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INFORMATION ON EXISTING INTERNATIONAL DISCIPLINES AND ARRANGEMENTS

ADDENDUM

At the last meeting of the Group of Negotiations on Services on 22-25 March 1988, it was agreed that three international organizations - the International Telecommunication Union (ITU), the International Civil Aviation Organization (ICAO) and the United Nations Conference on Trade and Development (UNCTAD) - would be invited to reply to a set of questions in order for the GNS to obtain more complete relevant information than that contained in MTN.GNS/W/16. In response to this decision, the attached answers from UNCTAD are being circulated.

GATT SECRETARIAT
UR-88-0188

Information on the United Nations Convention on a Code of Conduct for Liner Conferences and the United Nations Convention on International Multimodal Transport of Goods (MT Convention)

Questions 1 and 2

UNCTAD's work on economic, commercial and legal aspects of international shipping dates back to the first session of the Conference in 1964, when a "Common Measures of Understanding on Shipping Questions" was reached. The developing countries had raised the issue of shipping at that first session because of their dissatisfaction with the existing shipping services, notably with the institutional and operating environment of the industry which they felt was having an adverse effect on their efforts to expand trade and to improve their balance of payments.

The problems encountered related in particular to the functioning of the liner shipping markets which since 1875 had been organized in so-called liner conferences, which are cartel-type co-operative agreements among shipowners serving the same trade route. Conferences aim at restricting price competition and, depending on their individual scopes, allocating cargo shares, sailing quotas, revenue shares, etc. Today there exist some 350 conferences covering virtually all trade routes that warrant a sufficient cargo generation.

This organizational form of shipping and the distinct rate setting procedures inherent in it have been the root of concern in the international trading community and in developing countries in particular. In their traditional operations liner conferences unilaterally tended to fix freight rates at levels that enable even high cost members to make operating profits. These freight levels could also be retained at times of surplus of shipping tonnage because of the absence of effective competition from operators within a conference and owing to joint action of the conference against outsiders to prevent them from intruding into conference-controlled trade routes. Another area of complaint particular of developing countries' shippers, related to service quality. Sailing frequencies and types of vessels employed were equally decided unilaterally and often did not meet the demands of trading interests of developing countries.

Another particular feature of the conference system, namely its closed nature, was a cause of concern for developing countries. Consequently, shipping companies of developing countries wishing to participate in the carriage of their foreign trade were often denied adequate participation in these conferences.

This "Common Measures of Understanding" reached with the developed countries in 1964 concentrated on the liner trades which were then those services in which developing countries were largely interested and was addressed principally to securing closer consultations between shippers and conferences with regard to the running of shipping services. It supported the idea of international financing, and of technical assistance for the improvement of port operations and connected inland transport facilities in developing countries on favourable terms and conditions. It also encouraged the development of merchant marines of developing countries as an important element of policies of import substitution and export of services.

Following the "Common Understanding" the Committee on Shipping was established by the Trade and Development Board in its resolution 11 (I) of 29 April 1965. The Committee on Shipping has since had thirteen regular sessions and three special sessions. Among the terms of reference of the Committee on Shipping were:

"(a) To promote understanding and co-operation in the field of shipping and to be available for the harmonization of shipping policies of Governments and regional economic groupings which fall within the competence of the Trade and Development Board;

(b) To study and make recommendations on the ways in which and the conditions under which international shipping can most effectively contribute to the expansion of world trade, in particular of the trade of developing countries. Particular attention should be paid to economic aspects of shipping, to those shipping matters which affect the trade and balance of payments of developing countries, and to related shipping policies and legislation of Governments on matters which fall within the competence of the Trade and Development Board;

(c) To study measures to improve port operations and connected inland transport facilities, with particular reference to those ports whose trade is of economic significance to the country in which they are situated or to world trade;

(d) To make recommendations designed to secure, where appropriate, the participation of shipping lines of developing countries in shipping conferences on equitable terms;

(e) To promote co-operation between shippers and the conferences, a well-organized consultation machinery should be established with adequate procedures for hearing and remedying complaints by the formation of shippers' councils or other suitable bodies on a national and regional basis...;

(f) To study and make recommendations with a view to promoting the development of merchant marines, in particular of developing countries...".

Subsequently the Committee on Shipping, at its fourth session in 1970, approved its work programme, which refers inter alia to:

(a) Protection of shippers' interests through the establishment of national and regional consultation machinery, and studies of the level and structure of freight rates, conference practices and adequacy of shipping services.

(b) Establishment or expansion of merchant marines in developing countries.

(c) Improvement of port operations and connected facilities.

(d) Technological progress in maritime transport.

(e) International legislation on shipping.

(f) Substantive support for technical assistance in the above fields and the organization of seminars and training courses in shipping and port economics.

