paragraphs 252 and 253.

258. There are other issues raised in the preceding chapters on which agreement between the Government and a conference may be needed in order to provide adequate assurances to the Government that the Code will be applied effectively and that national interests will be protected in the trade concerned. These issues could be covered in the relevant national legislation or other legal instrument dealing with the application of the Code, but perhaps the most appropriate way of treating these issues would be by a memorandum of understanding agreed to between the appropriate authorities and the conference. These issues concern:

The shippers' organizations and shippers entitled to participate in consultations - see chapter XIII, paragraph 201,

The criteria for freight rate determination - see chapter XIV, paragraphs 209 to 217,

Evaluation of the level of costs of the conference - see chapter XIV, paragraphs 218 to 222,

The freight rate freeze - see chapter XIV, paragraphs 224 and 225,

Procedures for general freight-rate increases - see chapter XV, paragraphs 228 to 232,

Formulae and principles for surcharges - see Chapter XV, paragraphs 238 and 239,

Impartial review and local conciliation - see chapter XII, paragraph 190 and chapter XIII, paragraph 196.

Notes

1/ Deliberations and negotiations within UNCTAD take place on a regional group system consisting of four basic country groupings:

Group B - developed market economy countries
Group of 77 - developing countries
Group D - Socialist countries of Eastern Europe
China.

2/ The relevant tonnage is deemed to be that contained in Lloyd's Register of Shipping, Statistical Tables 1973, Table 2 "World-Fleets-Analysis by Principal Types", in respect of general cargo (including passenger/cargo) ships and container (fully cellular) ships, exclusive of the United States reserve fleet as well as the United States and Canadian Great Lakes' fleets.

3/ See General Assembly Resolution 35/36.

4/ For a detailed discussion, see "UNCTAD activities in the field of shipping" (TD/278), Geneva, 1983.

5/ For legislative measures to be taken with respect to the definition of the term "liner conference", as used in the Code, see chapter VIII.

6/ For a discussion on non-conference lines, see chapter III.

7/ Reproduced in annex V.

8/ A list of reservations and declarations made by Contracting Parties is reproduced in annex IV.

9/ See paragraph 21 of Chapter I.

10/ TD/CODE/13, page 86.

11/ See also on this subject chapter III.

12/ The conditions which should apply when vessels are registered under the national flag have been elaborated in detail in the United Nations Convention on Conditions for Registration of Ships which was adopted by the Conference of Plenipotentiaries on 7 February 1986. The full text of the convention is shown in document TD/RS/CONF/23, which is available from the UNCTAD secretariat upon request.

13/ See also chapter VIII, paragraph 114.

14/ See Article 2.1 of EEC Council Regulation No. 954/79, reproduced in annex V.

15/ See also chapter VIII, paragraphs 110 to 114.

16/ See also chapter X, paragraphs 165 and 166, and chapter XI, paragraph 182.

17/ See chapter XI.

18/ In this connection, see also chapter VIII, paragraphs 115 to 120.

19/ For an informative publication on the establishment and operations of shippers' councils and shipping investigation units, see "Protection of shipper interests - Guidelines for developing countries" (TD/B/C.4/176), which is available from the UNCTAD secretariat upon request.

20/ The question of liner conference surcharges has been examined in an UNCTAD report entitled "Formulae and methods used for applying liner conference surcharges" (TD/B/C.4/265). This report is available from the UNCTAD secretariat upon request.

21/ Port congestion surcharges are examined in the UNCTAD report "Development and improvement of ports - port congestion surcharges: underlying principles" (TD/B/C.4/279). This report is also available from the UNCTAD secretariat on request.

22/ See also Chapter VIII paragraph 135.

ANNEX I

Convention on a Code of Conduct for Liner Conferences */

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Annex I

CONVENTION ON A CODE OF CONDUCT FOR LINER CONFERENCES

OBJECTIVES AND PRINCIPLES

The Contracting Parties to the present Convention,

Desiring to improve the liner conference system,

Recognizing the need for a universally acceptable code of conduct for liner conferences,

Taking into account the special needs and problems of the developing countries with respect to the activities of liner conferences serving their foreign trade,

Agreeing to reflect in the Code the following fundamental objectives and basic principles:

(a) The objective to facilitate the orderly expansion of world sea-borne trade;

(b) The objective to stimulate the development of regular and efficient liner services adequate to the requirements of the trade concerned;

(c) The objective to ensure a balance of interests between suppliers and users of liner shipping services;

(d) The principle that conference practices should not involve any discrimination against the shipowners, shippers or the foreign trade of any country;

(e) The principle that conferences hold meaningful consultations with shippers' organizations, shippers' representatives and shippers on matters of common interest, with, upon request, the participation of appropriate authorities;

(f) The principle that conferences should make available to interested parties pertinent information about their activities which are relevant to those parties and should publish meaningful information on their activities,

Have agreed as follows:

Part one

Chapter I

DEFINITIONS

Liner conference or conference

A group of two or more vessel-operating carriers which provides international liner services for the carriage of cargo on a particular route or routes within specified geographical limits and which has an agreement or arrangement, whatever its nature, within the framework of which they operate under uniform or common freight rates and any other agreed conditions with respect to the provision of liner services.

National shipping line

A national shipping line of any given country is a vessel-operating carrier which has its head office of management and its effective control in that country and is recognized as such by an appropriate authority of that country or under the law of that country.

Lines belonging to and operated by a joint venture involving two or more countries and in whose equity the national interests, public and/or private, of those countries have a substantial share and whose head office of management and whose effective control is in one of those countries can be recognized as a national line by the appropriate authorities of those countries.

Third-country shipping line

A vessel-operating carrier in its operations between two countries of which it is not a national shipping line.

Shipper

A person or entity who has entered into, or who demonstrates an intention to enter into, a contractual or other arrangement with a conference or shipping line for the shipment of goods in which he has a beneficial interest.

Shippers' organization

An association or equivalent body which promotes, represents and protects the interests of shippers and, if those authorities so desire, is recognized in that capacity by the appropriate authority or authorities of the country whose shippers it represents.

Goods carried by the conference

Cargo transported by shipping lines members of a conference in accordance with the conference agreement.

Appropriate authority

Either a government or a body designated by a government or by national legislation to perform any of the functions ascribed to such authority by the provisions of this Code.

Promotional freight rate

A rate instituted for promoting the carriage of non-traditional exports of the country concerned.

Special freight rate

A preferential freight rate, other than a promotional freight rate, which may be negotiated between the parties concerned.

Chapter II
RELATIONS AMONG MEMBER LINES

Article I
MEMBERSHIP

1. Any national shipping line shall have the right to be a full member of a conference which serves the foreign trade of its country, subject to the criteria set out in article 1, paragraph 2. Shipping lines which are not national lines in any trade of a conference shall have the right to become full members of that conference, subject to the criteria set out in article 1, paragraphs 2 and 3, and to the provisions regarding the share of trade as set out in article 2 as regards third-country shipping lines.

2. A shipping line applying for membership of a conference shall furnish evidence of its ability and intention, which may include the use of chartered tonnage, provided the criteria of this paragraph are met, to operate a regular, adequate and efficient service on a long-term basis as defined in the conference agreement within the framework of the conference, shall undertake to abide by all the terms and conditions of the conference agreement, and shall deposit a financial guarantee to cover any outstanding financial obligation in the event of subsequent withdrawal, suspension or expulsion from membership, if so required under the conference agreement.

3. In considering an application for membership by a shipping line which is not a national line in any trade of the conference concerned, in addition to the provisions of article 1, paragraph 2, the following criteria, *inter alia*, should be taken into account:

(a) The existing volume of the trade on the route or routes served by the conference and prospects for its growth;

(b) The adequacy of shipping space for the existing and prospective volume of trade on the route or routes served by the conference;

(c) The probable effect of admission of the shipping line to the conference on the efficiency and quality of the conference service;

(d) The current participation of the shipping line in trade on the same route or routes outside the framework of a conference; and

(e) The current participation of the shipping line on the same route or routes within the framework of another conference.

The above criteria shall not be applied so as to subvert the implementation of the provisions relating to participation in trade set out in article 2.

4. An application for admission or readmission to membership shall be promptly decided upon and the decision communicated by a conference to an applicant promptly, and in no case later than six months from the date of application. When a shipping line is refused

admission or readmission the conference shall, at the same time, give in writing the grounds for such refusal.

5. When considering applications for admission, a conference shall take into account the views put forward by shippers and shippers' organizations of the countries whose trade is carried by the conference, as well as the views of appropriate authorities if they so request.

6. In addition to the criteria for admission set out in article 1, paragraph 2, a shipping line applying for readmission shall also give evidence of having fulfilled its obligations in accordance with article 4, paragraphs 1 and 4. The conference may give special scrutiny to the circumstances under which the line left the conference.

Article 2
PARTICIPATION IN TRADE

1. Any shipping line admitted to membership of a conference shall have sailing and loading rights in the trades covered by that conference.

2. When a conference operates a pool, all shipping lines members of the conference serving the trade covered by the pool shall have the right to participate in the pool for that trade.

3. For the purpose of determining the share of trade which member lines shall have the right to acquire, the national shipping lines of each country, irrespective of the number of lines, shall be regarded as a single group of shipping lines for that country.

4. When determining a share of trade within a pool of individual member lines and/or groups of national shipping lines in accordance with article 2, paragraph 2, the following principles regarding their right to participation in the trade carried by the conference shall be observed, unless otherwise mutually agreed:

(a) The group of national shipping lines of each of two countries the foreign trade between which is carried by the conference shall have equal rights to participate in the freight and volume of traffic generated by their mutual foreign trade and carried by the conference;

(b) Third-country shipping lines, if any, shall have the right to acquire a significant part, such as 20 per cent, in the freight and volume of traffic generated by that trade.

5. If, for any one of the countries whose trade is carried by a conference, there are no national shipping lines participating in the carriage of that trade, the share of the trade to which national shipping lines of that country would be entitled under article 2, paragraph 4 shall be distributed among the individual member lines participating in the trade in proportion to their respective share.

6. If the national shipping lines of one country decide not to carry their full share of the trade, that portion of

their share of the trade which they do not carry shall be distributed among the individual member lines participating in the trade in proportion to their respective shares.

7. If the national shipping lines of the countries concerned do not participate in the trade between those countries covered by a conference, the shares of trade carried by the conference between those countries shall be allocated between the participating member lines of third countries by commercial negotiations between those lines.

8. The national shipping lines of a region, members of a conference, at one end of the trade covered by the conference, may redistribute among themselves by mutual agreement the shares in trades allocated to them, in accordance with article 2, paragraphs 4 to 7 inclusive.

9. Subject to the provisions of article 2, paragraphs 4 to 8 inclusive regarding shares of trade among individual shipping lines or groups of shipping lines, pooling or trade-sharing agreements shall be reviewed by the conference periodically, at intervals to be stipulated in those agreements and in accordance with criteria to be specified in the conference agreement.

10. The application of the present article shall commence as soon as possible after entry into force of the present Convention and shall be completed within a transition period which in no case shall be longer than two years, taking into account the specific situation in each of the trades concerned.

11. Shipping lines members of a conference shall be entitled to operate chartered ships to fulfil their conference obligations.

12. The criteria for sharing and the revision of shares as set out in article 2, paragraphs 1 to 11 inclusive shall apply when, in the absence of a pool, there exists berthing, sailing and/or any other form of cargo allocation agreement.

13. Where no pooling, berthing, sailing or other trade participation agreements exist in a conference, either group of national shipping lines, members of the conference, may require that pooling arrangements be introduced, in respect of the trade between their countries carried by the conference, in conformity with the provisions of article 2, paragraph 4; or alternatively they may require that the sailings be so adjusted as to provide an opportunity to these lines to enjoy substantially the same rights to participate in the trade between those two countries carried by the conference as they would have enjoyed under the provisions of article 2, paragraph 4. Any such request shall be considered and decided by the conference. If there is no agreement to institute such a pool or adjustment of sailings among the members of the conference, the groups of national shipping lines of the countries at both ends of the trade shall have a majority vote in deciding to establish such a pool or adjustment of sailings. The matter shall be

decided upon within a period not exceeding six months from the receipt of the request.

14. In the event of a disagreement between the national shipping lines of the countries at either end whose trade is served by the conference with regard to whether or not pooling shall be introduced, they may require that within the conference sailings be so adjusted as to provide an opportunity to these lines to enjoy substantially the same rights to participate in the trade between those two countries carried by the conference as they would have enjoyed under the provisions of article 2, paragraph 4. In the event that there are no national shipping lines in one of the countries whose trade is served by the conference, the national shipping line or lines of the other country may make the same request. The conference shall use its best endeavours to meet this request. If, however, this request is not met, the appropriate authorities of the countries at both ends of the trade may take up the matter if they so wish and make their views known to the parties concerned for their consideration. If no agreement is reached, the dispute shall be dealt with in accordance with the procedures established in this Code.

15. Other shipping lines, members of a conference, may also request that pooling or sailing agreements be introduced, and the request shall be considered by the conference in accordance with the relevant provisions of this Code.

16. A conference shall provide for appropriate measures in any conference pooling agreement to cover cases where the cargo has been shut out by a member line for any reason excepting late presentation by the shipper. Such agreement shall provide that a vessel with unbooked space, capable of being used, be allowed to lift the cargo, even in excess of the pool share of the line in the trade, if otherwise the cargo would be shut out and delayed beyond a period set by the conference.

17. The provisions of article 2, paragraphs 1 to 16 inclusive concern all goods regardless of their origin, their destination or the use for which they are intended, with the exception of military equipment for national defence purposes.

