Northwestern Journal of International Law & Business

Volume 6
Issue 2 *Summer*

Summer 1984

UNCTAD Code of Conduct for Liner Conferences: Trade Milestone or Millstone--Time Will Soon Tell, The Perspectives

Leslie Kanuk

Follow this and additional works at: http://scholarlycommons.law.northwestern.edu/njilb

Part of the International Law Commons

Recommended Citation
Leslie Kanuk, UNCTAD Code of Conduct for Liner Conferences: Trade Milestone or Millstone--Time Will Soon Tell, The Perspectives, 6 Nw. J. Int'l L. & Bus. 357 (1984-1985)

This Article is brought to you for free and open access by Northwestern University School of Law Scholarly Commons. It has been accepted for inclusion in Northwestern Journal of International Law & Business by an authorized administrator of Northwestern University School of Law Scholarly Commons.

PERSPECTIVE

The UNCTAD Code of Conduct for Liner Conferences: Trade Milestone or Millstone — Time Will Soon Tell

*Leslie Kanuk, Ph.D.**

I. Introduction

At the same time that the Reagan Administration completes the dismantling of the regulatory framework which has controlled the transportation industry in this country for over a century, the world-wide maritime community is gearing up for what could prove to be the most gigantic regulatory superstructure the world has ever known. I refer, of course, to the implementation of the Code of Conduct for Liner Conferences developed by the United Nations Conference on Trade and Development, more commonly known as UNCTAD. The UNCTAD Code came into force on October 6, 1983, six months after ratification by the requisite number of countries representing 25 percent of the total volume

* Dr. Leslie Kanuk is Lippert Distinguished Professor of Marketing at Baruch College of the City University of New York and former Chairman of the Federal Maritime Commission. She served as Chairman of the Advisory Panel on Maritime Trade and Technology for the United States Congress Office of Technology Assessment, and was a member of the Maritime Transportation Research Board of the National Academy of Sciences.

of world trade in the year 1974.[1] The UNCTAD Code is a multilateral agreement which has the potential of "balkanizing" world trade through the division of liner conference cargoes between trading partners.[2] It leaves a small percentage of liner conference cargoes open to third flag

---

[1] The Code was adopted in Geneva in April 1974, to become effective six months after ratification by at least 24 nations controlling 25% of the world's tonnage. UNCTAD, United Nations Conference of Plenipotentiaries on a Code of Conduct for Liner Conferences, vol. II, Final Act (including the Convention and resolutions) and tonnage requirements Annex I (Art. 49) at 18, U.N. Doc. TD/CODE/13/Add. 1 (1975) [hereinafter cited as UNCTAD Liner Code]. This was accomplished in April 1983, when 58 countries representing 28.6% of the world's liner tonnage (measured in 1974) had ratified the UNCTAD Code. For a list of signatories *see*, 22 Int'l Leg. Mat. 1227 (1983).

[2] A brief description of the structure of international ocean shipping may serve to clarify some of the issues provoked by adoption of the UNCTAD Code.

International ocean shipping in most of the world is dominated by shipping cartels, euphemistically known as *shipping conferences*. Conferences usually operate on specific trade routes—e.g., in specific "trades" between two or more nations. Conference members generally agree on rates to be charged and on levels of service to be offered. To avoid the costly problem of excess cargo space, many conferences are *closed*—that is, they restrict their membership and they rationalize their sailings (e.g., they limit the amount of cargo space that each member may provide.) Carriers in a specific trade that are not members of a conference are called *independents* or *outsiders*. A carrier can belong to a conference in one trade and be an independent in another. Independents generally charge lower rates than the conferences, and thus exert a downward pull on conference rates, since conference members cannot let too great a price differential build without losing cargo to the independents. If a nation permits only conference carriers to operate in its trade, the trade is considered *closed*.

To provide a countervailing force to the power of the shipping conferences, many nations permit their shippers to band together into *shippers' councils*. These councils are permitted to negotiate rates and services with the conferences on behalf of their members with antitrust immunity.

The United States has adjusted somewhat uneasily to the cartel environment of ocean shipping while trying to adhere to its basic economic philosophy of free and open competition. In the early 1900s, Congress recognized that United States carriers could not compete with conference members who had the collective strength to engage in predatory rate wars in order to eliminate outsiders from their trades. With the enactment of the Shipping Act of 1916, United States carriers were permitted to join conferences which were specifically approved by a newly created independent regulatory agency, now called the Federal Maritime Commission. *See*, Shipping Act of 1916, ch. 451, 39 Stat. 728 (1916) (codified as amended at 46 U.S.C. §§ 801-842 (1982 & Supp. 1984).