Prior to the creation of UNCTAD, the shipping industry was outside global international economic regulation or action. The establishment of UNCTAD and its Committee on Shipping in April 1965 brought the international shipping industry under discussion and examination with all countries participating. Consequently a forum was created where all parties involved in maritime transport - governments, shipowners, shippers and port authorities - could meet, discuss, negotiate and elaborate international measures to meet the concerns of the developing and developed countries. Perhaps equally important was the fact that the Committee on Shipping provided the only universal forum where developing countries and developed countries could meet to discuss and find acceptable international solutions and agreements on matters that had begun to affect gravely the shipping industries and economies of countries. The establishment of the Committee on Shipping came in time to divert the industry from a course that might have lead to chaos, intensified unilateral actions and perhaps strife and antagonism between the traditional maritime States and developing countries.

The Committee on Shipping, as an integral part of UNCTAD, followed the policy and philosophy of its governing body. In the early years of the Committee on Shipping the dominant issues in its deliveration were the level and structure of freight rates, protection of shippers' interests, consultation machinery, and related issues such as terms of shipment.

From the early 1970s onwards the development of national merchant marines gained prominence in the deliberations of the Committee on Shipping. It was also natural for the Committee on Shipping to concentrate from the start on the liner sector. The controversy and near antagonism over liner conferences meant that much time and effort was devoted to solving the problems and grievances that surrounded the liner conference system.

In due course the liner sector experienced tremendous technological change through the introduction of containerization. The Committee on Shipping reacted to this changing situation in order to meet the challenge. The terms of refernece of the Committee on Shipping were expanded in September 1978 to include the question of international multimodal transport and the work programme of the Committee was correspondingly enlarged. The terms of reference of the Committee on Shipping regarding multimodal transport inter alia call for the Committee:

"(a) To promote understanding and co-operation in the field of multimodal transport and containerization and to be available for the harmonization of the relevant policies of Governments and regional economic groupings which fall within the competence of the Trade and Development Board;

(b) To study, make recommendations, and undertake measures where appropriate on the ways in which international multimodal transport can most appropriately contribute to the accelerated development and facilitation of international trade, in particular of developing countries. Particular attention should be paid to the economic and related analysis of international multimodal transport, including its effect on trade, the balance of payments, and marketing and total distribution costs, as well as to the related policies and legislation of Governemnts on matters which fall within the competence of the Trade and Development Board;

(c) To make recommendations designed to promote the interests of shippers and the participation of multimodal transport operators of developing countries in international trade;

(d) To promote assistance to developing countries and to support the regional commissions and the modal specialist organizations on questions connected with the field of multimodal transport, including containerization and other systems of unitization...".

In the two decades of work on shipping, ports, multimodal transport and related maritime legislation, UNCTAD has addressed a wide spectrum of economic, commercial and legal questions in these fields. In so doing it has brought under international discussion, negotiations and resolution issues which concerned the international community through the mechanisms of the Committee on Shipping, the Working Group on International Shipping Legislation, other subsidiary bodies or through conferences of plenipotentiaries and sessions of UNCTAD. In consequence of the action taken in terms of conventions, decisions, resolutions and model rules and guidelines a significant contribution has been made towards achieving the objectives initially envisaged in the terms of reference mentioned above.

Answers 3 to 13 relate to the United Nations Convention on a Code of Conduct for Liner Conferences and the United Nations Convention on International Multimodal Transport of Goods (MT Convention)

Question 3

(a) Status of the

- United Nations Convention on a Code of Conduct for Liner Conferences:

  69 Contracting parties; entered into force 6 October 1983

- United Nations Convention on International Multimodal Transport of Goods (MT Convention)

  5 Contracting Parties; entry into force requirement 30 Contracting Parties

(b) The objectives of the Code are 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, or cross-traders, 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 also sets forth rules for the establishment of pools or other type of trade-sharing arrangements in conference, as well as 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 or 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.

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 mandatory dispute settlement based on 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.

Article 47(1) of the Convention requires each of the contracting parties to take such legislative or other measures as may be required to implement the Code. In interpreting this provision it should be noted that the Code provides the general structure for a self-regulating system of conference, shipping line and shippers relationships so that the substantive provisions of the Code can largely be implemented through action of the commercial parties. At best, an indirect role is granted to governments inasmuch as the existence of State-owned lines brings them into the application process, or inasmuch as shippers' councils are sometimes directly responsible to their respective

governments. The implementation of cargo-sharing provisions is normally left to conferences. Furthermore, as far as the consultation and the conciliation procedures are concerned, the role of governments under the Code is largely confined to that of an observer not having a decisive part to play in the decision-making processes.