Article 3

DECISION-MAKING PROCEDURES

The decision-making procedures embodied in a conference agreement shall be based on the equality of all the full member lines; these procedures shall ensure that the voting rules do not hinder the proper work of the conference and the service of the trade and shall define the matters on which decisions will be made by unanimity. However, a decision cannot be taken in respect of matters defined in a conference agreement relating to the trade between two countries without the consent of the national shipping lines of those two countries.

Article 4
SANCTIONS

1. A shipping line member of a conference shall be entitled, subject to the provisions regarding withdrawal which are embodied in pool schemes and/or cargo-sharing arrangements, to secure its release, without penalty, from the terms of the conference agreement after giving three months' notice, unless the conference agreement provides for a different time period, although it shall be required to fulfil its obligations as a member of the conference up to the date of its release.

2. A conference may, upon notice to be specified in the conference agreement, suspend or expel a member for significant failure to abide by the terms and conditions of the conference agreement.

3. No expulsion or suspension shall become effective until a statement in writing of the reasons therefor has been given and until any dispute has been settled as provided in chapter VI.

4. Upon withdrawal or expulsion, the line concerned shall be required to pay its share of the outstanding financial obligations of the conference, up to the date of its withdrawal or expulsion. In cases of withdrawal, suspension or expulsion, the line shall not be relieved of its own financial obligations under the conference agreement or of any of its obligations towards shippers.

Article 5
SELF-POLICING

1. A conference shall adopt and keep up to date an illustrative list, which shall be as comprehensive as possible, of practices which are regarded as malpractices and/or breaches of the conference agreement and shall provide effective self-policing machinery to deal with them, with specific provisions requiring:

(a) The fixing of penalties or a range of penalties for malpractices or breaches, to be commensurate with their seriousness;

(b) The examination and impartial review of an adjudication of complaints, and/or decisions taken on complaints, against malpractices or breaches, by a person or body unconnected with any of the shipping lines members of the conference or their affiliates, on request by the conference or any other party concerned;

(c) The reporting, on request, on the action taken in connexion with complaints against malpractices and/or breaches, and on a basis of anonymity for the parties concerned, to the appropriate authorities of the countries whose trade is served by the conference and of the countries whose shipping lines are members of the conference.

2. Shipping lines and conferences are entitled to the full co-operation of shippers and shippers' organizations in the endeavour to combat malpractices and breaches.

Article 6
CONFERENCE AGREEMENTS

All conference agreements, pooling, berthing and sailing rights agreements and amendments or other documents directly related to, and which affect, such agreements shall be made available on request to the appropriate authorities of the countries whose trade is served by the conference and of the countries whose shipping lines are members of the conference.

Chapter III
RELATIONS WITH SHIPPERS

Article 7
LOYALTY ARRANGEMENTS

1. The shipping lines members of a conference are entitled to institute and maintain loyalty arrangements with shippers, the form and terms of which are matters for consultation between the conference and shippers' organizations or representatives of shippers. These loyalty arrangements shall provide safeguards making explicit the rights of shippers and conference members. These arrangements shall be based on the contract system or any other system which is also lawful.

2. Whatever loyalty arrangements are made, the freight rate applicable to loyal shippers shall be determined within a fixed range of percentages of the freight rate applicable to other shippers. Where a change in the differential causes an increase in the rates charged to shippers, the change can be implemented only after 150 days' notice to those shippers or according to regional practice and/or agreement. Disputes in connexion with a change of the differential shall be settled as provided in the loyalty agreement.

3. The terms of loyalty arrangements shall provide safeguards making explicit the rights and obligations of shippers and of shipping lines members of the conference in accordance with the following provisions, *inter alia*:

(a) The shipper shall be bound in respect of cargo whose shipment is controlled by him or his affiliated or subsidiary company or his forwarding agent in accordance with the contract of sale of the goods concerned, provided that the shipper shall not, by evasion, subterfuge, or intermediary, attempt to divert cargo in violation of his loyalty commitment;

(b) Where there is a loyalty contract, the extent of actual or liquidated damages and/or penalty shall be specified in the contract. The member lines of the conference may, however, decide to assess lower liquidated damages or to waive the claim to liquidated damages. In

any event, the liquidated damages under the contract to be paid by the shipper shall not exceed the freight charges on the particular shipment, computed at the rate provided under the contract;

(c) The shipper shall be entitled to resume full loyalty status, subject to the fulfilment of conditions established by the conference which shall be specified in the loyalty arrangement;

(d) The loyalty arrangement shall set out:

- (i) A list of cargo, which may include bulk cargo shipped without mark or count, which is specifically excluded from the scope of the loyalty arrangement;
- (ii) A definition of the circumstances in which cargo other than cargo covered by (i) above is considered to be excluded from the scope of the loyalty arrangement;
- (iii) The method of settlement of disputes arising under the loyalty arrangement;
- (iv) Provision for termination of the loyalty arrangement on request by either a shipper or a conference without penalty, after expiry of a stipulated period of notice, such notice to be given in writing; and
- (v) The terms for granting dispensation.

4. If there is a dispute between a conference and a shippers' organization, representatives of shippers and/or shippers about the form or terms of a proposed loyalty arrangement, either party may refer the matter for resolution under appropriate procedures as set out in this Code.

Article 8

DISPENSATION

1. Conferences shall provide, within the terms of the loyalty arrangements, that requests by shippers for dispensation shall be examined and a decision given quickly and, if requested, the reasons given in writing where dispensation is withheld. Should a conference fail to confirm, within a period specified in the loyalty arrangement, sufficient space to accommodate a shipper's cargo within a period also specified in the loyalty arrangement, the shipper shall have the right, without being penalized, to utilize any vessel for the cargo in question.

2. In ports where conference services are arranged subject to the availability of a specified minimum of cargo (i.e. on inducement), but either the shipping line does not call, despite due notice by shippers, or the shipping line does not reply within an agreed time to the notice given by shippers, shippers shall automatically have the right, without prejudicing their loyalty status, to use any available vessel for the carriage of their cargo.

Article 9

AVAILABILITY OF TARIFFS AND RELATED CONDITIONS AND/OR REGULATIONS

Tariffs, related conditions, regulations, and any amendments thereto shall be made available on request to

shippers, shippers' organizations and other parties concerned at reasonable cost, and they shall be available for examination at offices of shipping lines and their agents. They shall spell out all conditions concerning the application of freight rates and the carriage of any cargo covered by them.

Article 10

ANNUAL REPORTS

Conferences shall provide annually to shipper' organizations, or to representatives of shippers, reports on their activities designed to provide general information of interest to them, including relevant information about consultations held with shippers and shippers' organizations, action taken regarding complaints, changes in membership, and significant changes in service, tariffs and conditions of carriage. Such annual reports shall be submitted, on request, to the appropriate authorities of the countries whose trade is served by the conference concerned.

Article 11

CONSULTATION MACHINERY

1. There shall be consultations on matters of common interest between a conference, shippers' organizations, representatives of shippers and, where practicable, shippers, which may be designated for that purpose by the appropriate authority if it so desires. These consultations shall take place whenever requested by any of the above-mentioned parties. Appropriate authorities shall have the right, upon request, to participate fully in the consultations, but this does not mean that they play a decision-making role.

2. The following matters, *inter alia*, may be the subject of consultation:

- (a) Changes in general tariff conditions and related regulations;
- (b) Changes in the general level of tariff rates and rates for major commodities;
- (c) Promotional and/or special freight rates;
- (d) Imposition of, and related changes in, surcharges;
- (e) Loyalty arrangements, their establishment or changes in their form and general conditions;
- (f) Changes in the tariff classification of ports;
- (g) Procedure for the supply of necessary information by shippers concerning the expected volume and nature of their cargoes; and
- (h) Presentation of cargo for shipment and the requirements regarding notice of cargo availability.

3. To the extent that they fall within the scope of activity of a conference, the following matters may also be the subject of consultation:

- (a) Operation of cargo inspection services;
- (b) Changes in the pattern of services;
- (c) Effects of the introduction of new technology in the carriage of cargo, in particular unitization, with consequent reduction of conventional service or loss of direct services; and

(d) Adequacy and quality of shipping services, including the impact of pooling, berthing or sailing arrangements on the availability of shipping services and freight rates at which shipping services are provided; changes in the areas served and in the regularity of calls by conference vessels.

4. Consultations shall be held before final decisions are taken, unless otherwise provided in this Code. Advance notice shall be given of the intention to take decisions on matters referred to in article 11, paragraphs 2 and 3. Where this is impossible, urgent decisions may be taken pending the holding of consultations.

5. Consultations shall begin without undue delay and in any event within a maximum period specified in the conference agreement or, in the absence of such a provision in the agreement, not later than 30 days after receipt of the proposal for consultations, unless different periods of time are provided in this Code.

6. When holding consultations, the parties shall use their best efforts to provide relevant information, to hold timely discussions and to clarify matters for the purpose of seeking solutions of the issues concerned. The parties involved shall take account of each other's views and problems and strive to reach agreement consistent with their commercial viability.

Chapter IV FREIGHT RATES

Article 12

CRITERIA FOR FREIGHT-RATE DETERMINATION

In arriving at a decision on questions of tariff policy in all cases mentioned in this Code, the following points shall, unless otherwise provided, be taken into account:

(a) Freight rates shall be fixed at as low a level as is feasible from the commercial point of view and shall permit a reasonable profit for shipowners;

(b) The cost of operations of conferences shall, as a rule, be evaluated for the round voyage of ships, with the outward and inward directions considered as a single whole. Where applicable, the outward and inward voyage should be considered separately. The freight rates should take into account, among other factors, the nature of cargoes, the interrelation between weight and cargo measurement, as well as the value of cargoes;

(c) In fixing promotional freight rates and/or special freight rates for specific goods, the conditions of trade for these goods of the countries served by the conference,

particularly of developing and land-locked countries, shall be taken into account.

Article 13

CONFERENCE TARIFFS AND CLASSIFICATION OF TARIFF RATES

1. Conference tariffs shall not unfairly differentiate between shippers similarly situated. Shipping lines members of a conference shall adhere strictly to the rates, rules and terms shown in the tariffs and other currently valid published documents of the conference and to any special arrangements permitted under this Code.

2. Conference tariffs should be drawn up simply and clearly, containing as few classes/categories as possible, depending on the commodity and, where appropriate, for each class/category; they should also indicate, wherever practicable, in order to facilitate statistical compilation and analysis, the corresponding appropriate code number of the item in accordance with the Standard International Trade Classification, the Brussels Tariff Nomenclature or any other nomenclature that may be internationally adopted; the classification of commodities in the tariffs should, as far as practicable, be prepared in co-operation with shippers' organizations and other national and international organizations concerned.

Article 14

GENERAL FREIGHT-RATE INCREASES

1. A conference shall give notice of not less than 150 days, or according to regional practice and/or agreement, to shippers' organizations or representatives of shippers and/or shippers and, where so required, to appropriate authorities of the countries whose trade is served by the conference, of its intention to effect a general increase in freight rates, an indication of its extent, the date of effect and the reasons supporting the proposed increase.

2. At the request of any of the parties prescribed for this purpose in this Code, to be made within an agreed period of time after the receipt of the notice, consultations shall commence, in accordance with the relevant provisions of this Code, within a stipulated period not exceeding 30 days or as previously agreed between the parties concerned; the consultations shall be held in respect of the bases and amounts of the proposed increase and the date from which it is to be given effect.

3. A conference, in an effort to expedite consultations, may or upon the request of any of the parties prescribed in this Code as entitled to participate in consultations on general freight-rate increases shall, where practicable, reasonably before the consultations, submit to the participating parties a report from independent accountants of repute, including, where the requesting parties accept it as one of the bases of consultations, an aggregated analysis of

data regarding relevant costs and revenues which in the opinion of the conference necessitate an increase in freight rates.

4. If agreement is reached as a result of the consultations, the freight-rate increase shall take effect from the date indicated in the notice served in accordance with article 14, paragraph 1, unless a later date is agreed upon between the parties concerned.

5. If no agreement is reached within 30 days of the giving of notice in accordance with article 14, paragraph 1, and subject to procedures prescribed in this Code, the matter shall be submitted immediately to international mandatory conciliation, in accordance with chapter VI. The recommendation of the conciliators, if accepted by the parties concerned, shall be binding upon them and shall be implemented, subject to the provisions of article 14, paragraph 9, with effect from the date mentioned in the conciliators' recommendation.

6. Subject to the provisions of article 14, paragraph 9, a general freight-rate increase may be implemented by a conference pending the conciliators' recommendation. When making their recommendation, the conciliators should take into account the extent of the above-mentioned increase made by the conference and the period for which it has been in force. In the event that the conference rejects the recommendation of the conciliators, shippers and/or shippers' organizations shall have the right to consider themselves not bound, after appropriate notice, by any arrangement or other contract with that conference which may prevent them from using non-conference shipping lines. Where a loyalty arrangement exists, shippers and/or shippers' organizations shall give notice within a period of 30 days to the effect that they no longer consider themselves bound by that arrangement, which notice shall apply from the date mentioned therein, and a period of not less than 30 days and not more than 90 days shall be provided in the loyalty arrangement for this purpose.

7. A deferred rebate which is due to the shipper and which has already been accumulated by the conference shall not be withheld by, or forfeited to, the conference as a result of action by the shipper under article 14, paragraph 6.

8. If the trade of a country carried by shipping lines members of a conference on a particular route consists largely of one or few basic commodities, any increase in the freight rate on one or more of those commodities shall be treated as a general freight-rate increase, and the appropriate provisions of this Code shall apply.