All conference in the United States trades are required to be *open*—that is, any carrier that wants to join a conference must be admitted. Subsequent Congresses have reaffirmed the grant of antitrust immunity to carriers operating within approved agreements in our trades (most recently with the passage of the Shipping Act of 1984, 46 U.S.C.A. § 1706 (Supp. 1984)) but have continued to deny antitrust immunity to *shippers associations*.

Carriers can be divided into two categories: *liners* and *tramps*. Those that offer common carriage services on a regularly scheduled basis on a regular trade route are called liners; those that operate on an irregular basis according to the availability of cargo are called tramps. Most nations in the world value the notion of having their own merchant fleets—for economic reasons, for national defense reasons, and for reasons of national pride. Consequently, many nations provide direct and indirect subsidies to their national flag carriers in order to keep them financially viable. Such subsidies often take the form of cargo policies which reserve a large part of the nation's cargo for carriers registered under the national flag and which meet specified minimum requirements of ownership, operation and manning by citizens of that nation.

carriers, if agreed to by the national flag carriers in the trade.[3]

UNCTAD was formed in response to the developing nations dissatisfaction with their "have-not" status in relation to the industrialized world.[4] One of the first areas which the UNCTAD secretariat addressed was the field of liner shipping.[5] The developing nations were angered by the fact that they were barred from membership in the closed European and Japanese conferences which controlled their trades with these countries. They felt victimized by conference-imposed rate structures which they believed to be disproportionately high outbound, thus impairing the competitive position of their primary products in world markets. They were concerned that the closed conference system prohibited the development of their own merchant fleets, perceived by many nations to be a symbol of national sovereignty and power. Furthermore, they felt, not unreasonably perhaps, that they were entitled to carry a significant share of their own foreign commerce. Their resulting "declaration of freedom"—the UNCTAD Code of Conduct for Liner Conferences—is a document which paradoxically supports the very provisions which provoked its inception: closed conferences, increased anticompetitive activity, and inflationary pricing mechanisms.

A careful examination of the Code itself reveals it to be a poorly drafted, internally contradictory and ambiguous document—open to varying interpretations of form and substance—which implicitly requires an elaborately complex regulatory mechanism to assure that its cargo-sharing provisions are adhered to by Codist signatories. The Code may also prove to be the proverbial camel's nose under the tent. It purports, as its title implies, to be a code of conduct for *liner conferences*. However, various informed interpretations of the Code, and premature unilateral efforts by some nations to implement the Code,[6] indicate that non-

---

3 The nations at either end of a trade—the importing nation and the exporting nation—are called *trading partners*, and a ship registered in either nation that is engaged in that trade is called a *national flag carrier.* A carrier that is not a national carrier—that is, not registered in either the exporting or importing nation—is called a *cross trader* or *third flag carrier.*

4 UNCTAD was established as a permanent organ of the United Nations General Assembly on December 30, 1964. G.A. Res. 1995, 19 U.N. GAOR Supp. (No. 15) at 1-5, U.N. Doc. A/5815 (1964). One of its principal purposes was to speed the economic development of developing nations. UNCTAD is comprised of six main committees which deal with specific areas of trade and development, including a Committee on Shipping.

5 At its third session in 1972, UNCTAD requested the General Assembly to adopt a code of conduct for liner conferences. Proceedings of the U.N. Conference on Trade and Development, Third Session, Santiago de Chile, 1 UNCTAD Annex I.A. (Agenda Item 16) at 93-98, U.N. Doc. TD/180, Vol. I (1972). This came as a result of several years of effort on the part of LDCs—originally known as the Group of 77—to exert control over significant shares of their own nation's maritime cargo.

6 For example, in 1982 the government of the Phillipines decreed that 40 percent of all liner

conference carriers might very well be barred from Codist trades, thus effectively closing the trades as well as the conferences. The developing countries have also begun lobbying for a code of conduct for *bulk* trades[7] and are seeking the elimination of flags of convenience.[8] Should they accomplish these objectives as well, they may very well end up controlling world trade, and ultimately destroying it.

