ΑΠΟ ΤΗΝ ΚΙΝΗΣΗ ΤΩΝ ΙΔΕΩΝ

THE 1988 REVIEW CONFERENCE ON THE CODE OF CONDUCT FOR LINER CONFERENCES *

by
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The convention on a code of conduct for liner conferences, which was concludend in Geneva in April 1974 under the auspices of the United Nations, known as the «UNCTAD code», or simply «the code» came into force as from the sixth October 1983. This became possible after the E.E.C. concil has decided for the member countries to ratify the code - though under certain important reservations.

In line with this decision, Federal Republic of Germany and the Netherands ratified the code so that the requirement of article 49 were satisfied.

According to article 49 of the convention, the code should enter into force, six months after the date on which not less than 24 states, the combined tonnage ofwhich amounts to at least 25 percent of the world general cargo tonnage, have become contracting parties. This occurred on 6th April 1983 when 58 countries • totalling 20.842.921 grt i.e. 28.67 % of world general cargo tonnage had become contracting parties to the code convention.

However, it was not until the second part of 1985, that the code started affecting the trade - routes to and from Europe. Moreover, to - date, it has not, as yet, become applicable in very important trades such as those to and from Ja-

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pan, or the United States, or the trades to and from Brazil, Argentina, Australia, Canada and several other countries with significant interests in liner trades.

As result, not very much experience exists to date from the implementation of the code. However, in conformity with art. 52 para. 1 of the code convention, a review conference was convened for the late part of 1988. According to the wording of the said stipulation of the code, the purpose of the review conference should be «to review the working of the convention, with particular reference to its implementations and to consider and adopt appropriate amendments». It appears, therefore, that the scope of the review conference is not as wide as some people at this side of the world like for the conference to be.

Following para. 2 of the same article 52 of the convention «the depositary» (i.e., the secretary general of the United Nations), shall, four years from the date on which the 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». To my knowledge such a documentation did not circulate to - date.

It might usefully be added though, that in conformity with para. 16 of Resolution 144 of UNCTAD VI conference, followed by a similar decision of the committee on shipping of UNCTAD received at its 11th session (November 1984) the Secretariat of UNCTAD produced a report under the Symbol TD/B/C. 4/300 containing information and guidelines with regard the implementation of the code ; also two support documents (UNCTAD/ST/SHIP 1 and UNCTAD/ST/SHIP/2). These documents were submitted to the committee on shipping at its 12th session (November 1986).

The following information is added in an effort to throw further light regarding the above documents.

(a) They reflected information collected by the UNCTAD sercetariat till late 1985 i.e. within two years from the date (October 1983) the code convention came into force in trades:

— between developing countries, parties to the code,

— between socialist countries, also

— between Federal Republic of Germany and the Netherlands and all other countries which were parties to the code convention in 1983.

(b) The inquiry was based on replies : (i) to notes sent by the secretary - general of UNCTAD in February and August 1985, to which notes replices were received from 44 countries including countries not parties to the code convention such as Belgium, Ireland, Spain, also countries which became later parties to the code such as Denmark, Finland, Sweden, United Kingdom. (ii) from liner conferences serving trades of countries parties to the code.

The above comment and observations aim at explaining the doubts expressed above as to :

(a) the adequacy of the experience also of the empirical evidence, available, to help make the review conference productive enough as to fulfil its task.

(b) whether the letter and the wording of the provisions of article 52 of the code convention were observed - beyond any doubt.

To take this discussion some what further ; it appears that a cenrtain degree of confusion was present, at least at the initial stages of work for the planning for the Review conference.

For instance ; as mentioned before, article 52 para. 2 of the Code provides among others that the depositary shall.... «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».

To the view of independent observers, also to my personal view, the wording of article 52 of the code is clear enough. No other parties excepting the contracting parties to the code could be «entitled» to attend the Review conference.