9. Conferences should institute any general freight-rate increase effective in accordance with this Code for a period of a stated minimum duration, subject always to the rules regarding surcharges and regarding adjustment in freight rates consequent upon fluctuations in foreign exchange rates. The period over which a general freight-rate increase is to apply is an appropriate matter to be considered during

consultations conducted in accordance with article 14, paragraph 2, but unless otherwise agreed between the parties concerned during the consultations, the minimum period of time between the date when one general freight-rate increase becomes effective and the date of notice for the next general freight-rate increase given in accordance with article 14, paragraph 1 shall not be less than 10 months.

Article 15

PROMOTIONAL FREIGHT RATES

1. Promotional freight rates for non-traditional exports should be instituted by conferences.

2. All necessary and reasonable information justifying the need for a promotional freight rate shall be submitted to a conference by the shippers, shippers' organizations or representatives of shippers concerned.

3. Special procedures shall be instituted providing for a decision within 30 days from the date of receipt of that information, unless mutually agreed otherwise, on applications for promotional freight rates. A clear distinction shall be made between these and general procedures for considering the possibility of reducing freight rates for other commodities or of exempting them from increases.

4. Information regarding the procedures for considering applications for promotional freight rates shall be made available by the conference to shippers and/or shippers' organizations and, on request, to the Governments and/or other appropriate authorities of the countries whose trade is served by the conference.

5. A promotional freight rate shall be established normally for a period of 12 months, unless otherwise mutually agreed between the parties concerned. Prior to the expiry of the period, the promotional freight rate shall be reviewed, on request by the shipper and/or shippers' organization concerned, when it shall be a matter for the shipper and/or shippers' organization, at the request of the conference, to show that the continuation of the rate is justified beyond the initial period.

6. When examining a request for a promotional freight rate, the conference may take into account that, while the rate should promote the export of the non-traditional product for which it is sought, it is not likely to create substantial competitive distortions in the export of a similar product from another country served by the conference.

7. Promotional freight rates are not excluded from the imposition of a surcharge or a currency adjustment factor in accordance with articles 16 and 17.

8. Each shipping line member of a conference serving the relevant ports of a conference trade shall accept, and not unreasonably refuse, a fair share of cargo for which a promotional freight rate has been established by the conference.

Article 16
SURCHARGES

1. Surcharges imposed by a conference to cover sudden or extraordinary increases in costs or losses of revenue shall be regarded as temporary. They shall be reduced in accordance with improvements in the situation or circumstances which they were imposed to meet and shall be cancelled, subject to article 16, paragraph 6, as soon as the situation or circumstances which prompted their imposition cease to prevail. This shall be indicated at the moment of their imposition, together, as far as possible, with a description of the change in the situation or circumstances which will bring about their increase, reduction or cancellation.

2. Surcharges imposed on cargo moving to or from a particular port shall likewise be regarded as temporary and likewise shall be increased, reduced or cancelled, subject to article 16, paragraph 6, when the situation in that port changes.

3. Before any surcharge is imposed, whether general or covering only a specific port, notice should be given and there shall be consultation, upon request, in accordance with the procedures of this Code, between the conference concerned and other parties directly affected by the surcharge and prescribed in this Code as entitled to participate in such consultations, save in those exceptional circumstances which warrant immediate imposition of the surcharge. In cases where a surcharge has been imposed without prior consultation, consultations, upon request, shall be held as soon as possible thereafter. Prior to such consultations, conferences shall furnish data which in their opinion justify the imposition of the surcharge.

4. Unless the parties agree otherwise, within a period of 15 days after the receipt of a notice given in accordance with article 16, paragraph 3, if there is no agreement on the question of the surcharge between the parties concerned referred to in that article, the relevant provisions for settlement of disputes provided in this Code shall prevail. Unless the parties concerned agree otherwise, the surcharge may, however, be imposed pending resolution of the dispute, if the dispute still remains unresolved at the end of a period of 30 days after the receipt of the above-mentioned notice.

5. In the event of a surcharge being imposed, in exceptional circumstances, without prior consultation as provided in article 16, paragraph 3, if no agreement is reached through subsequent consultations, the relevant provisions for settlement of disputes provided in this Code shall prevail.

6. Financial loss incurred by the shipping lines members of a conference as a result of any delay on account of consultations and/or other proceedings for resolving disputes regarding imposition of surcharges in accordance

with the provisions of this Code, as compared to the date from which the surcharge was to be imposed in terms of the notice given in accordance with article 16, paragraph 3, may be compensated by an equivalent prolongation of the surcharge before its removal. Conversely, for any surcharge imposed by the conference and subsequently determined and agreed to be unjustified or excessive as a result of consultations or other procedures prescribed in this Code, the amounts so collected or the excess thereof as determined hereinabove, unless otherwise agreed, shall be refunded to the parties concerned, if claimed by them, within a period of 30 days of such claim.

Article 17
CURRENCY CHANGES

1. Exchange rate changes, including formal devaluation or revaluation, which lead to changes in the aggregate operational costs and/or revenues of the shipping lines members of a conference relating to their operations within the conference provide a valid reason for the introduction of a currency adjustment factor or for a change in the freight rates. The adjustment or change shall be such that in the aggregate the member lines concerned neither gain nor lose, as far as possible, as a result of the adjustment or change. The adjustment or change may take the form of currency surcharges or discounts or of increases or decreases in the freight rates.

2. Such adjustments or changes shall be subject to notice, which should be arranged in accordance with regional practice, where such practice exists, and there shall be consultations in accordance with the provisions of this Code between the conference concerned and the other parties directly affected and prescribed in this Code as entitled to participate in consultations, save in those exceptional circumstances which warrant immediate imposition of the currency adjustment factor or freight-rate change. In the event that this has been done without prior consultations, consultations shall be held as soon as possible thereafter. The consultations should be on the application, size and date of implementation of the currency adjustment factor or freight-rate change, and the same procedures shall be followed for this purpose as are prescribed in article 16, paragraphs 4 and 5, in respect of surcharges. Such consultations should take place and be completed within a period not exceeding 15 days from the date when the intention to apply a currency surcharge or to effect a freight-rate change is announced.

3. If no agreement is reached within 15 days through consultations, the relevant provisions for settlement of disputes provided in this Code shall prevail.

4. The provisions of article 16, paragraph 6 shall apply, adapted as necessary to currency adjustment factors and freight-rate changes dealt with in the present article.

Chapter V
OTHER MATTERS

Article 18
FIGHTING SHIPS

Members of a conference shall not use fighting ships in the conference trade for the purpose of excluding, preventing or reducing competition by driving a shipping line not a member of the conference out of the said trade.

Article 19
ADEQUACY OF SERVICE

1. Conferences should take necessary and appropriate measures to ensure that their member lines provide regular, adequate and efficient service of the required frequency on the routes they serve and shall arrange such services so as to avoid as far as possible bunching and gapping of sailings. Conferences should also take into consideration any special measures necessary in arranging services to handle seasonal variations in cargo volumes.

2. Conferences and other parties prescribed in this Code as entitled to participate in consultations, including appropriate authorities if they so desire, should keep under review, and should maintain close co-operation regarding the demand for shipping space, the adequacy and suitability of service, and in particular the possibilities for rationalization and for increasing the efficiency of services. Benefits identified as accruing from rationalization of services shall be fairly reflected in the level of freight rates.

3. In respect of any port for which conference services are supplied only subject to the availability of a specified minimum of cargo, that minimum shall be specified in the tariff. Shippers should give adequate notice of the availability of such cargo.

Article 20
HEAD OFFICE OF A CONFERENCE

A conference shall as a rule establish its head office in a country whose trade is served by that conference, unless agreed otherwise by the shipping lines members of that conference.

Article 21
REPRESENTATION

Conferences shall establish local representation in all countries served, except that where there are practical reasons to the contrary the representation may be on a regional basis. The names and addresses of representatives shall be readily available, and these representatives shall ensure that the views of shippers and conferences are made

rapidly known to each other with a view to expediting prompt decisions. When a conference considers it suitable, it shall provide for adequate delegation of powers of decision to its representatives.

Article 22
**CONTENTS OF CONFERENCE AGREEMENTS,
TRADE PARTICIPATION AGREEMENTS
AND LOYALTY ARRANGEMENTS**

Conference agreements, trade participation agreements and loyalty arrangements shall conform to the applicable requirements of this Code and may include such other provisions as may be agreed which are not inconsistent with this Code.

Part two

Chapter VI
**PROVISIONS AND MACHINERY FOR SETTLEMENT
OF DISPUTES**

A. GENERAL PROVISIONS

Article 23

1. The provisions of this chapter shall apply whenever there is a dispute relating to the application or operation of the provisions of this Code between the following parties:

- (a) A conference and a shipping line;
- (b) The shipping lines members of a conference;
- (c) A conference or a shipping line member thereof and a shippers' organization or representatives of shippers or shippers; and
- (d) Two or more conferences.

For the purposes of this chapter the term "party" means the original parties to the dispute as well as third parties which have joined the proceedings in accordance with (a) of article 34.

2. Disputes between shipping lines of the same flag, as well as those between organizations belonging to the same country, shall be settled within the framework of the national jurisdiction of that country, unless this creates serious difficulties in the fulfilment of the provisions of this Code.

3. The parties to a dispute shall first attempt to settle it by an exchange of views or direct negotiations with the intention of finding a mutually satisfactory solution.

4. Disputes between the parties referred to in article 23, paragraph 1 relating to:

- (a) Refusal of admission of a national shipping line to a conference serving the foreign trade of the country of that shipping line;

- (b) Refusal of admission of a third-country shipping line to a conference;
- (c) Expulsion from a conference;
- (d) Inconsistency of a conference agreement with this Code;
- (e) A general freight-rate increase;
- (f) Surcharges;
- (g) Changes in freight rates or the imposition of a currency adjustment factor due to exchange rate changes;
- (h) Participation in trade; and
- (i) The form and terms of proposed loyalty arrangements

which have not been resolved through an exchange of views or direct negotiations shall, at the request of any of the parties to the dispute, be referred to international mandatory conciliation in accordance with the provisions of this chapter.

Article 24

1. The conciliation procedure is initiated at the request of one of the parties to the dispute.
2. The request shall be made:
 - (a) In disputes relating to membership of conferences: not later than 60 days from the date of receipt by the applicant of the conference decision, including the reasons therefor, in accordance with article 1, paragraph 4 and article 4, paragraph 3;
 - (b) In disputes relating to general freight-rate increases: not later than the date of expiry of the period of notice specified in article 14, paragraph 1;
 - (c) In disputes relating to surcharges: not later than the date of expiry of the 30-day period specified in article 16, paragraph 4 or, where no notice has been given, not later than 15 days from the date when the surcharge was put into effect; and
 - (d) In disputes relating to changes in freight rates or the imposition of a currency adjustment factor due to exchange rate changes: not later than five days after the date of expiry of the period specified in article 17, paragraph 3.
3. The provisions of article 24, paragraph 2 shall not apply to a dispute which is referred to international mandatory conciliation in accordance with article 25, paragraph 3.
4. Requests for conciliation in disputes other than those referred to in article 24, paragraph 2, may be made at any time.
5. The time-limits specified in article 24, paragraph 2 may be extended by agreement between the parties.
6. A request for conciliation shall be considered to have been duly made if it is proved that the request has been

sent to the other party by registered letter, telegram or teleprinter or has been served on it within the time-limits specified in article 24, paragraphs 2 or 5.

7. Where no request has been made within the time-limits specified in article 24, paragraphs 2 or 5, the decision of the conference shall be final and no proceedings under this chapter may be brought by any party to the dispute to challenge that decision.

Article 25

1. Where the parties have agreed that disputes referred to in article 23, paragraph 4 (a), (b), (c), (d), (h) and (i) shall be resolved through procedures other than those established in that article, or agree on procedures to resolve a particular dispute that has arisen between them, such disputes shall, at the request of any of the parties to the dispute, be resolved as provided for in their agreement.
2. The provisions of article 25, paragraph 1 apply also to the disputes referred to in article 23, paragraph 4 (e), (f) and (g), unless national legislation, rules or regulations prevent shippers from having this freedom of choice.
3. Where conciliation proceedings have been initiated, such proceedings shall have precedence over remedies available under national law. If a party seeks remedies under national law in respect of a dispute to which this chapter applies without invoking the procedures provided for in this chapter, then, upon the request of a respondent to those proceedings, they shall be stayed and the dispute shall be referred to the procedures defined in this chapter by the court or other authority where the national remedies are sought.

Article 26

1. The Contracting Parties shall confer upon conferences and shippers' organizations such capacity as is necessary for the application of the provisions of this chapter. In particular:
 - (a) A conference or a shippers' organization may institute proceedings as a party or be named as a party to proceedings in its collective capacity;
 - (b) Any notification to a conference or shippers' organization in its collective capacity shall also constitute a notification to each member of such conference or shippers' organization;
 - (c) A notification to a conference or shippers' organization shall be transmitted to the address of the head office of the conference or shippers' organization. Each conference or shippers' organization shall register the address of its head office with the Registrar appointed in accordance with article 46, paragraph 1. In the event that a conference or a shippers' organization fails to register or has no head office, a notification to any member in the name of the conference or shippers' organization shall be

deemed to be a notification to such conference or organization.

2. Acceptance or rejection by a conference or shippers' organization of a recommendation by conciliators shall be deemed to be acceptance or rejection of such a recommendation by each member thereof.

Article 27

Unless the parties agree otherwise, the conciliators may decide to make a recommendation on the basis of written submissions without oral proceedings.