The legislative actions to be taken by governments are basically measures which would enable the various commercial parties concerned to play their respective roles as envisaged in the Code. Firstly, the Convention must become national law. Whether this will be done by translating the Code into national law, supplemented by introductory articles, or whether a comprehensive new national law will have to be drafted depends on the regulatory framework for liner shipping existing in each country.

Basically, the specific national law provisions or administrative decrees which will be required to implement the Code relate to : (a) provisions designating the Ministry or department that shall be "the appropriate authority" for purposes of the Convention as defined in part I, chapter I (Definitions) of the Convention; (b) if not already the case under the national law, provisions granting legal status to organizations to participate in proceedings under chapter VI, as provided in article 26; (c) provisions for a national disputes settlement machinery to be applied to disputes between national flag shipping lines and national organizations, as provided in article 23(2); (d) provisions designating the court or competent authority to which applications for the enforcement of a recommendation may be sought pursuant to article 39.

Once the legislative base is established for implementing the Code, the government is then in a position to undertake the following action: (a) to nominate a panel of conciliators as required in article 30(2) and to communicate the names to the Registrar of the Code. and (b) through its "appropriate authority", to establish a procedure for granting recognition to shipping lines pursuant to the definition of "national shipping line" given in the Code and, if it so desires, to shippers' organizations or representatives of shippers as specified in article 11(1).

The Multimodal Convention is designed to stimulate the development of smooth, economic and efficient multimodal transport services adequate to the requirements of trade in the interests of all countries and taking into account the special problems of transit countries.

The main concepts and principles are:

- to ensure a balance of interests between suppliers and users of multimodal transport services;
- to have regard to the special interests and problems of developing countries as regards introduction of new technologies and participation in services of their national carriers;
- to determine equitable provisions concerning the liability régime in multimodal transport operations;
- to ensure freedom for shippers to choose between multimodal and segmented transport services.

Contracting parties shall apply the provisions of the Convention to multimodal contracts concluded after the entry into force of the Convention in respect of that State.

Apart from these provisions governing the contractual relationship between users and providers of multimodal transport services, the Convention contains two provisions which are of public law nature (articles 4 and 32). Article 4 commits the Contracting Parties to recognize that the Convention shall not affect the application of international conventions or national law regulating and controlling transport operations and that it shall not affect the right of States to regulate and control at the national level multimodal transport operations. This provision was of particular importance to developing countries who wanted to commit Contracting Parties to apply the Code of Conduct equally to multimodal transport. Furthermore, procedures of customs transit for international multimodal transport are dealt with in article 32 and in the annex to the Convention.

Question 4

The provisions of the Code govern liner conference services, which by nature constitute international service transactions. For the individual country an engagement in international liner shipping is of a dual character as it can be both a foreign trade supporting service industry as well as an industry in its own right, for example, when engaging in cross trading activities between third countries. Code provisions basically relate to the right of participation in trade of national lines and cross traders as well as the corresponding obligations vis-à-vis the trade. Conference representation is equally covered in the Code (articles 20 and 21).

Service transactions covered by the Multimodal Convention go way beyond those covered by the Code. The Convention, once in force, will be applicable to any international multimodal transport service, which means to the carriage of goods by at least two different modes of transport - whichever modes this may be - on the basis of a multimodal transport document (contract). The Convention extensively provides for the continuous monitoring of service flows in particular with regard to rights and obligations concerning taking in charge and delivery of goods (e.g. articles 14 and 15).

Question 5

Both conventions constitute multilateral instruments, one of the objectives of which is to ensure the application of uniform principles internationally.

The international community has long recognized that shipping as an inherently international industry without geographically clearly defined and limited markets provides the need for a multilateral dialogue and internationally agreed solutions to structural problems. This refers to an agreed general framework for promotional policies but even more so to regulatory policies, which aim at correcting mechanisms of markets which, as mentioned above, are international by nature. Consequently, unilateral and unco-ordinated regulatory action will rather lead to further market distortions than to optimum market structures.

There are further potentially negative aspects to unilateral regulatory action. Due to the internationality of shipping services unilateral action invariably impinges on shipping interests of other countries, often to an extent that policy options are imposed by more powerful shipping and trading nationals upon their trading partners. Such impingement on the sovereignty of States will eventually lead to retaliatory action, further aggravating market disequilibria. However, despite this generally recognized principle, unilateral action is still being taken by a number of countries.

However, there are some constraints to be borne in mind. Unilateral action taken by a few individual countries might still be acceptable to the trading community as long as their overall interest and particularly the interests of the major trading and shipping nations are not significantly affected. However, in the long run it cannot be expected that unilateral action will stop there. What is rather to be expected is a proliferation of unilateral action that eventually will have to be countervailed. The resulting vicious circle of unilateralism, retaliation and counter-retaliation can only be overcome by reaffirmation of the supremacy of international dialogue mutually reinforcing multilateral agreement and instruments.