In my view, the United States has wisely refrained from ratifying the UNCTAD Code. I concede that it might have been useful for the State Department to participate in the final negotiations which produced the Code, if such participation would have enabled the United States to influence its outcome. However, the United States did not anticipate that the Code would actually achieve ratification by the requisite number of nations. Indeed, it was not until 1979, when the European Community decided to ratify the Code with reservations, that it appeared that the Code had any chance of passage at all.

The United States totally disavowed the Code from its inception in 1974 because of its clear contradiction with United States economic policy. However, a number of prominent people from various sectors of our maritime community—including liner company presidents and union leaders—have urged the government to ratify the Code. In some cases, advocates of the Code have not fully understood its provisions, its implications and its potential impact on United States' international trade. In other cases, advocates of ratification have not recognized the distinction between direct bilateral agreements and the multilateral agreement that is the UNCTAD Code. This paper endeavors to make that distinction

---

trade was reserved to national flag vessels and 40 percent to the bilateral trading partner. When combined with an earlier decree reserving all government cargoes for national flag carriers, it turns out to be more like 60 percent of the trade that is actually reserved for Phillipine flag vessels.

Venezuela has legislation in force reserving 50 percent of all cargo to its national flag vessels.

In June of 1979, the Republic of Korea decreed that 100 percent of all liner cargoes were reserved for Korean flag vessels.

[7] Cargoes can be divided into two categories: general cargo and bulk cargo. Bulk cargoes, such as coal, wheat, oil or minerals, are cargoes "without measure or count." All other cargo is called general cargo, which in turn is divided into breakbulk and container cargo.

The UNCTAD Shipping Secretariat is investigating a bulk cargo-sharing code structured along the lines of the Liner Code, and held meetings concerning a bulk code in late 1982. The United States government boycotted these meetings.

[8] To avoid high taxes and high labor costs associated with flag registry in their own countries, many shipowners register their vessels in nations which offer them substantial tax advantages as well as cheap labor options. As a result, nations such as Liberia and Panama have become the registry havens for so-called flags of convenience. The developing nations believe that if flags of convenience were abolished, many shipowners operating under these flags could not afford to pay the higher labor costs of employing their own national seamen, and so would sell their vessels to developing nations (presumably at a loss).

clear.[9]

II. Key Provisions of the Code

The Code is a complex, poorly written, ambiguous, sometimes contradictory document consisting of fifty-four articles and two non-binding annexes. Article 1 of the Code gives the national shipping lines of two trading partner the *right* of conference membership in the trade between their two nations, and *permits* cross traders into the conference, if agreed to by the national flag lines.[10] Article 2 reserves dominant and equal shares of cargo for the national flag carriers, permitting some shares for cross traders *if agreed to* by the national flag lines.[11] Article 3 grants the national shipping lines veto power over liner conference actions affecting the trade of their home country.[12] Articles 4 through 11 deal with the Code mechanics, including the provision for conference self-policing and shippers councils, purportedly as counterweights to potential abuses of conference power.[13] Articles 12 through 17 concern freight rates, tariffs, and other charges.[14] Articles 18 through 46 relate to the settlement of disputes and provide for non-binding "international mandatory conciliation."[15] Articles 47 through 54 are largely administrative in nature and concern implementation of the Code.[16]

The Code's basic issues and points of disagreement center on closed conferences, closed trades, cargo sharing, disputes settlement, shipper/carrier consultation, rate-making and regulation. Underlying all of these issues is the Code's probable impact on shippers and on trade. The following analysis of the Code's key provisions focuses on each of these issues in turn.

III. Closed Conferences

Under Article 1, Code conferences are open to all national shipping lines of each trading partner and closed to all others, though third-flag carriers may be admitted if mutually agreed to by the national flag car-

[9] It should be noted that the Code is legally binding only on those nations which have ratified it and which have enacted conforming domestic legislation. UNCTAD Liner Code, *supra* note 1, (Arts. 47-49) at 17-18.
[10] UNCTAD Liner Code, *supra* note 1, (Art. 1) at 5.
[11] UNCTAD Liner Code, *supra* note 1, (Art. 2) at 5-6.
[12] UNCTAD Liner Code, *supra* note 1, (Art. 3) at 6.
[13] UNCTAD Liner Code, *supra* note 1, (Arts. 4-11) at 7-9.
[14] UNCTAD Liner Code, *supra* note 1, (Arts. 12-17) at 9-11.
[15] UNCTAD Liner Code, *supra* note 1, (Arts. 18-46) at 12-17.
[16] UNCTAD Liner Code, *supra* note 1, (Arts. 47-56) at 17-19.

rier.[17] Article 3 grants veto power to the national shipping lines, which can be exercised on "all matters defined in a conference agreement relating to trade between two countries."[18] The veto power gives effective control of the conferences to the national carriers of either one of the trading partners.