B. INTERNATIONAL MANDATORY CONCILIATION

Article 28

In international mandatory conciliation the appropriate authorities of a Contracting Party shall, if they so request, participate in the conciliation proceedings in support of a party being a national of that Contracting Party, or in support of a party having a dispute arising in the context of the foreign trade of that Contracting Party. The appropriate authority may alternatively act as an observer in such conciliation proceedings.

Article 29

1. In international mandatory conciliation the proceedings shall be held in the place unanimously agreed to by the parties or, failing such agreement, in the place decided upon by the conciliators.

2. In determining the place of conciliation proceedings the parties and the conciliators shall take into account, *inter alia*, countries which are closely connected with the dispute, bearing in mind the country of the shipping line concerned and, especially when the dispute is related to cargo, the country where the cargo originates.

Article 30

1. For the purposes of this chapter an international panel of conciliators shall be established, consisting of experts of high repute or experience in the fields of law, economics of sea transport, or foreign trade and finance, as determined by the Contracting Parties selecting them, who shall serve in an independent capacity.

2. Each Contracting Party may at any time nominate members of the panel up to a total of 12, and shall communicate their names to the Registrar. The nominations shall be for periods of six years each and may be renewed. In the event of the death, incapacity or resignation of a member of the panel, the Contracting Party which nominated such person shall nominate a replacement

for the remainder of his term of office. A nomination takes effect from the date on which the communication of the nomination is received by the Registrar.

3. The Registrar shall maintain the panel list and shall regularly inform the Contracting Parties of the composition of the panel.

Article 31

1. The purpose of conciliation is to reach an amicable settlement of the dispute through recommendations formulated by independent conciliators.

2. The conciliators shall identify and clarify the issues in dispute, seek for this purpose any information from the parties, and on the basis thereof, submit to the parties a recommendation for the settlement of the dispute.

3. The parties shall co-operate in good faith with the conciliators in order to enable them to carry out their functions.

4. Subject to the provisions of article 25, paragraph 2, the parties to the dispute may at any time during the conciliation proceedings decide in agreement to have recourse to a different procedure for the settlement of their dispute. The parties to a dispute which has been made subject to proceedings other than those provided for in this chapter may decide by mutual agreement to have recourse to international mandatory conciliation.

Article 32

1. The conciliation proceedings shall be conducted either by one conciliator or by an uneven number of conciliators agreed upon or designated by the parties.

2. Where the parties cannot agree on the number or the appointment of the conciliators as provided in article 32, paragraph 1, the conciliation proceedings shall be conducted by three conciliators, one appointed by each party in the statement(s) of claim and reply respectively, and the third by the two conciliators thus appointed, who shall act as chairman.

3. If the reply does not name a conciliator to be appointed in cases where article 32, paragraph 2 would apply, the second conciliator shall, within 30 days following the receipt of the statement of claim, be chosen by lot by the conciliator appointed in the statement of claim from among the members of the panel nominated by the Contracting Party or Parties of which the respondent(s) is(are) a national(s).

4. Where the conciliators appointed in accordance with article 32, paragraphs 2 or 3 cannot agree on the appointment of the third conciliator within 15 days following the date of the appointment of the second

conciliator, he shall, within the following 5 days, be chosen by lot by the appointed conciliators. Prior to the drawing by lot:

(a) No member of the panel of conciliators having the same nationality as either of the two appointed conciliators shall be eligible for selection by lot;

(b) Each of the two appointed conciliators may exclude from the list of the panel of conciliators an equal number of them subject to the requirement that at least 30 members of the panel shall remain eligible for selection by lot.

Article 33

1. Where several parties request conciliation with the same respondent in respect of the same issue, or of issues which are closely connected, that respondent may request the consolidation of those cases.

2. The request for consolidation shall be considered and decided upon by majority vote by the chairmen of the conciliators so far chosen. If such request is allowed, the chairmen will designate the conciliators to consider the consolidated cases from among the conciliators so far appointed or chosen, provided that an uneven number of conciliators is chosen and that the conciliator first appointed by each party shall be one of the conciliators considering the consolidated case.

Article 34

Any party, other than an appropriate authority referred to in article 28, if conciliation has been initiated, may join in the proceedings:

either

(a) As a party, in case of a direct economic interest;

or

(b) As a supporting party to one of the original parties, in case of an indirect economic interest,

unless either of the original parties objects to such joinder.

Article 35

1. The recommendations of the conciliators shall be made in accordance with the provisions of this Code.

2. When the Code is silent upon any point, the conciliators shall apply the law which the parties agree at the time the conciliation proceedings commence or thereafter, but not later than the time of submission of evidence to the conciliators. Failing such agreement, the law which in the opinion of the conciliators is most closely connected with the dispute shall be applicable.

3. The conciliators shall not decide *ex aequo et bono* upon the dispute unless the parties so agree after the dispute has arisen.

4. The conciliators shall not bring a finding of *non liquet* on the ground of obscurity of the law.

5. The conciliators may recommend those remedies and reliefs which are provided in the law applicable to the dispute.

Article 36

The recommendations of the conciliators shall include reasons.

Article 37

1. Unless the parties have agreed before, during or after the conciliation procedure that the recommendation of the conciliators shall be binding, the recommendation shall become binding by acceptance by the parties. A recommendation which has been accepted by some parties to a dispute shall be binding as between those parties only.

2. Acceptance of the recommendation must be communicated by the parties to the conciliators, at an address specified by them, not later than 30 days after receipt of the notification of the recommendation; otherwise, it shall be considered that the recommendation has not been accepted.

3. Any party which does not accept the recommendation shall notify the conciliators and the other parties, within 30 days following the period specified in article 37, paragraph 2 of its grounds for rejection of the recommendation, comprehensively and in writing.

4. When the recommendation has been accepted by the parties, the conciliators shall immediately draw up and sign a record of settlement, at which time the recommendation shall become binding upon those parties. If the recommendation has not been accepted by all parties, the conciliators shall draw up a report with respect to those parties rejecting the recommendation, noting the dispute and the failure of those parties to settle the dispute.

5. A recommendation which has become binding upon the parties shall be implemented by them immediately or at such later time as is specified in the recommendation.

6. Any party may make its acceptance conditional upon acceptance by all or any of the other parties to the dispute.

Article 38

1. A recommendation shall constitute a final determination of a dispute as between the parties which accept it, except to the extent that the recommendation is not recognized and enforced in accordance with the provisions of article 39.

2. "Recommendation" includes an interpretation, clarification or revision of the recommendation made by the conciliators before the recommendation has been accepted.

Article 39

1. Each Contracting Party shall recognize a recommendation as binding between the parties which have accepted it and shall, subject to the provisions of article 39, paragraphs 2 and 3, enforce, at the request of any such party, all obligations imposed by the recommendation as if it were a final judgement of a court of that Contracting Party.

2. A recommendation shall not be recognized and enforced at the request of a party referred to in article 39, paragraph 1 only if the court or other competent authority of the country where recognition and enforcement is sought is satisfied that:

(a) Any party which accepted the recommendation was, under the law applicable to it, under some legal incapacity at the time of acceptance;

(b) Fraud or coercion has been used in the making of the recommendations;

(c) The recommendation is contrary to public policy (*ordre public*) in the country of enforcement; or

(d) The composition of the conciliators, or the conciliation procedure, was not in accordance with the provisions of this Code.

3. Any part of the recommendation shall not be enforced and recognized if the court or other competent authority is satisfied that such part comes within any of the subparagraphs of article 39, paragraph 2 and can be separated from other parts of the recommendation. If such part cannot be separated, the entire recommendation shall not be enforced and recognized.

Article 40

1. Where the recommendation has been accepted by all the parties, the recommendation and the reasons therefor may be published with the consent of all the parties.

2. Where the recommendation has been rejected by one or more of the parties but has been accepted by one or more of the parties:

(a) The party or parties rejecting the recommendation shall publish its or their grounds for rejection, given pursuant to article 37, paragraph 3, and may at the same time publish the recommendation and the reasons therefor;

(b) A party which has accepted the recommendation may publish the recommendation and the reasons therefor; it may also publish the grounds for rejection given by any other party unless such other party has already published its rejection and the grounds therefor in accordance with article 40, paragraph 2 (a).

3. Where the recommendation has not been accepted by any of the parties, each party may publish the recommendation and the reasons therefor and also its own rejection and the grounds therefor.

Article 41

1. Documents and statements containing factual information supplied by any party to the conciliators shall be made public unless that party or a majority of the conciliators agrees otherwise.

2. Such documents and statements supplied by a party may be tendered by that party in support of its case in subsequent proceedings arising from the same dispute and between the same parties.

Article 42

Where the recommendation has not become binding upon the parties, no views expressed or reasons given by the conciliators, or concessions or offers made by the parties for the purpose of the conciliation procedure, shall affect the legal rights and obligations of any of the parties.

Article 43

1. (a) The costs of the conciliators and all costs of the administration of the conciliation proceedings shall be borne equally by the parties to the proceedings, unless they agree otherwise.

(b) When the conciliation proceedings have been initiated, the conciliators shall be entitled to require an advance or security for the costs referred to in article 43, paragraph 1 (a).

2. Each party shall bear all expenses it incurs in connexion with the proceedings, unless the parties agree otherwise.

3. Notwithstanding the provisions of article 43, paragraphs 1 and 2, the conciliators may, having decided unanimously that a party has brought a claim vexatiously or frivolously, assess against that party any or all of the costs of other parties to the proceedings. Such decision shall be final and binding on all the parties.

Article 44

1. Failure of a party to appear or to present its case at any stage of the proceedings shall not be deemed an admission of the other party's assertions. In that event, the other party may, at its choice, request the conciliators to close the proceedings or to deal with the questions presented to them and submit a recommendation in accordance with the provisions for making recommendations set out in this Code.

2. Before closing the proceedings, the conciliators shall grant the party failing to appear or to present its case a period of grace, not exceeding 10 days, unless they are satisfied that the party does not intend to appear or to present its case.

3. Failure to observe procedural time-limits laid down in this Code or determined by the conciliators, in particular time-limits relating to the submission of statements or information, shall be considered a failure to appear in the proceedings.

4. Where the proceedings have been closed owing to one party's failure to appear or to present its case, the conciliators shall draw up a report noting that party's failure.

Article 45

1. The conciliators shall follow the procedures stipulated in this Code.

2. The rules of procedure annexed to the present Convention shall be considered as model rules for the guidance of conciliators. The conciliators may, by mutual consent, use, supplement or amend the rules contained in the annex or formulate their own rules of procedure to the extent that such supplementary, amended or other rules are not inconsistent with the provisions of this Code.

3. If the parties agree that it may be in the interest of achieving an expeditious and inexpensive solution of the conciliation proceedings, they may mutually agree to rules of procedure which are not inconsistent with the provisions of this Code.

4. The conciliators shall formulate their recommendation by consensus or failing that shall decide by majority vote.

5. The conciliation proceedings shall finish and the recommendation of the conciliators shall be delivered not later than six months from the date on which the conciliators are appointed, except in the cases referred to in article 23, paragraph 4 (e), (f), and (g), for which the time limits in article 14, paragraph 1 and article 16, paragraph 4 shall be valid. The period of six months may be extended by agreement of the parties.

C. INSTITUTIONAL MACHINERY

Article 46

1. Six months before the entry into force of the present Convention, the Secretary-General of the United Nations shall, subject to the approval of the General Assembly of the United Nations, and taking into account the views expressed by the Contracting Parties, appoint a Registrar,

who may be assisted by such additional staff as may be necessary for the performance of the functions listed in article 46, paragraph 2. Administrative services for the Registrar and his assistants shall be provided by the United Nations Office at Geneva.

2. The Registrar shall perform the following functions in consultation with the Contracting Parties as appropriate:

(a) Maintain the list of conciliators of the international panel of conciliators and regularly inform the Contracting Parties of the composition of the panel;

(b) Provide the names and addresses of the conciliators to the parties concerned on request;

(c) Receive and maintain copies of requests for conciliation, replies, recommendation, acceptances, or rejections, including reasons therefor;

(d) Furnish on request, and at their cost, copies of recommendations and reasons for rejection to the shippers' organizations, conferences and Governments, subject to the provisions of article 40;

(e) Make available information of a non-confidential nature on completed conciliation cases, and without attribution to the parties concerned, for the purposes of preparation of material for the Review Conference referred to in article 52; and

(f) The other functions prescribed for the Registrar in article 26, paragraph 1 (c) and article 30, paragraphs 2 and 3.

Chapter VII

FINAL CLAUSES

Article 47

IMPLEMENTATION

1. Each Contracting Party shall take such legislative or other measures as may be necessary to implement the present Convention.

2. Each Contracting Party shall communicate to the Secretary-General of the United Nations, who shall be the depositary, the text of the legislative or other measures which it has taken in order to implement the present Convention.

Article 48

SIGNATURE, RATIFICATION, ACCEPTANCE, APPROVAL AND ACCESSION

1. The present Convention shall remain open for signature as from 1 July 1974 until and including 30 June 1975 at United Nations Headquarters and shall thereafter remain open for accession.

2. All States^a are entitled to become Contracting Parties to the present Convention by:

- (a) Signature subject to and followed by ratification, acceptance or approval; or
- (b) Signature without reservation as to ratification, acceptance or approval; or
- (c) Accession.

3. Ratification, acceptance, approval or accession shall be effected by the deposit of an instrument to this effect with the depositary.