The Code of Conduct provides the most widely accepted international framework (79 countries) within which liner conferences operate. The existence of the Code, however, does not render bilateral or plurilateral arrangements unnecessary but equally provides the framework in particular for bilateral or plurilateral trade participation arrangements. In this respect it is important to note that Contracting Parties to the Code are committee to its provisions especially with regard to the maintenance of third-party rights accorded under the Code. These rights should not be infringed on in any bilateral agreement.

Additionally, the Code provides for the possibility of plurilateral arrangements to be made with regard to the allocation of cargo shares on a subregional basis; thus institutionalizing co-operative arrangements. The corresponding redistribution mechanisms are provided for in article 2(8) of the Code.

Question 6

There is a close relationship between prospects for economic growth through trade and the provision of liner shipping services. This linkage is not only reflected in the fact that shipping services will not be demanded unless there is cargo to be moved, but more so inversely that no trade can take place unless adequate shipping services are at the disposal of the trading community. Consequently, the shipping industry not only reacts to trading requirements but, in many cases, has created pre-conditions for the expansion of world trade based on an intensified international division of labour.

However, it is not only the existence of a shipping industry as such that pre-conditions the expansion of trade but rather the provision of services adequate to the different needs of various trading interests. Such adequacy refers to all facets of qualitiative characteristics of shipping services, i.e. the availability of physically suitable ships responding to particular transport needs, the frequency of services offered to avoid undue interruptions in commodity flows, the pricing of such services in line with the ability of the goods traded to bear the cost of transport. Unless these criteria are met, shipping cannot fulfil its role as a catalyst of trade.

Both the Code and the Multimodal Convention are designed to allow the liner shipping (Code) or transport industries (Multimodal Convention) to play this anticipated role in the promotion of economic growth. Among the fundamental objectives and basic principles of the Code as reflected in its preamble are "... to facilitate the orderly expansion of world seaborne trade" and "... to stimulate the development of regular and efficient liner services adequate to the requirements of the trade concerned." Of particular relevance in fulfilling these objectives are the provisions of chapters III and IV of the Code dealing with conference/shipper relations and freight rates. Conference/shipper relations under the Code are based on equality and non-discrimination and ensures that trading interests are adequately reflected in conference decision making. This relates equally to pricing practices where the Code removes some of the irrationally and arbitrariness previously observed in conference pricing.

Equally the Code contributes to growth and development through diversification of economic activities based on rights of participation in trade.

The Multimodal Convention aims at redressing the currently prevailing imbalances in contractual rights and obligations of transport users and provides, thus facilitating the foreign trade flows (see also preamble to the Convention).

Question 7

The Code is of a universal character, in fact the Preamble to the Convention stresses its universality while taking into account the special needs of developing countries.

The Code constitutes one of the basic instruments for the realization of particular shipping policy aspirations of developing countries. The adoption of the Convention constituted to a large extent a response to grievances that had been at the root of concerns of developing countries since shipping negotiations started in UNCTAD. These related to the arbitrary and unilateral decision-making processes of tacitly accepted shipping cartels that gravely affected the economies served by them on such important issues as the right to provide shipping services, participation in trades, adequacy of service, levels of freight rates and conditions of service, etc. Thus the Code in its very essence is addressing problems of development of developing countries.

Apart from addressing trade issues of developing countries - as already pointed out under answer 6 above - the Code equally covers development issues through promoting the creation and expansion of liner fleets in developing countries. In this respect, the Code of Conduct is to be seen as an important instrument for the attainment of a more significant participation in shipping by developing countries, as expressed in the International Development Strategy for the Third United Nations Development Decade in the field of transport. In fact, the Code is one of the most crucial supporting measures for the realization of the major targets of the 1980s in shipping, i.e. the attainment of structural change in the shipping industry and of a 20 per cent share of world tonnage for developing countries. As far as liner shipping is

concerned, the Code makes a dual contribution to the attainment of these goals because it reduces investment risk and, even more importnat, it helps developing countries' shipping lines to secure cargo - a support without which any quantitative tonnage targets become meaningless.

The importance of the Code for developing countries is not to be seen in isolation but as part of shipping political package containing other important elements which aim at the same target and which have been under consideration in UNCTAD. Among others, these related elements include ship financing, registration of ships, multimodal transport operations, model legislation, etc.