The Code definition of the term "conference" is so limited and lacking in precision that it is likely to cause future problems.[19] For example, it fails to specify exactly what constitutes a conference for Code purposes. Indeed, the Code seems to consider the trade between two countries as equivalent to the scope of a single conference. However, liner conferences invariably cover more than a single pair of countries.[20] Furthermore, several conferences frequently cover a single trade between two countries.[21] Sometimes these are competitive conferences, sometimes they are complementary—operating in opposite directions. The Code definition of "conference" also does not encompass intermodal cargo movements,[22] nor does it provide for membership by non-vessel operating common carriers.[23] The definition is loose enough to include joint services, space charter arrangements and consortia.[24]

This lack of definitional precision creates special problems in establishing the intent and potential impact of Code provisions. The lack of clarity extends to the exact content or effect of the legal obligations the Code creates. For example, the Code requires self-policing,[25] but does not provide any oversight mechanism to monitor conformance. Further-

---

17 *See supra* note 10.

18 *See supra* note 12.

19 UNCTAD Liner Code, *supra* note 1, (Ch. I) at 4.

20 For example, the India, Pakistan, Bangladesh, Ceylon and Burma Outward Freight Conference covers trade between all of those countries and the United States Atlantic and Gulf ports.

21 The West Coast of India and Pakistan/USA Conference covers trade to the United States Atlantic and Gulf Coasts from India and Pakistan, Tuticorin Karachi range inclusive.

22 Intermodalism, or door-to-door cargo transport, was made possible with the development of container shipping in the late 1950s. Most general cargo today is moved in containers. The contained is a standard-sized tamper-resistant metal box which can be easily interchanged among transportation modes (i.e., from truck to rail to ship) without unloading and reloading the cargo.

23 A non-vessel operating common carrier (NVOCC or NVD) consolidates less-than-containerload cargoes for small shippers. In effect the NVO buys cargo space "wholesale" and sells it "retail." NVO's have become an important factor in containerized shipping.

24 In order to reduce fixed costs, several carriers may join together to offer a single service—either by buying and operating a vessel jointly, or by alternating the use of their vessels. These are called joint services or consortia. Also, to accommodate more cargo without incurring the costs of putting an additional vessel into service, one carrier may charter (i.e. space charter) available space on other carrier's vessel.

25 Self-policing procedures are designed to prevent conference members from cheating each other or engaging in other malpractices such as operating outside of their approved agreements. In the United States trades, conferences are required to adopt self-policing procedures; in many other trades, conferences do so voluntarily.

more, the Code leaves to the conferences themselves to define what they consider malpractices to be.

IV. Closed Trades

A careful reading of the Code and observation of unilateral attempts to implement the Code suggest that the Code is intended to close not only conference membership but also entire trades.[26] In fact, the Code is totally ambiguous about the fate of independent carriers. Article 2.17 of the Code states that the cargo sharing provisions of the Code concern "all goods regardless of their origins, their destinations or the use for which they are intended, with the exception of military equipment for national defense purposes."[27] This suggests that all existing preference cargoes, with the exception of military equipment for defense purposes, must be forfeited to the pool. Since the cargo sharing provisions of the Code are to be governed by the conference, one cannot avoid the inference that the conferences must cover the entire trade.

As originally proposed, the Code equated conference cargoes with the total liner trade between two countries. The developing countries were clearly apprehensive that outside competition might erode the conference system and render the Code ineffective. However, only in the non-binding resolutions of Annex II is the matter of non-conference carriers discussed at all, and then it is with the clear understanding that the operations of independent shipping lines would be permitted only so long as their presence did not damage the smooth operation of liner conferences nor jeopardize the Code's cargo sharing provisions. Clearly, the status of independents under the Code is uncertain. If independent carriers do in fact exert a downward pressure on conference prices, the exclusion of independents from Code trades would eliminate such pressure, and could lead to monopoly pricing abuses.