Despite this, all states members of the United Nations - not necessarily contracting parties to the code - had initially been approached by UNCTAD. The origin for such action appears to be that there has been some debate, as to whether non - contracting parties (that means states), should be invited to participate in the Review conference. It appears that the UNCTAD sercetariat was in favour of inviting all states members of the United Nations to take part in the review conference. Perhaps the feeling had prevailed, at a certain point of time, that the wider the participation at the Review Conference the better for the conference's chances for a success could be.

As far I know, even if such intention existed for a moment, this does not

exist any more, because it would have been in contradiction not only with the letter of the code convention, but also to the practice which had been applied in the past, in similar situations.

A compromise solution has been submitted to the UN headquarters in New York for their consideration. This was to the effect that all states members of the United Nations, not participants to the code conventions should be invited, if they so wished, to attend the Review Conference as observers, having the right to address the conference and express their views, but not to **vote** in the conference.

At the time of drafting this paper it was not known to me what has been the decision of the UN headquarters, on the subject.

As to the other point raised before, namely that not enough time had passed since the code came into effect and not enough experience had been acquired, it seems to me appropriate to add that no further comment and no further judgement should be passed, until one would be able to see the number, also the type of topics which would be included in the agenda for the Review Conference, also what amendments would be proposed.

Within the limitations mentioned above, I shall attempt in the paragraphs to follow, a presentation of certain thoughts (occasionally in conjunction with some relevant information derived from and/or based on the documentation available at the time of drafting these notes), with regard to possible areas of implementation of the code which might attract the interest of contracting parties and to relevant suggestions for amendments to the code.

Before I attempt this, I think that I should refer to an indirect benefit from convening the Review Conference. It appears that certain governments of countries not parties to the convention, are speeding up the procedures to ratify or acceed to the code (e. g., Italy, Spain, Austria, possibly Belgium) in order to become - in time for the Conference - full members of the code convention, hence become eligible to participate with full rights at the Review Conference. For the time being, of the 68 countries parties to the code convention 65 (including China) are developing.

As mentioned earlier, the purpose of convening the review conference (as this purpose is stated in article 52 of the code convection) should be «to review the working of the convention with particular reference to its implementation and to consider and adopt appropriate amendments».

As the time of commencement of the review conference comes closer, it becomes apparent that certain arguments, from the part of those who opposed the code have lost their weight and tend to disappear, as for instance arguments like **the** following :

— the liner conference system would not survive the coming into force of the code.

— The code is obsolete as a result of developments in trade and technology.

— The application of the code will create chaotic results in the liner trades to **the** detriment of the international seaborne trade.

No one, of course, could dispute that the world liner system is undergoing a radical and profound change, also that this process for this change has not been completed. The containerization, the emergence of consortia, the concept of round the world services, coupled with other organizational and structural changes both in liner services, also in the world seaborne trade, all work towards a continuous change in the international liner trades. Nevertheless there is not the slightest evidence that the basic concepts adopted in and the principles governing the code of conduct, have lost their significance or that any of the basic stipulations of the code have become obsolete.

There are, however, fundanmental differences between contracting parties with regard philosophies relating to policies when approaching the implementation of the code provisions. The relevant difficulties are of highly political nature.

For instance, most of the major trading countries in Western Europe - certainly also in other parts of the advanced industrial world - are increasingly influenced by a profound change of thinking, which leeds in economic policies based on less government interference in economic life in those countries. This occurs in countries in which traditionally the government involvement in economic affairs was, by all standards, small. Now, under the influence of this thinking, government and private interests in the shipping industry of those countries, are interested to have this tendency reflected in the code, taking advantage of the opportunity offered to them by the Review Conference. The attitude of those countries, seem to be that liner shipping, should provide under competitive conditions, the desirable system for the carriage of international seaborne general cargo trade. It remains open to question, to define objectively what the meaning of competitive conditions» is.

On the opposite side developing countries seem to demand the strengthening of government intervention and role in the liner trades and they are interested to see this reflected, clearly, in the code. While, these countries accept the principle of efficiency in the liner operations, same countries see liner shipping as a service to a particular country, not necessarily producing a direct commercial profit, as long as it can produce a wider social and economic benefit for that country.