Specific provisions to reach the development objectives are included in chapters II, III and IV of the Code in particular. Articles 1 and 2 establish the right to membership in conferences and participation in trade of national shipping lines. Thus the countries served by a conference, through their national shipping lines have an express and nearly absolute right to participate in the carriage of their foreign trade, subject only to a limited number of minimum commercial and organizational criteria. Consequently, the cartel (conference) itself is no longer in a position to arbitrarily reject requests for membership by developing countries carriers. This, however, does not imply that "closed" conferences have been turned into "open" ones because the right to admission of individual lines is limited to those having national line status. As a result of these provisions developing countries have been able to increase their share in the liner trades considerably since the Code was adopted in 1974 (its formal entry into force in 1983 is not a useful date for purposes of comparison as many Code principles were actually observed already prior to that date). While it is not possible to give exact global data on participation by developing countries' carrier, it can be stated that in some "Codist" trades, that share is coming close to the anticipated 40 per cent.

The provisions of chapter II together with those of chapters III and IV also contribute specifically to the development of trade of developing countries. The problems addressed here relate to those of adequacy of services, stabilization of freight rates, granting of promotional freight rates etc. Apart from provisions of chapter IV which have a direct bearing on the level and structure of freight rates, these issues are being covered in a

comprehensive manner in chapter II on consultation procedures. The approach chosen here is to improve service qualities through institutionalized dialogue between the commercial parties concerned.

Question 8

One of the underlying reasons to negotiate and adopt the Code of Conduct was the generally prevailing dissatisfaction with a number of working mechanisms of liner conferences as they existed in the early 1970s. As has been mentioned above, these conferences constituted cartels unilaterally fixing prices and conditions of trades, exercising restrictive business practices and were one of the main causes of sub-optimum allocation of resources prevailing in shipping. While it was not the intention of the drafters of the Code to abolish the system (the necessity to maintain the conference system had already been acknowledged in the "Common Measure of Understanding on Shipping Questions" of 1964), the intention was to abolish the abuses permitted by the system and to create a regulatory framework that would:

- make conference behaviour more transparent,
- create countervailing power,
- open up the system to some extent,
- impose certain obligations on conferences,
- establish a recourse system against conference decisions

and would thus be acceptable to the international community at large.

Additionally, the Code can clearly be considered as promoting or maintaining liberalization inasmuch as it constitutes a multilateral response to restrictive bilateral cargo sharing agreements that were increasingly introduced in the 1960s and 1970s.

The way by which this liberalization is achieved is mainly by introducing flexibility in trade participation agreements (article 2), by securing access to the trades by third-flag carriers (articles 1(1), 1(3) and 2(4)) and by reconfirming a principle of self-administration of conferences within the

general regulatory framework provided by the Code (see also answer to question 11). Of these elements the position of third-flag shipping lines is of particular relevance.

In evaluating the position of cross traders under the Code a distinction has to be made between cross traders as a group and individual lines acting as cross traders. Conference membership as well as the right of participation in the trade of third-country shipping lines as a group is clearly guaranteed by the provisions of article 2(4) and 1(3).

This, however, does not mean that any individual third-country shipping line has a right to membership. Admission to the conference of these lines is - in addition to the requirements to be met by the national lines - subject to the provisions established under article 1(3). However, it is important to note that the requirements of article 1(3) cannot be applied in such a way that no third-flag carrier is admitted to the conference.

Once a cross trader has been admitted to the conference, he has the right to participate in all trades covered by that conference, for which he qualifies as a cross trader. The actual share of the total allocation to be taken up by an individual line is to be determined by commercial negotiations. For the purposes of the Code these rights are conferred on any cross trader, irrespective of whether he is on "incidental" or a "pure" cross trader. Thus the following lines can qualify as cross traders:

- national shipping lines of other countries served by the conference;
- lines of countries not served by the conferece;
- shipping lines of the trading partners not recognized as national lines.

While article 3 stipulates that conference decision-making procedures shall be based on all full member lines, article 2(13) and (14) limits the rights of third-country lines with regard to the decision on the introduction of pooling arrangements within the conference. Third-country lines have the right to request the introduction of pooling or sailing agreements (article 2(15)), but the final decision on this is left to the national shipping lines of the countries at both ends of the trade.

These rights conferred on third-flag carriers are not only in line with the development objectives dealt with under question 8 but constitute an important support thereof. The maintenance of an important third flag involvement is one of the crucial elements in guaranteeing a minimum level of competition also within the conference which has a beneficial effect on prices and conditions of services provided and consequently on the promotion of trade of developing countries. This is being achieved without unduly compromising the position of national lines, particularly those of developing countries.

Question 9

Both conventions in their totality are based on the principle of equality among States parties to them. This is also reflected in the universality of both instruments. Additionally the Code provides for a fair balance of interest among specific groups of countries which may be labelled as typical users and providers (exporters) of liner shipping services (particularly through safeguarding third flag shipping as referred under question 8).