Article 49

ENTRY INTO FORCE

1. The present Convention shall enter into force six months after the date on which not less than 24 States, the combined tonnage of which amounts to at least 25 per cent of world tonnage, have become Contracting Parties to it in accordance with article 48. For the purpose of the present article the tonnage shall be deemed to be that contained in *Lloyd's Register of Shipping - Statistical Tables 1973*, table 2 "World Fleets - Analysis by Principal Types", in respect to general cargo (including passenger/cargo) ships and container (fully cellular) ships, exclusive of the United States reserve fleet and the American and Canadian Great Lakes fleets.^b

2. For each State which thereafter ratifies, accepts, approves or accedes to it, the present Convention shall come into force six months after deposit by such State of the appropriate instrument.

3. Any State which becomes a Contracting Party to the present Convention after the entry into force of an amendment shall, failing an expression of a different intention by that State:

- (a) Be considered as a Party to the present Convention as amended; and
- (b) Be considered as a Party to the unamended Convention in relation to any Party to the present Convention not bound by the amendment.

^a At its 9th plenary meeting on 6 April 1974, the Conference adopted the following understanding recommended by its Third Main Committee:

"In accordance with its terms, the present Convention will be open to participation by all States, and the Secretary-General of the United Nations will act as depositary. It is the understanding of the Conference that the Secretary-General, in discharging his functions as depositary of a convention or other multilateral legally binding instrument with an "All-States" clause, will follow the practice of the General Assembly of the United Nations in implementing such a clause and, whenever advisable, will request the opinion of the General Assembly before receiving a signature or an instrument of ratification, acceptance, approval or accession."

^b The tonnage requirements for the purposes of article 49, paragraph 1 are set out in part two below.

Article 50

DENUNCIATION

1. The present Convention may be denounced by any Contracting Party at any time after the expiration of a period of two years from the date on which the Convention has entered into force.

2. Denunciation shall be notified to the depositary in writing, and shall take effect one year, or such longer period as may be specified in the instrument of denunciation, after the date of receipt by the depositary.

Article 51

AMENDMENTS

1. Any Contracting Party may propose one or more amendments to the present Convention by communicating the amendments to the depositary. The depositary shall circulate such amendments among the Contracting Parties, for their acceptance, and among States entitled to become Contracting Parties to the present Convention which are not Contracting Parties, for their information.

2. Each proposed amendment circulated in accordance with article 51, paragraph 1 shall be deemed to have been accepted if no Contracting Party communicates an objection thereto to the depositary within 12 months following the date of its circulation by the depositary. If a Contracting Party communicates an objection to the proposed amendment, such amendment shall not be considered as accepted and shall not be put into effect.

3. If no objection has been communicated, the amendment shall enter into force for all Contracting Parties six months after the expiry date of the period of 12 months referred to in article 51, paragraph 2.

Article 52

REVIEW CONFERENCES

1. A Review Conference shall be convened by the depositary five years from the date on which the present Convention comes into force to review the working of the Convention, with particular reference to its implementation, and to consider and adopt appropriate amendments.

2. The depositary shall, four years from the date on which the present Convention comes into force, seek the views of all States entitled to attend the Review Conference and shall, on the basis of the views received, prepare and circulate a draft agenda as well as amendments proposed for consideration by the Conference.

3. Further review conferences shall be similarly convened every five years, or at any time after the first Review Conference, at the request of one-third of the

Contracting Parties to the present Convention, unless the first Review Conference decides otherwise.

4. Notwithstanding the provisions of article 52, paragraph 1, if the present Convention has not entered into force five years from the date of the adoption of the Final Act of the United Nations Conference of Plenipotentiaries on a Code of Conduct for Liner Conferences, a Review Conference shall, at the request of one-third of the States entitled to become Contracting Parties to the present Convention, be convened by the Secretary-General of the United Nations, subject to the approval of the General Assembly, in order to review the provisions of the Convention and its annex and to consider and adopt appropriate amendments.

Article 53

FUNCTIONS OF THE DEPOSITARY

1. The depositary shall notify the signatory and acceding States of:

(a) Signatures, ratifications, acceptances, approvals and accessions in accordance with article 48;

(b) The date on which the present Convention enters into force in accordance with article 49;

(c) Denunciations of the present Convention in accordance with article 50;

(d) Reservations to the present Convention and the withdrawal of reservations;

(e) The text of the legislative or other measures which each Contracting Party has taken in order to implement the present Convention in accordance with article 47;

(f) Proposed amendments and objections to proposed amendments in accordance with article 51; and

(g) Entry into force of amendments in accordance with article 51, paragraph 3.

2. The depositary shall also undertake such actions as are necessary under article 52.

Article 54

AUTHENTIC TEXTS - DEPOSIT

The original of the present Convention, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, will be deposited with the Secretary-General of the United Nations.

IN WITNESS WHEREOF the undersigned, having been duly authorized to this effect by their respective Governments, have signed the present Convention, on the dates appearing opposite their signatures.

ANNEX TO THE CONVENTION

Model rules of procedure for international mandatory conciliation

Rule 1

1. Any party wishing to institute conciliation proceedings under the Code shall address a request to that effect in writing, accompanied by a statement of claim to the other party, and copied to the Registrar.

2. The statement of claim shall:

(a) Designate precisely each party to the dispute and state the address of each;

(b) Contain a summary statement of pertinent facts, the issues in dispute and the claimant's proposal for the settlement of the dispute;

(c) State whether an oral hearing is desired and, if so, and to the extent then known, the names and addresses of persons to give evidence, including experts' evidence, for the claimant;

(d) Be accompanied by such supporting documentation and relevant agreements and arrangements entered into by the parties as the claimant may consider necessary at the time of making the claim;

(e) Indicate the number of conciliators required, any proposal concerning the appointment of conciliators, or the name of the conciliator appointed by the claimant in accordance with article 32, paragraph 2; and

(f) Contain proposals, if any, regarding rules of procedure.

3. The statement of claim shall be dated and shall be signed by the party.

Rule 2

1. If the respondent decides to reply to the claim, he shall, within 30 days following the date of his receipt of the statement of claim, transmit a reply to the other party and copied to the Registrar.

2. The reply shall:

(a) Contain a summary statement of pertinent facts opposed to the contentions in the statement of claim, the respondent's proposal, if any, for the settlement of the dispute and any remedy claimed by him with a view to the settlement of the dispute;

(b) State whether an oral hearing is desired and, if so, and to the extent then known, the names and addresses of persons to give evidence, including experts' evidence, for the respondent;

(c) Be accompanied by such supporting documentation and relevant agreements and arrangements entered into by the parties as the respondent may consider necessary at the time of making the reply;

(d) Indicate the number of conciliators required, any proposal concerning the appointment of conciliators, or the name of the conciliator appointed by the respondent in accordance with article 32, paragraph 2; and

(e) Contain proposals, if any, regarding rules of procedure.

3. The reply shall be dated and shall be signed by the party.

Rule 3

1. Any person or other interest desiring to participate in conciliation proceedings under article 34 shall transmit a written request to the parties to the dispute, with a copy to the Registrar.

2. If participation in accordance with (a) of article 34 is desired, the request shall set forth the grounds therefor, including the information required under rule 1, paragraph 2 (a), (b) and (d).

3. If participation in accordance with (b) of article 34 is desired, the request shall state the grounds therefor and which of the original parties would be supported.

4. Any objection to a request for joinder by such a party shall be sent by the objecting party, with a copy to the other party, within seven days of receipt of the request.

5. In the event that two or more proceedings are consolidated, subsequent requests for third-party participation shall be transmitted to all parties concerned, each of which may object in accordance with the present rule.

Rule 4

By agreement between the parties to a dispute, on motion by either party, and after affording the parties an opportunity of being heard, the conciliators may order the consolidation or separation of all or any claims then pending between the same parties.

Rule 5

1. Any party may challenge a conciliator where circumstances exist that cause justifiable doubts as to his independence.

2. Notice of challenge, stating reasons therefor, should be made prior to the date of the closing of the proceedings, before the conciliators have rendered their recommendation. Any such challenge shall be heard promptly and shall be determined by majority vote of the conciliators in the first instance, as a preliminary point, in cases where more than one conciliator has been appointed. The decision in such cases shall be final.

3. A conciliator who has died, resigned, become incapacitated or disqualified shall be replaced promptly.

4. Proceedings interrupted in this way shall continue from the point where they were interrupted, unless it is agreed by the parties or ordered by the conciliators that a review or rehearing of any oral testimony take place.

Rule 6

The conciliators shall be judges of their own jurisdiction and/or competence within the provisions of the Code.

Rule 7

1. The conciliators shall receive and consider all written statements, documents, affidavits, publications or any other evidence, including oral evidence, which may be submitted to them by or on behalf of any of the parties, and shall give such weight thereto as in their judgement such evidence merits.

2. (a) Each party may submit to the conciliators any material it considers relevant, and at the time of such submission shall deliver certified copies to any other party to the proceedings, which party shall be given a reasonable opportunity to reply thereto;

(b) The conciliators shall be the sole judges of the relevance and materiality of the evidence submitted to them by the parties;

(c) The conciliators may ask the parties to produce such additional evidence as they may deem necessary to an understanding and determination of the dispute, provided that, if such additional evidence is produced, the other parties to the proceedings shall have a reasonable opportunity to comment thereon.

Rule 8

1. Whenever a period of days for the doing of any act is provided for in the Code or in these rules, the day from which the period

begins to run shall not be counted, and the last day of the period shall be counted, except where that last day is a Saturday, Sunday or a public holiday at the place of conciliation, in which case the last day shall be the next business day.

2. When the time provided for is less than seven days, intermediate Saturdays, Sundays and public holidays shall be excluded from the computation.

Rule 9

Subject to the provisions relating to procedural time-limits in the Code, the conciliators may, on a motion by one of the parties or pursuant to agreement between them, extend any such time-limit which has been fixed by the conciliators.

Rule 10

1. The conciliators shall fix the order of business and, unless otherwise agreed, the date and hour of each session.

2. Unless the parties otherwise agree, the proceedings shall take place in private.

3. The conciliators shall specifically inquire of all the parties whether they have any further evidence to submit before declaring the proceedings closed, and a noting thereof shall be recorded.

Rule 11

Conciliators' recommendations shall be in writing and shall include:

- (a) The precise designation and address of each party;
- (b) A description of the method of appointing conciliators, including their names;
- (c) The dates and place of the conciliation proceedings;
- (d) A summary of the conciliation proceedings, as the conciliators deem appropriate;
- (e) A summary statement of the facts found by the conciliators;
- (f) A summary of the submissions of the parties;
- (g) Pronouncements on the issues in dispute, together with the reasons therefor;
- (h) The signatures of the conciliators and the date of each signature; and
- (i) An address for the communication of the acceptance or rejection of the recommendation.

Rule 12

The recommendation shall, so far as possible, contain a pronouncement on costs in accordance with the provisions of the Code. If the recommendation does not contain a full pronouncement on costs, the conciliators shall, as soon as possible after the recommendation, and in any event not later than 60 days thereafter, make a pronouncement in writing regarding costs as provided in the Code.

Rule 13

Conciliators' recommendations shall also take into account previous and similar cases whenever this would facilitate a more uniform implementation of the Code and observance of conciliators' recommendations.

Annex II

RESOLUTIONS ADOPTED BY THE CONFERENCE

1. Completion of the work of the Conference .

The United Nations Conference of Plenipotentiaries on a Code of Conduct for Liner Conferences,

Having met in accordance with General Assembly resolution 3035 (XXVII) of 19 December 1972 to consider and adopt a convention or any other multilateral legally binding instrument on a code of conduct for liner conferences,

Having agreed unanimously in respect of a large number of paragraphs contained in the draft code of conduct for liner conferences annexed to the reports of the three main committees of the Conference of Plenipotentiaries,

Having noted that the principles in regard to the settlement of some fundamental issues before the United Nations Conference of Plenipotentiaries for a Code of Conduct for Liner Conferences submitted by the President of the Conference, and annexed to this resolution, have been accepted, among the States participating in the Conference, by all developing countries, all socialist countries of Eastern Europe and a number of developed market-economy countries, and having noted also that a number of other developed market-economy countries have not accepted the above-mentioned principles and that a number of other such countries have reserved their position on the subject,

Taking note that all countries which have accepted the principles referred to in the preceding paragraph have agreed that these principles shall form the basis of further work on the relevant sections of the draft code of conduct for liner conferences,

Taking note also of the views of countries which have not accepted the principles referred to above and the desire of these countries that their views be taken into account in the further work,

1. *Takes note* of the substantial progress achieved during the first part of the Conference;

2. *Takes note* also of the report on the plenary meetings of the Conference and of the reports of its three main committees;

3. *Considers* that the best interests of all countries will be served by a resumption of the United Nations Conference of Plenipotentiaries on a Code of Conduct for

Liner Conferences in Geneva on 11 March 1974 for a period of three weeks in order that it may complete its task;

4. *Requests* the Secretary-General of the United Nations and the Secretary-General of UNCTAD to make arrangements for the resumption of the Conference of Plenipotentiaries accordingly;

5. *Affirms* that the large number of paragraphs agreed unanimously and contained in the draft code of conduct for liner conferences annexed to the reports of the three main committees of the Conference of Plenipotentiaries shall not be reopened for any further discussion or for changes in the texts of these paragraphs, with the exception of any editorial and/or legal drafting changes that may be deemed necessary;

6. *Notes* the agreement of all countries who have accepted the principles in regard to the settlement of some fundamental issues before the United Nations Conference submitted by the President of the Conference, and annexed to this resolution, to continue to regard these principles as the basis for further work at the resumed Conference of Plenipotentiaries and not to reopen discussion on these principles and also not to reopen for any further discussion or changes the relevant paragraphs of the draft code agreed by all such countries, and based on these principles, with the exception of any editorial and/or legal drafting changes that may be deemed necessary or any other drafting changes considered necessary for securing improved conformity of the texts of these paragraphs with the agreed principles;

7. *Confirms* the willingness of all parties to this resolution to continue negotiations at the resumed Conference of Plenipotentiaries from the stage reached at its adjournment with a view to considering and adopting at the resumed conference a convention or any other multilateral legally binding instrument on a code of conduct for liner conferences;

8. *Requests* the UNCTAD secretariat to prepare texts in legal language in respect of texts annexed to the reports of the main committees of the Conference and to circulate such texts to the Governments of all member States as an aid to their consideration well in advance of the resumption of the Conference of Plenipotentiaries.