V. Cargo Sharing

The issue that has excited most attention and interest in the Code is the provision for cargo sharing. Article 2 specifies that cargo between two trading partners should be shared on an equal basis, and that cross traders, "if any," shall be permitted to acquire a significant part of the trade, "such as 20 percent."[28] This rather ambiguous statement has been perceived by much of the world as a rigid division of cargoes into a 40/

26 *See supra* note 6.
27 UNCTAD Liner Code, *supra* note 1, (Art. 2.17) at 6.
28 *See supra* note 11.

40/20 scheme,[29] which the fact is that no such mathematical formula has been proposed. Indeed, it seems likely to this observer that the trade share accorded to cross traders will probably range well below 20 percent, if it is granted at all.

In the several instances where developing countries have unilaterally tried to implement the Code prior to ratification, they have sought greater than a 40 percent cargo share.[30] Because of disparities in cargo values, most cargo-sharing regimens are operationalized through accompanying revenue-sharing pools, so that trading partners share revenues in the same proportions originally allocated to cargo shares. Once a revenue pool is established, individual national flag lines might not be concerned with actually carrying much of their own cargo at all, so long as they receive their allotted share of the pool revenues. Revenue pools, almost by definition, provide a built-in incentive for a national flag line to be an *undercarrier* and thereby minimize its operational costs, since it is guaranteed its full revenue share nevertheless. If a carrier systematically carries *more* than its allotted share of cargo, but is allowed to keep only the allotted share of the revenues, you can be quite certain that its share of conference revenues not only covers its full operating costs, but also includes a profit. Thus, revenue pooling tends to both inflate conference shipping rates and downgrade member shipping services.

Aside from allocating cargo shares to qualified national shipping lines, Article 2 seems to imply that nations have innate "rights" to their cargo shares, and that these rights may be bartered or sold to the highest bidder. Thus a developing nation without a fleet may find it financially attractive to nominate a cross trading carrier as its national flag line in return for a share of the revenues earned from carrying that nation's protected pool share. This approach exemplifies the position of many developing nations which have argued that nations that generate liner cargoes have the innate right to control the transport of those cargoes. Since the underlying carrier—the cross trader masquerading as the developing country's national line—will only enter into such an agreement in order to earn a profit, clearly its payments to the host country for the right to carry that nation's cargo will simply be an add-on, contributing to unnecessarily high freight rates.

[29] A 40/40/20 division of cargo means that 40 percent of the trade is reserved for the national flag ships of each trading partner, and 20 percent for the ships of third flag countries (e.g., cross traders).

[30] *See supra* note 6.

VI. DISPUTE SETTLEMENT

The Code includes a novel, but non-binding procedure for the settlement of disputes between and among carriers, conferences, and shippers. This procedure, labeled "international mandatory conciliation,"[31] can be considered mandatory only in the sense that once a party has requested conciliation, it must go ahead, regardless of the other party's wishes. Neither party, however, is bound by the conciliator's decision, and the Code applies no sanctions against a party who rejects the conciliator's recommendation. When either or both parties disagree and disregard the conciliation recommendation, each can take the matter to its own national courts. Of course, the results of domestic legal resolutions to the dispute may also be in conflict, yet the Code's legal regime only supersedes domestic legal decisions if the disputants agree with the conciliator's findings. Clearly, there are severe shortcomings in such an ambiguous and nonconclusive dispute settlement mechanism.

VII. SHIPPER/CARRIER CONSULTATION

The Code authorizes the formation of shippers' councils to provide an effective countervailing balance to the power of closed conferences.[32] Shippers councils, in theory, have the ability to deny cargo to conferences which do not negotiate in good faith. This threat presumably provides shippers with the necessary leverage to assure conference cooperation. However, the threat of cargo denial lacks credibility if there are no independent carriers in the trade. Without independent carrier alternatives, shippers in a very literal sense become captive to the conference.

Another interesting aspect of the consultation procedure is the fact that the shippers' councils in Codist trades are likely not to be private sector bodies. Indeed, in many developing countries, existing shippers' councils are quasi-governmental organizations designed to prohibit conference exploitation. Given the fact that the Code does not expressly require a shippers' organization to be a private sector body, it seems likely that the shippers' councils of many developing countries will be government sponsored groups organized to negotiate rates and conditions of service with the liner conferences. If the national shipping line is also government owned or sponsored, the shipper and carrier bargaining agents of the developing country might have too much of a unanimity of interests for true bargaining to take place. Thus, the Code's supposed

[31] UNCTAD Liner Code, *supra* note 1, (Arts. 23-46) at 12-17.
[32] UNCTAD Liner Code, *supra* note 1, (Art. 11) at 8-9.

process of commercial negotiation between shippers and carriers may in reality lead to unilateral rate regulation by the developing nations.