Question 10

As has been mentioned above (question 5) the regulation of international liner shipping absolutely requires a multilateral approach. This framework is being provided by the Code itself, the provisions of which the Contracting Parties have the obligation to translate into national law in the most suitable manner. The Code provides the framework for the regulation of a very specific type of shipping services, which by definition are international. Consequently, the Codes does not in any way affect any country's right to take appropriate policy action on national shipping services nor on the provision of international shipping services falling outside the specific scope of the Convention.

Governmental action required to implement the Code basically involves the following:

Article 47(1) of the Convention requires each of the contracting parties to take such legislative or other measures as may be required to implement the Code. In interpreting this provision it should be noted that the Code

provides the general structure for a self-regulating system of conference, shipping line and shipper relationship so that the substantive provisions of the Code can largely be implemented through action of the commercial parties. At best, an indirect role is granted to governments inasmuch as the existence of State-owned lines brings them into the application process, or insasmuch as shippers' councils are sometimes directly responsible to their respective governments. As has been mentioned above, the implementation of cargo-sharing provisions shall be left to conferences. Furthermore, as far as the consultation and the conciliation procedures are concerned, the role of governments under the Code is largely confined to that of an observer not having a decisive part to play in the decision-making processes.

The legislative actions to be taken by governments are basically measures which would enable the various commercial parties concerned to play their respective roles as envisaged in the Code. Firstly, the Convention must become national law. Whether this will be done by translating the Code into national law, supplemented by introductory articles, or whether a comprehensive new national law will have to be drafted depends on the regulatory framework for liner shipping existing in each country.

Basically, the specific national law provisions or administrative decrees which will be required to implement the Code relate to: (a) provisions designating the Ministry or department that shall be "the appropriate authority" for purposes of the Convention as defined in part I, chapter I (Definitions) of the Convention; (b) if not already the case under the national law, provisions granting legal status to organizations to participate in proceedings under chapter VI, as provided in article 26; (c) provisions for a national disputes settlement machinery to be applied to disputes between national flag shipping lines and national organizations, as provided in article 23(2); (d) provisions designating the court or competent authority to which applications for the enforcement of a recommendation may be sought pursuant to article 39.

Once the legislative base is established for implementing the Code, the government is then in a position to undertake the following action: (a) to nominate a panel of conciliators as required in article 30(2) and to communicate the names to the Registrar of the Code; and (b) through its

"appropriate authority", to establish a procedure for granting recognition to shipping lines pursuant to the definition of "national shipping line" given in the Code and, if it so desires, to shippers' organizations or representatives of shippers as specified in article 11(1).

Pursuant to article 22, governments may wish to satisfy themselves that proper procedures exist to ensure that conference agreements, trade participation agreements and loyalty agreements conform to the applicable requirements of the Code. Article 6 provides that the relevant documents can be obtained by appropriate authorities from the conference.

While the general principles of translating into national law is also applicable to the Multimodal Convention, article 4 of that Convention contains a specific provision with regard to the regulation of multimodal transport operations. Article 4 states that the Convention shall not affect the application of international conventions or national law regulating and controlling transport operations and that it shall not affect the right of States to regulate and control at the national level multimodal transport operations.

Question 11

The Code provides a framework within which shipping companies members of conferences act. These are largely private operators. Within the given framework, provision is made for self-administration of those groupings of operators with minimum government interference.

In order to arrive at a rational approach towards administering the Code, it has to be recalled that the Code addresses itself to pragmatic regulation of individual liner conferences rather than the conference system as a whole. This becomes evident not only from the way individual liner conferences have developed in response to differing needs of the trades they are serving but also from the provisions of the Code itself. Thus, for instance, preambular clause (b) of the Convention establishes the objective "... to stimulate the development of regular and efficient liner services adequate to the requirements of the trade concerned." Additionally, article 22 refers to conference agreements, which "... may include such other provisions as may be

agreed ..." Thus, a number of provisions of the Convention are specifically or, at least, implicitly addressed to individual conferences. Consequently, the way the Code is being administered, i.e. what kind of machinery is being maintained or created and what kind of role the various interested parties will play, may, to a certain extent, also depend on the requirements of the trade and on historically established existing structures.

However, irrespective of what the detailed executive or administrative structure will ultimately be, the Code generally provides for a system of self-administration of conference, shipping line and shipper relationships such that the Code can for the most part be implemented through conference activities, the consultation procedures between conferences, shipping lines and shippers and the dispute settlement machinery (see also question 13). In addition, according to article 47, paragraph 1, governments are called upon to take such legislative or other measures as may be necessary to implement the Code. Apart from providing the framework within which the commercial parties can play their proper role in administering the Code, Governments can only participate in the administration in the widest sense through taking part in the consultation and conciliation procedures, albeit as observers not having a decisive part to play in the decision-making process.