*6th plenary meeting
15 December 1973*

ANNEX TO RESOLUTION I

Principles in regard to the settlement of some fundamental issues before the United Nations Conference of Plenipotentiaries on a Code of Conduct for Liner Conferences

A. Role of Governments

1. Upon the request of Governments, requisite information is to be furnished by the conferences.

2. Government representatives are to have the right to be present during consultations, to participate in the discussions fully, to make suggestions, and to promote agreement between the parties, but they shall have no role of a decision-maker.

3. Governments are to have a similar right of participation in conciliation proceedings.

B. Participation in trade

1. Equality of the rights of national lines at the two ends.

2. A share of 20 per cent is to be allocated to third-flag lines where they exist.

3. If national lines do not carry, or are unable to carry, their allocated share of the trade – and on this point they themselves shall make the decision – that portion of their share of the trade which they do not carry will revert to the pool to be shared *pro rata*.

4. National lines within a region at one end are to have the flexibility of adjustments among themselves in regard to their shares.

C. Implementation

1. Every effort is to be made by the parties to reach a settlement during consultations.

2. Where a matter is not settled by consultation and a dispute arises, it should be submitted to mandatory international conciliation; among such matters are questions relating to freight rates, surcharges, and currency adjustment factors.

3. Conciliators' recommendations, if accepted by the parties, shall be binding.

4. If conciliators' recommendations are rejected, reasons for their rejection are to be stated comprehensively in writing and published.

5. A review conference is to be convened after five years to review the working of the convention with particular reference to implementation. Such review conferences are to be held every five years thereafter.

D. Criteria for the determination of freight rates

1. These criteria should be as contained in the proposal submitted by the socialist countries of Eastern Europe for paragraph 54 of the Code.^a

^a For the text of this proposal, which was subsequently sponsored also by the Group of 77 and by France, see alternative 1 to paragraph 54 of the Code in *United Nations Conference of Plenipotentiaries on a Code of Conduct for Liner Conferences*, vol. I, *Reports and other documents* (United Nations publication, Sales No. E.75.II.D.11), part four, sect. 1.

2. The time between the date when one general freight-rate increase becomes effective and the date of notice of the next general freight-rate increase should not be less than 12 months.

Note. Reference was made to the apprehensions among different groups in regard to the question of outside competition, but the hope was expressed that this problem would be satisfactorily resolved by mutual discussion in the Committee or drafting group concerned.

2. Non-conference shipping lines

The United Nations Conference of Plenipotentiaries on a Code of Conduct for Liner Conferences,

Having prepared the Convention on a Code of Conduct for Liner Conferences with a view to improving the liner conference system,

Bearing in mind that the Convention is applicable to liner conferences and their external relations,

Resolves that:

1. Nothing in that Convention shall be construed so as to deny shippers an option in the choice between conference shipping lines and non-conference shipping lines subject to any loyalty arrangements where they exist;

2. Non-conference shipping lines competing with a conference should adhere to the principle of fair competition on a commercial basis;

3. In the interest of sound development of liner shipping service, non-conference shipping lines should not be prevented from operating as long as they comply with the requirements of paragraph 2 above.

*9th plenary meeting
6 April 1974*

3. Local conciliation

The United Nations Conference of Plenipotentiaries on a Code of Conduct for Liner Conferences,

Bearing in mind the importance of the consultation provisions and the dispute settlement procedures provided in the Convention on a Code of Conduct for Liner Conferences,

Noting that proposals were made to provide in the Code for submitting some disputes to local conciliation,

1. *Requests* the first Review Conference to be convened in accordance with article 52 of the Convention to give priority consideration to the subject of local conciliation, taking into account the views expressed by the Contracting Parties to the Convention on whether or not the absence of local conciliation has hampered the effective settlement of

disputes and, if so, which subjects should be considered appropriate for local conciliation and what procedures should be applied for resolving such disputes.

2. *Agrees* that in preparing for the Review Conference the depositary shall seek the views of all States entitled to

attend the Review Conference, which should be required to take into account the views expressed by appropriate authorities, liner conferences and shippers' organizations.

*9th plenary meeting
6 April 1974*

ANNEX III

List of States Contracting Parties to the Convention on a Code
of Conduct for Liner Conferences as of 30 June 1986

Bangladesh	Lebanon
Barbados	Madagascar
Benin	Malaysia
Bulgaria	Mali
Cameroon	Mauritius
Cape Verde	Mexico
Central African Republic	Morocco
Chile	Netherlands (for the Kingdom in Europe only)
China	Niger
Congo	Nigeria
Costa Rica	Norway
Cote d'Ivoire	Pakistan
Cuba	Peru
Czechoslovakia	Philippines
Denmark (except Greenland and the Faroe Islands)	Republic of Korea
Egypt	Romania
Ethiopia	Saudi Arabia
Finland	Senegal
France	Sierra Leone
Gabon	Sri Lanka
Gambia	Sudan
German Democratic Republic	Sweden
Germany, Federal Republic of	Togo
Ghana	Trinidad and Tobago
Guatemala	Tunisia
Guinea	Union of Soviet Socialist Republics
Guyana	United Kingdom (including Gibraltar and Hong Kong)
Honduras	United Republic of Tanzania
India	Uruguay
Indonesia	Venezuela
Iraq	Yugoslavia
Jamaica	Zaire
Jordan	
Kenya	
Kuwait	

ANNEX IV

RESERVATIONS AND DECLARATIONS MADE BY CONTRACTING PARTIES
TO THE CONVENTION ON A CODE OF CONDUCT
FOR LINER CONFERENCES

1. BULGARIA

The Government of the People's Republic of Bulgaria considers that the definition of liner conference does not include joint bilateral lines operating on the basis of intergovernmental agreements. With regard to the text of point 2 of the annex to resolution I, adopted on 6 April 1974, the Government of the People's Republic of Bulgaria considers that the provisions of the Convention on a Code of Conduct for Liner Conferences do not cover the activities of non-conference shipping lines.

2. CHINA

The joint shipping services established between the People's Republic of China and any other country through consultations and on a basis that the parties concerned may deem appropriate, are totally different from liner conferences in nature, and the provisions of the United Nations Convention on a Code of Conduct for Liner Conferences shall not be applicable thereto.

3. CUBA

Reservation

The Republic of Cuba enters a reservation concerning the provisions of article 2, paragraph 17, of the Convention, to the effect that Cuba will not apply said paragraph to goods carried by joint liner services for the carriage of any cargo, established in accordance with intergovernmental agreements, regardless of their origin, their destination or the use for which they are intended.

Declaration

With regard to the definitions in the first paragraph of part one, chapter I, the Republic of Cuba does not accept the inclusion in the concept of "Liner conference or conference" of joint liner services for the carriage of any type of cargo, established in accordance with intergovernmental agreements.

4. CZECHOSLOVAKIA

"The provisions of the Code of Conduct do not apply to joint line services established on the basis of intergovernmental agreements for serving the bilateral trade,

"Eventual one-sided regulation of the activity of non-conference lines by legislation of individual States would be considered incompatible on the part of the Czechoslovak Socialist Republic with the main aims and principles of the Convention and would not be recognized as valid."

5. DENMARK (Except Greenland and the Faroe Islands)

Reservations

1. For the purposes of the Code of Conduct, the term "national shipping line" may, in the case of a State member of the European Economic Community, include any vessel-operating shipping line established on the territory of that member State, in accordance with the Treaty establishing the European Economic Community.

2. (a) Without prejudice to paragraph (b) of this reservation, Article 2 of the Code of Conduct shall not be applied in conference trades between States members of the Community and, on a reciprocal basis, between these States and other OECD countries which are parties to the Code,

(b) Point (a) shall not affect the opportunities for participation as third country shipping lines in such trades, in accordance with the principles reflected in Article 2 of the Code, of the shipping lines of a developing country which are recognized as national shipping lines under the Code and which are:

(i) already members of a conference serving these trades, or

(ii) admitted to such a conference under Article 1 (3) of the Code.

3. Articles 3 and 14 (9) of the Code of Conduct shall not be applied in conference trades between the States members of the Community and, on a reciprocal basis, between these States and other OECD countries which are parties to the Code.

4. In trades to which Article 3 of the Code of Conduct applies, the last sentence of that Article is interpreted as meaning that:

(a) the two groups of national shipping lines will co-ordinate their positions before voting on matters concerning the trade between their two countries;

(b) this sentence applies solely to matters which the conference agreement identifies as requiring the assent of both groups of national shipping lines concerned, and not to all matters covered by the conference agreement.

Declarations

The Government of Denmark considers that the United Nations Convention on a Code of Conduct for Liner Conferences affords the shipping lines of developing countries extended opportunities to participate in the conference system and is drafted so as to regulate conferences and their activities in open trades (i.e., when opportunities to compete exist). This Government also considers that it is essential for the functioning of the Code and conferences subject thereto that opportunities for fair competition on a commercial basis by non-conference shipping lines continue to exist and that shippers are not denied an option in the choice between conference shipping lines and non-conference shipping lines, subject to loyalty arrangements where they

exist. These basic concepts are reflected in a number of provisions of the Code itself, including its objectives and principles, and they are expressly set out in Resolution No. 2 on non-conference shipping lines adopted by the United Nations Conference of Plenipotentiaries.

This Government considers furthermore that any regulations or other measures adopted by a contracting party to the United Nations Convention with the aim or effect of eliminating such opportunities for competition by non-conference shipping lines would be inconsistent with the above-mentioned basic concepts and would bring about a radical change in the circumstances in which conferences subject to the Code are envisaged as operating. Nothing in the Convention obliges other contracting parties to accept either the validity of such regulations or measures, or situations where conferences, by virtue of such regulations or measures, acquire effective monopoly in trades subject to the Code.

The Government of Denmark declares that it will implement the Convention in accordance with the basic concepts and considerations herein stated and, in so doing, is not precluded by the Convention from taking appropriate steps in the event that another contracting party adopts measures or practices that prevent fair competition on a commercial basis in its liner trades.

6. FINLAND

Reservations

1. Articles 2, 3 and 14 (9) of the Code of Conduct shall, on a reciprocal basis, not be applied in conference trades between Finland and other OECD countries which are parties to the Code.

2. In trades to which Article 3 of the Code of Conduct applies, the last sentence of that Article is interpreted as meaning that:

(a) the two groups of national shipping lines will co-ordinate their positions before voting on matters concerning the trade between their two countries;

(b) this sentence applies solely to matters which the conference agreement identifies as requiring the assent of both groups of national shipping lines concerned, and not to all matters covered by the conference agreement.

Declarations

A. The Government of Finland considers that the United Nations Convention on a Code of Conduct for Liner Conferences affords the shipping lines of developing countries extended opportunities to participate in the conference system and is drafted so as to regulate conferences and their activities in open trades (i.e. when opportunities to compete exist). This Government also considers that it is essential for the functioning of the Code and conferences subject thereto that opportunities for fair competition on a commercial basis by non-conference shipping lines continue to exist and that shippers are not denied an option in the choice between conference shipping lines and non-conference shipping lines, subject to loyalty arrangements where they

exist. These basic concepts are reflected in a number of provisions of the Code itself, including its objectives and principles, and they are expressly set out in Resolution No. 2 on non-conference shipping lines adopted by the United Nations Conference of Plenipotentiaries.

B. This Government considers furthermore that any regulations or other measures adopted by a contracting party to the United Nations Convention with the aim or effect of eliminating such opportunities for competition by non-conference shipping lines would be inconsistent with the above-mentioned basic concepts and would bring about a radical change in the circumstances in which conferences subject to the Code are envisaged as operating. Nothing in the Convention obliges other contracting parties to accept either the validity of such regulations or measures or situations where conferences, by virtue of such regulations or measures, acquire effective monopoly in trades subject to the Code.

C. The Government of Finland declares that it will implement the Convention in accordance with the basic concepts and considerations herein stated and, in so doing is not precluded by the Convention from taking appropriate steps in the event that another contracting party adopts measures or practices that prevent fair competition on a commercial basis in its liner trades.

7. FRANCE

Reservations

1. In application of the Code of Conduct, the concept of a "national shipping line" may, in the case of a member State of the European Community, include all shipping companies established on the territory of that member State in accordance with the treaty setting up the European Economic Community.

2. (a) Without prejudice to the text of paragraph (b) of this reservation, article 2 of the Code of Conduct shall not be applied in trade carried by a conference between the member States of the Community and, on a reciprocal basis, between those States and the other OECD countries parties to the Code,

(b) The text of paragraph (a) shall not affect the opportunities for shipping lines of developing countries, as third-country shipping lines, to take part in such trade in accordance with the principles set out in article 2 of the Code, provided they have been recognized as national shipping lines under the terms of the Code and:

(i) are already members of a conference carrying such trade, or

(ii) have been accepted for membership of such a conference under the provisions of article 1 (3) of the Code.

3. Article 3 and article 14 (9) of the Code of Conduct shall not be applied in trade carried out by a conference between the member States of the Community and, on a reciprocal basis, between those countries and the other OECD countries parties to the Code.