This fundamental difference between developed and developing countries is not of philosophical or economic nature, only. To a great extent, it is related with historical reasons, also with the level of development of the societies and peoples concerned.

In most developing countries, but also in some of comparatively less developed countries in Europe, at least common people and small business people look at their governments, seeking protection or some kind of regulatory action from the part of the state in day by day life. People need to learn a,nd apply in every day's life, the real meaning of terms such as «self restrain», «self sespect», also to behaviour as responsible and self disciplined members of the society, who know and accept that, their rights (including the right for free economic action in the society) can go no further than certain limits, that means no further than the point where from the rights for action, freedom, political liberties of other people, start.

You cannot avoid increased regulatory action, but only in those countries where the principles of equal rights and obligations are actively accepted and applied by all citizens to the benefit of all people. But no society is ideal in its organisation. The more capable a society is to operate in justice, the less the state intervention is needed.

Similarly ; you cannot oppose and reject regulatory action at the international level but only as long as, or to the extend that really equal opportunities and rights are offered to all countries also to their citizens to act in all fields of economic activity. T h e s e are not internationally equally available for all countries and firms, depending not only and simply on their particular capability to act, but much more on inherent disadvantages when compared with, long existed industries - in this particular case shipping industries-with large experience accumulated over time, industries which also enjoy other advantages created and consolidated in the past, under much different conditions than those currently existed.

I believe that, those countries and/or governments which stand against increased government regulation - particulary on an international level - should not

tend to ignore situations like those presented above. It should, also, be recalled that, if countries which feel that, they need protection by means of increased regulation at the international level, as to become able to protect and promote their legitimate economic interests and aspirations, would be deprived of such a possibility, then the alternative for them, would be the introduction of a regulatory action of their own at the national level, with obvious risks and repercussions for all.

I believe that at this stage of my presentation, I have finished with the comments of general character I, felt it useful to make on the review conference.

Therefore, I come back to specific points of implementation of the code, which appear to attract the interest of parties to code convention, as possible topics of the agenda of the Review Conference.

THE SCOPE OF APPLICATION OF THE CODE CONVENTION

Strong feelings and wide differences among contracting parties to the code, exist with regard to the scope of application of the code convention.

It appears that, in only one relevant point, might exist a fairly wide concesus and this is that the code should be applicable only in trades between contracting countries. Certain developing countries, though, indicated that following national legislation based on the code, would make the code applicable to all their trades, even if their trade partners are not parties to the code - particularly in concerns their participation in the respective trades.

One of the major points of dispute in relation to the implementation of the code provisions, relates to whether the code applies to the trade carried by liner conferences only, or to the entire liner trade carried between any two countries parties to the code.

The dispute is linked with and originates in the stipulation of article 2 para. 17 of the code which reads as follows.

«17. The provisions of article, 2, paras 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 defense purposes».

The entire article 2 is under the title «Participation in trade» and paras 1 to 16 cover ail relevant to that title aspects. It is also noted that the content and the exact wording of the particular para. 17 in question, has been adopted by a more than a two thirds majority formulated on a roll call vote, and has been supported mostly by developing countries, whereas it was opposed by the developed countries. Therefore, there can be no misunder standing as to the exact meaning of the wording of the paragrapgh 17 voted. The vote had taken place almost at the last moment of the conference on the code. The intension of those who voted for para. 17, was to mean that they wanted the whole trade, not only the part of the trade carried by conference vessels, to be covered by the code. Obviously, those who voted against wanted the opposite for their own reasons.

The latter group of countries continue to oppose para. 17 of article 2 of the code convention, by characteristing it as being an «artificial» stipulation.

Those countries admit, however, that the code, in principle, does not prevent countries parties to the convention to enact national legislations with the aim of regulating the entire liner trades, but such actions will be of a political nature, to which they are opponent.