Also within the context of the largely self-administering nature of the Code, there are at least two different approaches to the question of administration and implementation that have been followed by the various countries Contracting Parties to the Convention. The two approaches differ with regard to the degree of governmental involvement, particularly in the initial adjustment process in order to ensure that the various agreements on internal and external conference relationships conform to the requirements of the Code, but also in the ongoing application of such agreements and related practices falling within the scope of the Code.

The first approach which has been chosen by a number of developing countries envisages relatively active government involvement in the implementation and administration of the Code. As part of the initial adjustment process, and using article 47 as a basis, the appropriate governmental authorities initiate the adjustment process by convening conference shipping lines in their trades and shippers' organizations for

consultations and supervise the negotiations to ensure that the various agreements conform to the applicable requirements of the Code as required by article 22. This supervision can either be carried out by the "appropriate authority" designated pursuant to part one, Chapter I of the Convention or through shippers' organizations which, in turn, are either a subordinate authority to the relevant ministry or responsible to the "appropriate authority." Inherent in this approach is the need to take into account the fact that these agreements affecting national trades also affect at least one other country, i.e. the trading partner in each trade. Thus, Governments may wish to consult and are indeed consulting with the appropriate authorities of each trading partner in implementing the Code pursuant to this approach in order to avoid the application of conflicting measures.

Subsequent to the initial adjustment process, the ongoing administration of the Code would be via the medium of active governmental supervision. Even though the Code establishes a largely self-administering system, in view of the potential for disputes between the parties as to its implementation not being resolved through the prescribed conciliation machinery (in which recommendations are non-binding unless accepted by the parties concerned), it is possible for agreements to be established, modified or implemented, as well as related decisions to be made, which would not be in conformity with the requirements of the Code. Failure of these deviations to be corrected would result in the Government failing to fulfill its obligations under article 47 to take such measures as may be necessary to implement the Convention. Consequently, under this approach, the appropriate governmental authority could intervene, either upon its own decision or pursuant to a request from one of the aggrieved parties (shipping line, shippers' organization, etc.) to prevent the deviation.

The second approach open to Contracting Parties in the implementation of the Code is drawn from the generally self-administering nature of the Code system established by the Convention and appears to be preferred by developed market-economy countries. In this approach it is left to the parties involved (shipping lines, shippers' organizations, etc.) to adjust their relationships to conform to the provisions of the Code. Inherent in this approach is the need to create private remedies for aggrieved parties in the event that a conference agreement, trade participation agreement or loyalty agreement does

not conform to, or is not implemented in conformity with, the provisions of the Code and the dispute is not resolved during the prescribed conciliation procedures. Thus, Contracting Parties could fulfill their obligations under article 47 by providing the right for aggrieved parties to have recourse to national institutions where the Code confers legal rights or obligations on parties in the event that the concilication proceedings have either been unsuccessful in resolving the dispute or were not applicable. Depending on the judicial and administrative system of a particular country, the national remedies created could either be in the form of providing access to the legal court system or the establishment of a special court or administrative tribunal for Code-related disputes. As far as developed market-economy countries are concerned, the former approach of providing access to the legal court system has generally been chosen.

The principle of self-administration calls upon the commercial parties, particularly the conferences, to adjust agreements and practices to the requirements of the Code, as stated in article 22 of the Convention. Representatives of liner conferences and shippers would have to convene in the various conferences, in co-operation with "appropriate authorities" as sanctioned by the Code, and establish the necessary joint consultative machinery to draft the required documents and regulations on the basis of which the the Code would be operated. It would thus be up to the appropriate authorities and conferences and shippers to establish the machinery and its follow-up arrangements.

Additionally, article 5 of the Code provides for self-policing by conferences against malpractices by its member lines. In this context, article 5, paragraph 1 requires that conferences provide effective self-policing machinery and adopt and keep up to date an illustrative list, which shall be as comprehensive as possible, of practices which are regarded as malpractices or breaches of the conference agreement.

Question 12

The Code reflects a number of principles under discussion in the Group of Negotiation on Services. These are mainly those of

- non-discrimination
- transparency
- market access
- regional economic integration.

Non-discrimination is particularly reflected in the treatment of national shipping lines at both ends of the trade. In fact the so-called 40:40:20 formula generally referred to in connection with the Code is nowhere established as such in the Convention but arrived at by sometimes oversimplifying mathematical deduction. In fact, the provisions of the Convention on trade participation are solely based on the principle of equality among groups of national lines (see article 2(4a)).

The questions of transparency, market access and regional integration have been treated under questions 3, 7 and 8.

With regard to transparency the Code provides for extensive consultation procedures among liner conferences, individual shipping companies and shippers' organizations on all facets of the conference agreement which are of mutual interest to the parties concerned.