4. In any trade to which article 3 of the Code of Conduct applies, the last sentence of the article is taken to mean that:

(a) The two groups of national shipping lines shall co-ordinate their positions before voting on matters relating to trade between their two countries;

(b) The sentence shall be applied solely to matters defined in a conference agreement as requiring the consent of the two groups of national shipping lines concerned and not to all matters covered by the conference agreement.

8. GERMAN DEMOCRATIC REPUBLIC

The German Democratic Republic declares that the provisions of the Convention on a Code of Conduct for Liner Conferences will not be applied to jointly operated lines established on the basis of intergovernmental agreements for the joint conduct of the bilateral exchange of goods between the respective States.

9. GERMANY, FEDERAL REPUBLIC OF

Declaration

1. For the purpose of the Code of Conduct, the term "national shipping line" may, in the case of a member State of the European Economic Community, include any vessel-operating shipping line established on the territory of such member State in accordance with the EEC Treaty.

2. (a) Without prejudice to paragraph (b), article 2 of the Code of Conduct shall not be applied in conference trades between the member States of the European Economic Community or, on the basis of reciprocity, between such States and other OECD countries which are parties to the Code.

(b) Paragraph (a) shall not affect the opportunities for participation as third-country shipping lines in such trades, in accordance with the principles laid down in article 2 of the Code, of the shipping lines of a developing country which are recognized as national shipping lines under the Code and which are:

(i) already members of a conference serving these trades; or

(ii) admitted to such a conference under article 1 (3) of the Code.

3. Articles 3 and 14 (9) of the Code of Conduct shall not be applied in conference trades between the member States of the Community or, on a reciprocal basis, between such States and the other OECD countries which are parties to the Code.

4. In trades to which article 3 of the Code of Conduct applies, the last sentence of that article is interpreted as meaning that:

(a) The two groups of national shipping lines will co-ordinate their positions before voting on matters concerning the trade between their two countries;

(b) This sentence applies solely to matters which the conference agreement identifies as requiring the assent of both groups of national shipping lines concerned, and not to all matters covered by the conference agreement.

5. The Government of the Federal Republic of Germany will not prevent non-conference shipping lines from operating as long as they compete with conferences on a commercial basis while adhering to the principle of fair competition, in accordance with the resolution on non-conference lines adopted by the Conference of Plenipotentiaries. It confirms its intention to act in accordance with the said resolution.

(The Government of the Federal Republic of Germany also declared that the said Convention shall also apply to Berlin (West) with effect from the date on which it enters into force for the Federal Republic of Germany).

10. INDIA

In confirmation of paragraph (2) of the statement filed by the representative of India on behalf of the Group of 77 on 8 April 1974 at the United Nations Conference of Plenipotentiaries on a Code of Conduct for Liner Conferences, it is the understanding of the Government of India that the intergovernmental shipping services established in accordance with intergovernmental agreements fall outside the purview of the Convention on the Code of Conduct for Liner Conferences regardless of the origin of the cargo, their destination or the use for which they are intended.

11. IRAQ

The accession shall in no way signify recognition of Israel or entry into any relation therewith.

12. KUWAIT

The accession does not mean in any way a recognition of Israel by the Government of the State of Kuwait.

13. NETHERLANDS (For the Kingdom in Europe only)

Reservations

1. For the purposes of the Code of Conduct, the term "national shipping line" may, in the case of a member State of the European Economic Community, include any vessel-operating shipping line established on the territory of such member State in accordance with the EEC Treaty.

2. (a) Without prejudice to point (b) of this reservation, Article 2 of the Code of Conduct shall not be applied in conference trades between the member States of the European Economic Community or, on a reciprocal basis, between such States and the other OECD countries which are parties to the Code.

(b) Point (a) shall not affect the opportunities for participation as third-country shipping lines in such trades, in accordance with the principles reflected in Article 2 of the Code, of the shipping lines of a developing country which are recognized as national shipping lines under the Code and which are:

- (i) already members of a conference serving these trades, or
- (ii) admitted to such a conference under Article 1 (3) of the Code.

3. Articles 3 and 14 (9) of the Code of Conduct shall not be applied in conference trades between the member States of the European Economic Community or, on a reciprocal basis, between such States and the other OECD countries which are parties to the Code.

4. In trades to which Article 3 of the Code of Conduct applies, the last sentence of that Article is interpreted as meaning:

(a) The two groups of national shipping lines will co-ordinate their positions before voting on matters concerning the trade between their two countries;

(b) This sentence applies solely to matters which the conference agreement identifies as requiring the assent of both groups of national shipping lines concerned, and not to all matters covered by the conference agreement.

Declaration

The Government of the Kingdom of the Netherlands

- will not prevent non-conference lines from operating as long as they compete with conferences on a commercial basis while adhering to the principle of fair competition, in accordance with the Resolution on non-conference lines adopted by the Conference of Plenipotentiaries;
- confirms its intention of acting in accordance with the said Resolution.

14. NORWAY

Reservations

1. For the purpose of the Code of Conduct, the term national shipping line may, in the case of Norway or a member State of the European Economic Community or of the Organization for Economic Co-operation and Development, include any vessel-operating shipping line established on the territory of such State in accordance with the law applicable in that State.

2. (a) Without prejudice to paragraph (b) of this reservation, Article 2 of the Code of Conduct shall, on a reciprocal basis, not be applied in conference trades between OECD countries which are parties to the Code.

(b) Paragraph (a) shall not affect the opportunities of any shipping lines for participation as third-country shipping lines in such trades and for acquiring a significant part of the traffic of such trades.

3. Articles 3 and 14 (9) of the Code of Conduct shall, on a reciprocal basis, not be applied in trades between OECD countries which are parties to the Code.

4. In trades to which Article 3 of the Code of Conduct applies, the last sentence of that Article is interpreted as meaning that:

(a) The two groups of national shipping lines will co-ordinate their positions before voting on matters concerning the trade between their two countries;

(b) This sentence applies solely to matters which the conference agreement identifies as requiring the assent of both groups of national shipping lines concerned, and not to all matters covered by the conference agreement.

Declarations

The Government of Norway furthermore considers that the United Nations Convention on a Code of Conduct for Liner Conferences affords the shipping lines of developing countries extended opportunities to participate in the conference system and is drafted so as to regulate conferences and their activities in open trades (i.e. where opportunities to compete exist). This Government also considers that it is essential for the functioning of the Code and conferences subject thereto that opportunities for fair competition on a commercial basis by non-conference shipping lines continue to exist and that shippers are not denied an option in the choice between conference shipping lines and non-conference shipping lines, subject to loyalty arrangements where they exist. These basic concepts are reflected in a number of provisions of the Code itself, including its objectives and principles, and they are expressly set out in Resolution No. 2 on non-conference shipping lines adopted by the United Nations Conference of Plenipotentiaries.

The Government of Norway considers furthermore that any regulations or other measures adopted by a contracting party to the United Nations Convention with the aim or effect of eliminating such opportunities for competition by non-conference shipping lines would be inconsistent with the above-mentioned basic concepts and would bring about a radical change in the circumstances in which conferences subject to the Code are envisaged as operating. Nothing in the Convention obliges other contracting parties to accept either the validity of such regulations or measures or situations where conferences, by virtue of such regulations or measures, acquire effective monopoly in trades subject to the Code.

The Government of Norway declares that it will implement the Convention in accordance with the basic concepts and considerations herein stated and, in doing so, is not precluded by the Convention from taking appropriate steps in the event that another contracting party adopts measures or practices that prevent fair competition on a commercial basis in its liner trades.

15. PERU

The Government of Peru does not regard itself as being bound by the provisions of chapter II, article 2, paragraph 4, of the Convention.

16. SWEDEN

Reservations

1. For the purposes of the Code of Conduct, the term "national shipping line" may, in the case of Sweden or any other OECD country, include any vessel-operating shipping line established on the territory of the country in question in accordance with its laws and regulations.

2. (a) Without prejudice to paragraph (b) of this reservation, Article 2 of the Code of Conduct shall, on a reciprocal basis, not be applied in conference trades between Sweden and other OECD countries which are parties to the Code.

(b) Point (a) shall not affect the opportunities for participation as third country shipping lines in such trades, in accordance with the principles reflected in Article 2 of the Code, of the shipping lines of a developing country which are recognized as national shipping lines under the Code and which are:

(i) already members of a conference serving these trades; or

(ii) admitted to such a conference under Article 1 (3) of the Code.

3. Articles 3 and 14 (9) of the Code of Conduct shall, on a reciprocal basis, not be applied in conference trades between Sweden and other OECD countries which are parties to the Code.

4. In trades to which Article 3 of the Code of Conduct applies, the last sentence of the Article is interpreted as meaning that:

(a) The two groups of national shipping lines will co-ordinate their positions before voting on matters concerning the trade between their two countries;

(b) This sentence applies solely to matters which the conference agreement identifies as requiring the assent of both groups of national shipping lines concerned, and not to all matters covered by the conference agreement.

Declarations

A. The Government of Sweden considers that the United Nations Convention on a Code of Conduct for Liner Conferences affords the shipping lines of developing countries extended opportunities to participate in the conference system and is drafted so as to regulate conferences and their activities in open trades (i.e. when opportunities to compete exist). This Government also considers that it is essential for the functioning of the Code and conferences subject thereto that opportunities for fair competition on a commercial basis by non-conference shipping lines continue to exist and that shippers are

not denied an option in the choice between conference shipping lines and non-conference shipping lines, subject to loyalty arrangements where they exist. These basic concepts are reflected in a number of provisions of the Code itself, including its objectives and principles, and they are expressly set out in Resolution No. 2 on non-conference shipping lines adopted by the United Nations Conference of Plenipotentiaries.

B. This Government considers furthermore that any regulations or other measures adopted by a contracting party to the United Nations Convention with the aim or effect of eliminating such opportunities for competition by non-conference shipping lines would be inconsistent with the above-mentioned basic concepts and would bring about a radical change in the circumstances in which conferences subject to the Code are envisaged as operating. Nothing in the Convention obliges other contracting parties to accept either the validity of such regulations or measures or situations where conferences, by virtue of such regulations or measures, acquire effective monopoly in trades subject to the Code.

C. The Government of Sweden declares that it will implement the Convention in accordance with the basic concepts and considerations herein stated and, in so doing is not precluded by the Convention from taking appropriate steps in the event that another contracting party adopts measures or practices that prevent fair competition on a commercial basis in its liner trades.

17. UNION OF SOVIET SOCIALIST REPUBLICS

The Government of the Union of Soviet Socialist Republics considers that the provisions of the Convention on a Code of Conduct for Liner Conferences do not apply to joint shipping lines established on the basis of intergovernmental agreements to serve bilateral trade between the countries concerned.

18. UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

Reservations

I. In relation to the United Kingdom of Great Britain and Northern Ireland and to Gibraltar:

1. For the purposes of the Code of Conduct, the term "national shipping line" may, in the case of a member State of the Community, include any vessel-operating shipping line established on the territory of such member State in accordance with the EEC Treaty.

2. (a) Without prejudice to paragraph (b) of this reservation, Article 2 of the Code of Conduct shall not be applied in conference trades between the member States of the Community or, on a reciprocal basis, between such States and the other OECD countries which are parties to the Code.

(b) Point (a) shall not affect the opportunities for participation as third-country shipping lines in such trades, in accordance with the principles reflected in Article 2 of the Code, of the shipping lines of a developing country which are recognized as national shipping lines under the Code and which are:

- (i) already members of a conference serving these trades, or
- (ii) admitted to such a conference under Article 1 (3) of the Code.

3. Articles 3 and 14 (9) of the Code of Conduct shall not be applied in conference trades between the Member States of the Community or, on a reciprocal basis, between such States and the other OECD countries which are parties to the Code.

4. In trades to which Article 3 of the Code of Conduct applies, the last sentence of the Article is interpreted as meaning that:

(a) The two groups of national shipping lines will co-ordinate their positions before voting on matters concerning the trade between their two countries;

(b) This sentence applies solely to matters which the conference agreement identifies as requiring the assent of both groups of national shipping lines concerned, and not to all matters covered by the conference agreement.

II. In relation to Hong Kong:

1. (a) Without prejudice to paragraph (b) of this reservation, Article 2 of the Code of Conduct shall not be applied in conference trades, on a reciprocal basis, between Hong Kong and any State which has made a reservation disapplying Article 2 in respect of its trades with the United Kingdom.

(b) Point (a) above shall not affect the opportunity for participation as third country shipping lines in such trades in accordance with the principles reflected in Article 2 of the Code, of the shipping lines of a developing country which are recognized as national shipping lines under the Code and which are:

- (i) already members of a conference serving these trades, or
- (ii) admitted to such a conference under Article 1 (3) of the Code.

2. In trades where Article 2 of the Code applies, Hong Kong shipping lines will, subject to reciprocity, allow participation in redistribution by lines from any country which has agreed to allow participation by United Kingdom lines in redistribution in respect of any of its trades.

3. Article 3 and Article 14 (9) of the Code shall not be applied in conference trades, on a reciprocal basis, between Hong Kong and any State which has made a reservation disapplying Article 3 and Article 14 (9) in respect of its trades with the United Kingdom.

4. In trades to which Article 3 of the Code applies, the last sentence of that article is interpreted as meaning that:

- (i) the two groups of national shipping lines will co-ordinate their position before voting on matters concerning the trade between their two countries, and

- (ii) this sentence applies solely to matters which the conference agreement identifies as requiring the assent of both groups of national shipping lines concerned, and not to all matters covered by the conference agreement.