A possible explanation of the tension in the interpretation of para. 17 of art. 2 can be found in the desire of contracting parties in Europe, to ensure that free competition by outsiders to be an important element in counteracting to monopolistic practices by conferences and preserving the relevant right of choice to the shippers. This point of view is also reflected in the report TD/B/C. 4/300 by the secretariat of UNCTAD.

Perhaps a fair solution to this dispute, as well as to the dispute regarding what could be considered to be «a fair competition» from non conference lines, could be found by the Review Conference in the context of an agreed attempt to secure a clear and complete application of the stipulations of article 2, as to safeguard the share of developing countries also, of other interested countries, in their national trades as envisaged by the code and its «fundamental objectives and basic principles» as both these are set out in the preamble under points (a) and (b).

In this connection reference is made to the statement and declaration made by the representative of the group of 77 at the conference when the resolution No 2 on Non - Conference Lines was adopted and similar, in substance, statements and/or reservations made by other contracting countries.

According to the statement made by the representative of the group of 77, the group had supported resolution 2 on the «clear understanding (I follow the wording of the statement as presented in page 15 of UNCTAD/ST/SHIP 1) that non - conference shipping lines will not be permitted to operate in a manner that would damage the smooth functioning and operation of liner conferences». The statement went on to add «in no circumstances can we accept a situation where through their operation the national 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». The statement was concluded by adding that the 77 group governments «Will have full freedom of action to act suitably in the national interest» .... should such situation would arise «where our government, feel that the activities of non - conference lines should be curbed or regulated in any manner».

In view of the above and to close our discussion on the scope of application of the code, it becomes necessary to link the application of para. 17 of article 2, with the implementation of the resolution adopted by the conference «on the non - conference lines».

The question which arises, appears to be, in substance, concentrated in to whether the activities of non - conference lines fall within the frame of the code or not. In other words, the question is ; to whom the 20 % share allocated by the code for the third flag carriers, applies? To the third flag conference member lines only or to non conference lines as well ? There seems to be only one relevant stipulation in the code ; the one of para. 17 of article 2 which specifies that the provisioms of this article which refer to the right of participation in a trade, also to the cargo sharing «concern all goods .... with the exception of military equipment for national defence purposes».

On the other hand the resolution of the code conference on «non conference shipping lines», states that nothing in the convention shall be construed so as to deny shippers an option in the choice between conference and non conference shipping lines, subject to royalty arrangements. Further, it stipulates that «in the interest of sound development of liner shipping service, non - conference lines should not be prevented from operating. . . .». These recommendations of the resolution, - although lack a legal force - are backed by a number of declarations from the European countries and exert a strong pressure which originates in the shippers. The European shippers consider that the conference system as it operates, is in contradiction with article 85 of the Rome treaty which established the European Economic Community. They further consider,

as being of great importance to them, that the competition regulation is a means by which a fair balance between liner conferences based in Europe and shippers can be adequately restored. The European shippers are convinced that this balance can be safeguarded if and when liner conferences are subjected to an increased amount of effective outside competition so that shippers councils also that individual shippers are provided with efficient powers as to counter balance and reduce the monopolistic power and practices of liner conferences. They believe that the more effective is the non - conference competition the less would the need pe, for government regulation. In this connexion, I wish to recall and remind to you the points raised earlier on government regulation. This suggests that mere fact that at the European side, they oppose government regulation and consider it to be unnecessary - perhaps damaging - does not signify a principle which commands a universal acceptance since the great majority of the developing countries parties to the code refuse to accept this approach.

Besides, it has to be remembered that the code aims at a reorganization of liner trades, as to create a balanced system which would equally protect the interests of all parties concerned ; in particular to serve «the special needs and problems of developing countries with respect to the activities of liner conferences serving their foreign trades» (quoted from the objectives and principles of the code convention). Further ; the code stipulates (article 42), that freight rates shall be fixed at as low a level as is feasible from the commercial point of view and shall permit a reasonable profit for shipowners.