Article 2 of the Code guarantees access of recognized national shipping lines to conferences serving the trades of their respective countries. Equally, it assures adequate participation of third country shipping lines in those conferences. This latter right is not conferred on individual lines but rather on a group of third flag carriers wishing to participate in the trade. (For details see question 8).

Through the provisions of article 2, the Code equally contributes to efforts of regional economic integration. To this end, article 2(8) allows for the regionalization of national cargo shares to the benefit of joint venture shipping companies or similar co-operative arrangements.

Question 13

The Code contains extensive provisions on consultation between users and providers of shipping services as well as on dispute settlement.

Article 11 of the Code establishes the right of shippers' organizations to request consultation with conferences on "matters of common interest". The wording "matters of common interest" implies that all decisions of the conference affecting shippers are subject to consultations. Regarding this aspect, the Code goes way beyond established practices. An indicative list of matters which may be the subject to consultations is given in article 11(2) and (3). Furthermore, according to article 11(4), consultations are to be held before final decisions are taken, unless otherwise provided in the Code. Exceptions to the principle of advanced consultations basically relate to the imposition or change in the level of surcharges, where consultations, upon request, may be held as soon as possible thereafter.

In accordance with the philosophy of self-regulation of liner shipping conferences maintained by the Code, only those parties having a commercial interest can fully participate in consultations. Article 11, together with the annex to resolution 1, largely limits the role of governments in consultations to one of an observer. While governments do have the right, upon request, to participate fully in the consultations, they are not entitled to play a decision-making role.

Chapter VI, section A, of the Code specifies the parties who may invoke the disputes settlement machinery of the Code, and lists the types of disputes that may be referred to international mandatory conciliation at the request of any one of them. The procedure and time limits for conciliation proceedings are indicated. Parties are permitted to agree upon disputes settlement procedures other than international mandatory conciliation in respect of some types of disputes. However, while the Code does accord a considerable flexibility to the parties concerned to agree how their disputes are to be resolved, it is the international mandatory conciliation machinery which is given precedence over other procedures. Only conciliation procedures can be invoked by any one of the parties on its own initiative. Other options are open to the parties only if they mutually agree to resort to them.

Article 23(4) gives an exhaustive list of disputes which may be referred to international mandatory conciliation in accordance with the provisions of chapter VI. However, article 23(3) states that prior to initiating such procedures 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". This provision places a prior obligation upon the parties concerned to settle a dispute by an exchange of views or direct negotiations. While no specific procedure is laid down as to the manner and to the intensity of such negotiations, they might be interpreted as referring to the need to hold effective consultations as stipulated in article 11. Yet, it will probably have to be decided by conciliators on a case-by-case basis whether the requirements of article 23(3) have been met before initiating conciliation procedures. Furthermore, article 23 lists the parties which may initiate conciliation procedures. These are conferences, shipping lines members of a conference, other shipping lines, shippers' organizations, and representatives of shippers or shippers.

Provisions concerning the relationship between conciliation proceedings and remedies available under national law are contained in article 23(2) and 25. According to article 25(3) conciliation proceedings, where initiated, have precedence over remedies available under national law. This provision can be considered as a reinforcement of the primacy of mandatory conciliation established in article 23(4). Furthermore, it is stated in article 25(3) that "if a party seeks remedies under national law in respect of a dispute to which this chapter [chapter VI] 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". While the "procedures provided for in this chapter" are not clearly defined, they can be interpreted as including all those established, i.e. an exchange of views, direct negotiations, international mandatory conciliation or other unspecified procedures referred to in article 25(1) and (2). Thus, it is only after remedies have been sought under the machinery provided by the Code, that a dispute can be referred to national law, unless all parties have agreed to resort to such proceedings in the first place.

Secondly, there exists a relationship between conciliation proceedings and remedies available under national law in those cases where disputes arise among nationals of the same country. Article 23(2) states that "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".

The intention of paragraph 23(2) is to reserve the referral of disputes between nationals of the same country to tribunals or procedures operating within their own national jurisdiction. However, since it may not always be possible to enforce such a reservation without generating serious conflict with the interests of other nationals or relevant interests in terms of the fulfilment of the provisions of the Code, the qualifying phrase at the end of the sentence was introduced. Here again, the question whether a dispute should actually be referred to national jurisdiction or to mandatory conciliation should be decided case by case by conciliators or other adjudicators, rather than trying to establish generalized types of conflicts which are to be referred to one procedure or the other.

Question 14

Upon request the UNCTAD secretariat provides assistance to developing countries regarding the implementation of conventions adopted under the auspices of UNCTAD. In fact, the Committee on Shipping in resolution 61 (XIII) requests the secretariat to conduct "... symposia and senior management seminars on the implications of the international maritime instruments negotiated under the auspices of the United Nations ..."