Consider the fact that the Code guarantees the national flag lines of the developing countries membership in their liner conferences, gives them veto power over all conference actions, and permits their governments—through government-controlled shippers' councils—to be the official negotiators with the conferences on rates and services. Under such a scenario, both the shippers and the carriers of the developed trading partner are in a very tenuous position in terms of striking a fair and equitable deal.

VIII. Rate Setting

The Code gives the developing countries effective control over conference rate-setting through outright government regulation, mandatory negotiation with government-sponsored shippers' councils, and through "guidance" to conference rate-making bodies via the national flag line's participation in the conference. In a Codist trade, rates can be expected to increase: first, because of the inefficiencies of operation inherent in the captive trade, and second, because of the peculiar requirement that limits the minimum time interval between general freight rate increases to fifteen months.[33] While it is likely that the drafters of this provision intended that the restriction on increasing rates more frequently than once every fifteen months would keep rates down, it is even more likely to have the opposite effect. As commercial entities, carriers can be expected to adopt risk avoidance strategies in their rate-making procedures which provide them with buffers against unexpected downturns in business or increased operating costs. Risk avoidance strategies would dictate that rates be set at much higher levels than necessary in order to cover unexpected contingencies that may arise during the fifteen month interval between permitted rate increases.

The Code has another interesting rate provision: it permits the developing nations to insist on special promotional freight rates for exports they wish to promote.[34] Such special rates will have to be cross-subsidized, either by other export commodities or, which is more likely, by imports.[35] Thus, the burden of cross-subsidizing selected promotional

---

33 UNCTAD Liner Code, *supra* note 1, (Art. 14) at 9-10.

34 UNCTAD Liner Code, *supra* note 1, (Art. 15) at 10.

35 Rates are set on the basis of roundtrip voyages. If some rates are noncompensatory (i.e., "promotional") other rates must be increased accordingly. Since the developing country is not likely to permit an increase in the CIF costs of any other of its export commodities because that would make them uncompetitive in world markets, it will no doubt look to an increase in inbound rates for noncritical items, particularly those for which there are more than one source.

exports is likely to fall on the developed trading partner's own exports, making them less competitive in the marketplace.

The problem with excessive rates is that they tend to restrict trade. The ultimate result, of course, is not only reduced trade, but reduced revenues. This can have a downward spiralling effect on the economies of both the developed and the developing trading partners, with the potential consequence that UNCTAD will demand ever greater concessions for the developing countries.

IX. Government Regulation

For years the international shipping community has decried what it has perceived to be excessive regulation in the United States trades. I'm afraid that they have not seen anything yet. While the Code goes under the guise of an international agreement governed by commercial negotiations between shippers and carriers, it will require an inordinate amount of government regulation to ensure that the specified share of every signatory nation's trade with every other signatory nation is carried on the nominated carrier, and that the resulting revenues are divided according to formula. With a totally bilateralized world trade, the mechanism required for keeping track of cargo and revenue shares on a nation-by-nation basis promises to create an incredible new lawyer of government bureaucracy across the maritime world. It is somewhat ironic that this should occur at approximately the same time that the United States has sharply reduced all transportation regulation.[36]

X. Economic Efficiency

The closed conference provision of the Code appears to offer the potential for greater operating efficiencies through the rationalization of cargoes, leading to high vessel utilization and reduced unit costs.[37] However, a number of inherent factors in the Code lead me to believe that inefficiencies will prevail instead, leading to higher rates for most shippers and deliberately lower rates for others. First, the rigid cargo sharing formula has no built-in rewards for carrier efficiency, such as a redistribution of pool shares. Thus, with a captive market, carriers are unlikely

[36] Passage of the Shipping Act of 1984 completed deregulation of all the transportation modes: air, motor carrier, rail and ocean carriage. Shipping Act of 1984, Pub. L. No. 98-237, §§ 1-22, 98 Stat. 67-70, 72-77, 80-90 (codified as amended in scattered sections of 46 U.S.C.A. (Supp. 1984)).