Experience to - date, suggests that conference freight rates tended to be relatively lower in trades where outside competition or conditions of potential competition existed as a long term characteristic. Indeed, the higher is the elasticity of demand for conference services, arising from the possible availability of alternative means of transport, the greater is the pressure upon the conference to charge lower, than otherwise, freight rates. In principle, therefore, the existence of non conference lines in a trade, is beneficial for the trade concerned.

Assuming that the code would affect the non - conference line activities, by bringing them, within the 20 % share, it would be usefull to consider whether this would be damaging to shippers, as compared with the impact of the possible existence of outside competition under the regime existed to - date. No doubt, the inclusion of the non - conference lines within the 40 : 40 : 20 participation formula, should strengthen the code as an instrument and as vehicle for a reorganization of liner system, while it would not touch the right of independent lines to effecti-

vely exist. (Nevertheless, such a development should create strong incentive for the entry of the independents into the conferences, rather than remain outside, since, by entering the conferences, they might be able to better protect their interests, through their participation in the conference decision making).

As pointed out earlier, the code aims towards ensuring a balanced protection of the interests of both carriers and shippers and it has specitic provisions for this purpose. It imposes restrictions on and controls over conference practices. The question, therefore, arises; is the protection of shippers' interests as provided by the code, particularly when combined with the right of outsiders to carry part of the 20 % share allocated to third carriers, of less importance for the users of liner trades, than the possible benefits which could be derived through the possibility of outside competition, particularly in view of the very limted extend at which such a possibility existed, in many trades, in the past ?

To my view, an effective implementation of the code regarding, for instance, procedures for freight ratefixing, consultation and conciliation with, where appropriate, government participation, might exert an effeltive pressure on freight rate levels, also on the frequency and extend of freight rate increase and tend to keep levels of freights cost oriented. Whereas, the existence of non - conference competition might only mean, freight rates possibly moving on a curve of somewhat lower level than, but parallel to that, of conference rates.

If this interpretation is correct, the full implementation of the code should be of much greater importance for shippers - particularly in developing countries- than the presence of outside competition as this is experienced to - date. This should be the more so since, quite often, the outsider remains as such, only as long as it is sufficient for the conference concerned to be convinced that a mutually acceptable deal with him, would be less damaging for the conference interests, than the continuation of his independent activities. Alternatively it might happen that the outsider find himself compelled to withdraw under the pressure of losses incurred. Then freight rates are brought back to the levels desired, under the new market conditions, by the conference concerned.

If a fair compromise solution to the problem of «non conference lines» competition could not be reached, then, the danger would be high for action on the national level, by each individual developing country in its own way to act suitably in its national interest.

To my opinion, developing countries are justified when feeling that it is a common obligation for all countries parties to the code to ensure that the spe-

cial needs and problems of developing countries, also the fundamental objectives and basic principles as these are set out in the preamble of the code are observed, in what concerns the extent and nature of the non - conference lines competition.

To add a word to what already was said above, I should say that whatever the influence - in technology or organization of the liner conference system in future on the code, it seems clear that it would be to the interest of the interna tional liner trade, if the code would remain an effective means of international co - operation, both as a regulatory instrument and as on instrument to promote the participation of developing countries in the carriage of, their foreign seaborne trade, in line with the fundamental objectives and principles of the conventien.

Taking further our discussion on the scope of application of the code of conduct for liner conferences, we should refer to another point of disagreement between government parties to the convention with regard the implementation of the provision of para. 17 of article 2 of the code mentioned earlier.

This stipulation, has been extended by certain developing countries in such a way that all government controlled cargoes, are reserved for the carriage by the their national flag vessels exclusively.

Although the practical implications of such actions appear to be limited mostly because of non availability of sufficient national flag vessels in the countries applying these measures, clearly such policies go much beyond the code provisions and should be seen only as measures imposed by necessity upon the countries concerned, as a result of the presence of non - conference lines at an extent negatively affecting the right of the national lines of the developing countries concerned for an equal share in the carriage of their respective trades.