Declarations

1. The Government of the United Kingdom considers that the United Nations Convention on a Code of Conduct for Liner Conferences affords the shipping lines of developing countries extended opportunities to participate in the conference system and is drafted so as to regulate conferences and their activities in open trades (i.e. where opportunities to compete exist). The Government also considers that it is essential for the functioning of the Code and conferences subject thereto that opportunities for fair competition on a commercial basis by non-conference shipping lines continue to exist and that shippers are not denied an option in the choice between conference shipping lines and non-conference shipping lines, subject to loyalty arrangements where they exist. These basic concepts are reflected in a number of provisions of the Code itself, including its objectives and principles, and they are expressly set out in resolution No. 2 on non-conference shipping lines adopted by the United Nations Conference of Plenipotentiaries.

2. The Government considers furthermore that any regulations or other measures adopted by a Contracting Party to the Convention with the aim or effect of eliminating such opportunities for competition by non-conference shipping lines would be inconsistent with the above-mentioned basic concepts and would bring about a radical change in the circumstances in which conferences subject to the Code are envisaged as operating. Nothing in the Convention obliges other Contracting Parties to accept either the validity of such regulations or measures or situations where conferences, by virtue of such regulations or measures, acquire effective monopoly in trades subject to the Code.

3. The Government of the United Kingdom declares that it will implement the Convention in accordance with the basic concepts and considerations herein stated and, in so doing, is not precluded by the Convention from taking appropriate steps in the event that another Contracting Party adopts measures or practices that prevent fair competition on a commercial basis in its liner trades.

ANNEX V

EUROPEAN ECONOMIC COMMUNITY COUNCIL REGULATION No. 954/79

of 15 May 1979 concerning the ratification by Member States of,
or their accession to, the United Nations Convention on
a Code of Conduct for Liner Conferences

THE COUNCIL OF THE EUROPEAN COMMUNITIES

Having regard to the Treaty establishing the European Economic Community,
and in particular Article 84 (2) thereof,

Having regard to the draft Regulation submitted by the Commission,

Having regard to the opinion of the European Parliament,

Having regard to the opinion of the Economic and Social Committee,

Whereas a Convention on a Code of Conduct for Liner Conferences has been
drawn up by a conference convened under the auspices of the United Nations
Conference on Trade and Development and is open for ratification or accession;

Whereas the questions covered by the Code of Conduct are of importance
not only to the Member States but also to the Community, in particular from
the shipping and trading viewpoints, and it is therefore important that a
common position should be adopted in relation to this Code,

Whereas this common position should respect the principles and objectives
of the Treaty and make a major contribution to meeting the aspirations of
developing countries in the field of shipping while at the same time pursuing
the objective of the continuing application in this field of the commercial
principles applied by shipping lines of the OECD countries and in trades
between these countries;

Whereas to secure observance of these principles and objectives, since
the Code of Conduct contains no provision allowing the accession of the
Community as such, it is important that Member States ratify or accede to the
Code of Conduct subject to certain arrangements provided for in this
Regulation;

Whereas the stabilizing role of conferences in ensuring reliable services
to shippers is recognized, but it is nevertheless necessary to avoid possible
breaches by conferences of the rules of competition laid down in the Treaty;

Whereas the Commission will accordingly forward to the Council a proposal
for a Regulation concerning the application of those rules to sea transport,

HAS ADOPTED THIS REGULATION:

Article 1

1. When ratifying the United Nations Convention on a Code of Conduct for Liner Conferences, or when acceding thereto, member States shall inform the Secretary-General of the United Nations in writing that such ratification or accession has taken place in accordance with this Regulation.
2. The instrument of ratification or accession shall be accompanied by the reservations set out in Annex 1.

Article 2

1. In the case of an existing conference, each group of shipping lines of the same nationality which are members thereof shall determine by commercial negotiations with another shipping line of that nationality whether the latter may participate as a national shipping line in the said conference.

If a new conference is created, the shipping lines of the same nationality shall determine by commercial negotiations which of them may participate as a national shipping line in the future conference.

2. Where the negotiations referred to in paragraph 1 fail to result in agreement, each member State may, at the request of one of the lines concerned and after hearing all of them, take the necessary steps to settle the dispute.
3. Each member State shall ensure that all vessel-operating shipping lines established on its territory under the Treaty establishing the European Community are treated in the same way as lines which have their management head office on its territory and the effective control of which is exercised there.

Article 3

1. Where a liner conference operates a pool or a berthing, sailing and/or any other form of cargo allocation agreement in accordance with Article 2 of the Code of Conduct, the volume of cargo to which the group of national shipping lines of each member State participating in that trade or the shipping lines of the member States participating in that trade as third-country shipping lines are entitled under the Code shall be redistributed, unless a decision is taken to the contrary by all the lines which are members of the Conference and parties to the present redistribution rules. This redistribution of cargo shares shall be carried out on the basis of a unanimous decision by those shipping lines which are members of the conference and participate in the redistribution, with a view to all these lines carrying a fair share of the Conference trade.

2. The share finally allocated to each participant shall be determined by the application of commercial principles, taking account in particular of:

(a) The volume of cargo carried by the conference and generated by the member States whose trade is served by it;

(b) Past performance of the shipping lines in the trade covered by the pool;

(c) The volume of cargo carried by the conference and shipped through the ports of the member States;

(d) The needs of the shippers whose cargoes are carried by the conference.

3. If no agreement is reached on the redistribution of cargoes referred to in paragraph 1, the matter shall, at the request of one of the parties, be referred to conciliation in accordance with the procedure set out in Annex II. Any dispute not settled by the conciliation procedure may, with the agreement of the parties, be referred to arbitration. In that event, the award of the arbitrator shall be binding.

4. At intervals to be laid down in advance, shares allocated in accordance with paragraphs 1, 2 and 3 shall be regularly reviewed, taking into account the criteria set out in paragraph 2 and in particular from the viewpoint of providing adequate and efficient services to shippers.

Article 4

1. In a conference trade between a member State of the Community and a State which is a party to the Code of Conduct and not an OECD country, a shipping line of another member State of the OECD wishing to participate in the redistribution provided for in Article 3 of this Regulation may do so subject to reciprocity defined at governmental or ship-owners' level.

2. Without prejudice to paragraph 3 of this Article, Article 2 of the Code of Conduct shall not be applied in conference trades between member States or, on a reciprocal basis, between such States and the other OECD countries which are parties to the Code.

3. Paragraph 2 of this Article shall not affect the opportunities for participation as third-country shipping lines in such trades, in accordance with the principles reflected in Article 2 of the Code of Conduct, of the shipping lines of a developing country which are recognized as national shipping lines under the Code and which are:

(i) already members of a conference serving these trades; or

(ii) admitted to such a conference under Article 1 (3) of the Code.

4. Articles 3 and 14 (9) of the Code of Conduct shall not be applied in conference trades between the member States or, on a reciprocal basis, between such States and other OECD countries which are parties to the Code.

5. In conference trades between member States and between these States and other OECD countries which are parties to the Code of Conduct, the shippers and ship-owners of member States shall not insist on applying the procedures for settling disputes provided for in Chapter VI of the Code in their mutual relationships or, on a reciprocal basis, in relation to shippers and ship-owners of other OECD countries where other procedures for settling disputes have been agreed between them. They shall in particular take full

advantage of the possibilities provided by Article 25 (1) and (2) of the Code for resolving disputes by means of procedures other than those laid down in Chapter VI of the Code.

Article 5

For the adoption of decisions relating to matters defined in the conference agreement concerning the trade of a member State, other than those referred to in Article 3 of this Regulation, the national shipping lines of such State shall consult all the other Community lines which are members of the conference before giving or withholding their assent.

Article 6

Member States shall, in due course and after consulting the Commission, adopt the laws, regulations or administrative provisions necessary for the implementation of this Regulation.

This Regulation shall be binding in its entirety and directly applicable in all member States.

Done at Brussels, 15 May 1979.

For the Council

The President

R. BOULIN

Annex I */

Reservations

When ratifying the Convention or when acceding thereto, member States shall enter the following three reservations and interpretative reservation:

1. For the purposes of the Code of Conduct, the term "national shipping line" may, in the case of a member State of the Community, include any vessel-operating shipping line established on the territory of such member State in accordance with the EEC Treaty.
2. (a) Without prejudice to paragraph (b) of this reservation, Article 2 of the Code of Conduct shall not be applied in conference trades between the member States of the Community or, on a reciprocal basis, between such States and the other OECD countries which are parties to the Code.

*/ Annexes to the European Economic Community Council Regulation No. 954/79.

- (b) Point (a) shall not affect the opportunities for participation as third-country shipping lines in such trades, in accordance with the principles reflected in Article 2 of the Code, of the shipping lines of a developing country which are recognized as national shipping lines under the Code and which are:
- (i) already members of a conference serving these trades; or
 - (ii) admitted to such a conference under Article 1 (3) of the Code.
3. Articles 3 and 14 (9) of the Code of Conduct shall not be applied in conference trades between the member States of the Community or, on a reciprocal basis, between such States and the other OECD countries which are parties to the Code.
4. In trades to which Article 3 of the Code of Conduct applies, the last sentence of that Article is interpreted as meaning that:
- (a) The two groups of national shipping lines will co-ordinate their positions before voting on matters concerning the trade between their two countries;
 - (b) This sentence applies solely to matters which the conference agreement identifies as requiring the assent of both groups of national shipping lines concerned, and not to all matters covered by the conference agreement.

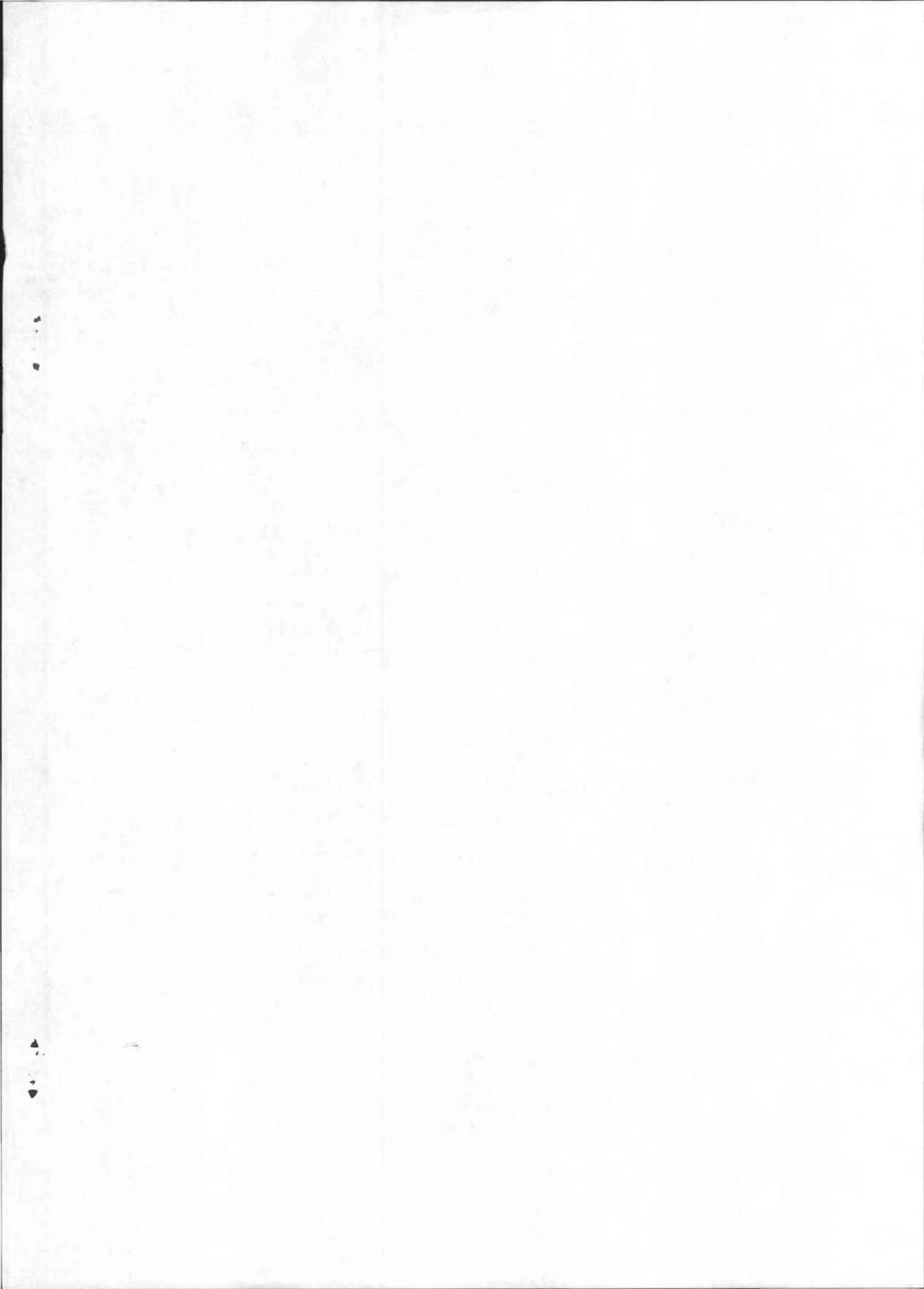
Annex II

Conciliation Referred to in Article 3 (3)

The parties to the dispute shall designate one or more conciliators.

Should they fail to agree on the matter, each of the parties to the dispute shall designate a conciliator and the conciliators thus designated shall co-opt another conciliator to act as chairman. Should a party fail to designate a conciliator or the conciliators designated by the parties fail to reach agreement on the chairman, the President of the International Chamber of Commerce shall, at the request of one of the parties, make the necessary designations.

The conciliators shall make every endeavour to settle the dispute. They shall decide on the procedure to be followed. Their fees shall be paid by the parties to the dispute.



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