[37] Because of the high break-even costs of container vessels, high utilization permits the allocation of fixed costs across a greater number of containers, thus reducing the cost per container. Low utilization (i.e., over-tonnaging) requires that fixed costs be spread over fewer containers, thus increasing the unit cost.

to expend time or money to improve service or equipment or seek ways to reduce costs. Second, since conferences generally set their rates at a level high enough to yield a profit for their least efficient member, more efficient carriers in the conference tend to earn excess profits at the conference-set rates. These excess profits are somewhat tempered by the presence of independent competition in the trade, which, as suggested earlier, serves to exert a downward pull on conference rates. If Codist traders are closed to independent carrier, however, an important curb on monopoly profits will have been lost, and rates in general can be expected to escalate.

In sum, the Code can be expected to fragment world trade, eliminate or minimize independent competition, apportion cargo without regard for relative differences in commercial efficiency, and eliminate conference flexibility. Furthermore, due to their relative inexperience in the field of ocean transportation, it is likely that the shipping lines of the developing nations will operate at higher costs and with lower service levels than the established cross traders which they will replace. This, together with the conference system's natural tendency to protect members with relatively high costs, supports the conclusion that the shipper is likely to experience much higher transportation costs and substantially decreased service in a fully operating code environment.

XI. UNITED STATES OPTIONS

In addition to all of the potential problems listed above, an even bigger problem that might emerge if the United States were to ratify the Code is the loss of United States control over the terms of its own trade. In a forum where the majority rules, the developing nations have the advantage of numbers. Despite their lack of economic strength, their efforts to reorder world economic relations may very well be accomplished simply through their superiority of numbers. Given the example of recent actions in the United Nations, I for one fear the prospect of having majority treaty decisions affecting United States world commerce made by majority vote of other nations, who may not have the best interests of this nation at heart.

The primary attraction of the Code among United States maritime interests is its cargo sharing provision. However, a careful reading of the Code suggests that United States carriers would have to relinquish their hold on all government-reserved cargoes[38] other than military equipment

[38] At the present time, the United States has a cargo policy which requires that 50 percent of all government-implied cargoes (e.g. AID cargoes) move on United States flag vessels. 46 U.S.C.

for national defense; thus, the effective increase in their share of guaranteed cargo would not be as significant as they may have envisioned. If cargo sharing is indeed the objective, there appear to be better ways to accomplish it—ways that would not require the United States to subordinate its own best interests to a multinational treaty. But before I discuss other United States policy options, it may be useful to examine the nature of the European Community's reservations to the UNCTAD Code—the so-called Brussels package.

XII. THE EUROPEAN COMMUNITY (E.C.) RESERVATIONS

The E.C. reservations, in brief, disapply the cargo sharing provisions of the Code to trade among the O.E.C.D. nations. This effectively eliminates any benefits whatever to United States flag carriers if the United States joins in the Code's ratification with the same reservations as the Brussels package. Consider how United States participation in world trade would be effected under three possible trade scenarios: trade between the United States and another O.E.C.D. nation; trade between the United States and a developing country; and trade between two developing countries with United States carriers operating as cross traders. For the sake of this example, let us assume a 40/40/20 cargo division (that is, 40 percent of the trade to the flag vessels of each trading partner, and 20 percent reserved for cross traders.)

In the first scenario, the cargo sharing provision would simply not apply, so that in our trade with Europe, for example, where the United States currently carries far less than 40 percent, United States ships would receive no added benefit through cargo reservation. In the second scenario, where the United States trades with a developing country, our trading partner could claim the full 40 percent of its cargo share; however, the United States share, together with the 20 percent third flag share, would be open to competition by all O.E.C.D. countries. Again, United States carriers would receive no added benefits of cargo reservation, while the O.E.C.D. carriers presently in the trade would not be required to relinquish any cargoes to United States carriers. In the third scenario, where United States carriers operate as cross traders in a trade between two developing countries, each trading partner would retain 40 percent of the total trade, while the United States carriers would have to compete with all other cross traders for a price of the remaining 20 percent share. Thus, under none of the possible scenarios would United States carriers receive any added cargo benefits were the govern-

§ 1241(b)(1) (1982). Under the Code, such cargo will no longer be reserved for United States vessels, but will go into the common pool.

ment to ratify the UNCTAD Code with the E.C. reservations, as so many of our European colleagues have urged us to do.[39]

Clearly, the United States has nothing to gain if it were to ratify the Code with the same reservations as the E.C. Why, then, do our European trading partners urge us to adopt it? They have made no secret of the fact that they are trying to head the United States off from taking what this observer considers to be a more logical course of action to achieve the same cargo sharing benefits: the negotiation of selected bilateral treaties. Government-to-government bilateral treaties would guarantee United States carriers a specific share of United States international commerce, and by doing so, would effectively limit the amount of United States cargo available to the European Community through direct and cross trading.