To continue our discussion on the scope of application of the code, reference should be made to of reservations made by a number of countries to the effect that joint services established in accordance with intergovernmental agreements fall outside the purview of the convention on the code, regardless of the origin of the cargoes, their destination or the use for which they are intended.

This reservation which has made by certain developing countries and their Eastern European socialist countries partners, appears, not to have raised any f o r m a l objections by any one contracting to the code country. Therefore it is operational. The reservation in question, affects the right of third flags,

carriers to participate in the trades concerned. In some cases the third flag carriers right is duly reflected in the agreements concluded. There seem to exist, however, cases which do not provide any reference for third flag carriers participation. In such cases, the relevant agreements might be considered as being inconsistent with the code obligations undertaken by each state party to the code convention. A number of countries members to such intergovernmental agreements, maintain that such intergovernmental agreements are instituted to ensure adequate and reliable liner service for the implementation of contractual trade between two countries and all payments arising in connection with the operation of the lines concerned, including the payment of freight, are made acording to the terms and conditions of trade agreements. Finally such bilateral agreement also include provisions covering many other aspects of the shipping concerned. Therefore no room is left for individual transactions between private parties.

OTHER TOPICS OF POSSIBLE INTEREST FOR THE REVIEW CONFERENCE

When talking of other topics of possible interest for the review conference we should not lose sight of the content and provisions of article 52 of the code which provides for the calling of the review conference. The purpose of the Review conference should be «to review the working of the convention, with particular reference to the implementation and to consider and adopt appropriate amendments».

In this connection, it can usefully recalled that, for those reasons mentioned at the beginning of this presentation, the implementation of the code provisions is still lagging behind, despite the intry into force of the code since 1983.

According to the views brought forward by various countries and included in the UNCTAD Report TD/B/C. 4/300 also in the two supporting papers related to the said report, consultation and conciliation procedures are such topics of inerest.

According to the document UNCTAD/ST/SHIP/1 (page 24, para. 82) «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 government 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».

Consultation machinery results are not binding. This tends to widen the scope and, it might be, the necessity or at least the desirability for government intervention.

Conference agreements can be established, modified or implemented also relative decisions can be taken and implemented in a form which might not be in conformity with the spirit the aims or even the wording of the code convention. Failure of such deviations from the code convention to be corrected might in the long run consist a grave danger for the legitimate interests of a given country. This signals the importance of the stipulation of the code convention which call for an appropriate authority to intervene, at the request of one of the interested parties or even upon its own decision.

In addition to the above, and although the code does accord a considerable flexibility to the parties concerned as to how to resolve their disputes, it is the mandatory international conciliation machinery to which the code gives predominance. However, where the parties concerned have agreed that disputes be resolved by other procedures, then those procedures may be used (art. 25) unless the national legislation, rules and regulations preclude this choice.

Most - or at least may - of the disputes refer to specific topics of rather local character. Such disputes could be resolved much more quickly, also possibly more easily and less costly on a level local conciliation machimnary rather than by the international mandatory conciliation mechanism. Apparently, this approach was considered at a stage of the 1974 conference and a relevant resolution was adopted, reguesting the first review conference to give priority consideration to the subject of local conciliation, taking into account the views expressed by the contracting parties, on whether or not the absence of local conciliation has hampered the effective settlement of disputes.

OTHER MINOR TOPICS

Among other minor topics it was almost unanimus negative reaction to suggestions that an amendment might be advisable in the code, to enable interested countries to «sell» their participation rights to the carriage of the national **trade.**

Almost identical in their wording suggestions have been proposed by EEC member countrices, which envisage amending the code convention as to make it possible for the Community, as such, to accede to the code.

An EEC country (Denmark) proposed that the principle that the code replaces unilateral measuses of cargo reservation should be embodied in the convention. Same and other countries suggested that freight rate fixing provisions of the code might amended with a view to become more compatible with commercial practices.