XIII. BILATERAL TREATIES

If we were living in a more perfect world, I would be totally opposed to the notion of the United States negotiating bilateral treaties with its trading partners. In fact, during my tenure on the Federal Maritime Commission, I consistently voted against bilateral agreements. My views towards bilaterals—towards any sort of protectionism—have not changed. I believe that bilateral agreements tend to inhibit trade, that they harm rather than help shippers, and that they are costly to the ultimate consumer. The same problems and potential for abuse which I identified in terms of the cargo sharing provision of the UNCTAD Code are present in government-to-government cargo sharing schemes.

Why then do I support bilaterals? The answer is simple. We are not living in a perfect world. Events are overtaking us. The UNCTAD Code has already gone into effect, though its impact has so far been minimal because the signatory nations must draft the necessary domestic legislation to properly implement the Code. Protectionism, with all its implied and potential abuses, is rampant throughout the maritime world. Under these circumstances, I feel that the United States—as the largest contributor to world commerce—must actively adopt a regime over which it can exert and maintain significant control. We must not allow ourselves to become pawns in a Codist world through a policy of passive or even benign acceptance. We must do what is best for this nation—actively, aggressively, and soon. And I am convinced that it is in the best interests of this nation to have a strong merchant marine.

[39] The Consultative Shipping Group (CSG), made up of members of the European Community and Japan, has held a series of meetings with State Department officials urging the United States to ratify the Code.

A series of carefully drafted bilateral treaties will give the United States the guaranteed cargo base needed to strengthen its merchant marine. Such treaties will permit the United States to negotiate from a position of strength and to have a full and equal say in their provisions.

In my view, a major problem with the bilateral treaties we presently have[40] is that our negotiators allowed them to be too vague and ambiguous. They agreed to a broad-brush framework, to be filled in later through commercial negotiation. However, I suspect that the subsequent so-called "commercial" negotiations were strongly influenced by our trading partners' interests, with the result that these treaties tend to favor the carriers of our trading partners more than they do our own. It is ironic that United States carriers have been so grateful to receive a guaranteed share of these trades, that they have willingly accepted such inequities without complaint. Hopefully, future bilateral treaties will be negotiated from a position of strength, to assure that United States flag carriers enjoy at least equivalent benefits as do other carriers in the same trades.

XIV. CONCLUSION

In conclusion, I would like to underscore my belief that guaranteed cargo shares tend to inhibit a carrier's service incentives, to the ultimate detriment of shippers and the general public. A protected industry has little motivation to innovate, to reduce costs, or to improve service. Indeed, major shippers have reported that the worst carrier service they receive are in the very trades which are presently covered by bilateral regimes.

An alternative to ratifying the UNCTAD Code of Conduct of Liner Conferences is the promulgation by the United States of a network of bilateral treaties. However, if the United States does enter into bilateral cargo-sharing treaties, it must exert special effort to assure that United States shippers are not hurt in the process. As a quid-pro-quo for their guaranteed cargo shares, United States carriers must pledge to render quality service at rates which enable United States shippers to remain competitive with foreign exporters. United States carriers must actively

[40] The United States presently has two 40/40/20 bilateral treaties: one with Argentina (Memo of Understanding/Maritime Matters, Mar. 31, 1978, United States-Argentina, 30 U.S.T. 1054, T.I.A.S. No. 9239.) and the other with Brazil (Agreement on Shipping: Equal Access to Government-Controlled Cargoes, Nov. 17, 1977, United States-Brazil, 29 U.S.T. 2860, T.I.A.S. No. 8981; Extension of Nov. 17, 1977 Agreement, Oct. 26, 1983, United States-Brazil, T.I.A.S. No. 10802). However, as a result of a side agreement between Argentina and Brazil, each country has allotted approximately half of the 20 percent third flag share to the other; thus the effective division is really closer to 40/50/10 in each bilateral trade.

strive *not* to take United States shippers for granted, but should constantly seek to anticipate and to satisfy their commercial needs.

In an increasingly ethnocentric world, United States carriers must recognize that United States shippers are their partners in world trade. In this regard, they can take a cue from some of our trading partners. If the United States is to prosper as a nation, all parties must work together to help each other achieve both individual and mutual objectives—not least of which should be a stronger United States based on increased international trade.