

II. INTERNATIONAL LEGISLATION ON SHIPPING*

A. A survey of the work in the field of international legislation on shipping undertaken by various international organizations and co-ordination of future work in this field: report of the Secretary-General**

INTRODUCTION

1. The Commission at its second session adopted a resolution¹ that, *inter alia*, noted "the importance of the question of international shipping and of the desirability of close collaboration with the organs and organizations already working in this field".

The resolution also took account "in particular, of resolution 14 (II) adopted at the second session of the United Nations Conference on Trade and Development on 25 March 1968, by which the Conference requested its Committee on Shipping to create a working group on international shipping legislation, and resolution 46 (VII) adopted in this connexion on 21 September 1968 by the Trade and Development Board". In addition, the resolution confirmed "its wish to see close co-operation established between the Commission and UNCTAD" and considered "that a duplication of work should be avoided".

2. The resolution provided that the Commission:

"1. *Decides* to include international legislation on shipping among the priority items in its programme of work;

"2. *Requests* the Secretary General to prepare a study in depth giving *inter alia* a survey of work in the field of international legislation on shipping done or planned in the organs of the United Nations, or in intergovernmental or non-governmental organizations, and to submit it to the Commission at its third session;

"3. *Decides* to set up a Working Group consisting of representatives of Chile, Ghana, India, Italy, the United Arab Republic, the Union of Soviet Socialist Republics and the United Kingdom of Great Britain and Northern Ireland, which may be convened by the Secretary-General, either on his own initiative or at the request of the Chairman, to meet some time before — and preferably shortly before—the commencement of the third session of the Commission to indicate the topics and method of work on the subject, taking into consideration the study prepared by the Secretary-General, if it is ready, and giving full regard to the recommendations of UNCTAD and any of its

organs, and to submit its report to the Commission at its third session;

"4. *Invites* the Chairman of its second session and, if he is unable to attend, his nominee from among the members of the Commission to attend the session of the UNCTAD Committee on Shipping to be held at Geneva in April 1969 and to inform that Committee of the course of the discussion in the Commission at its second session and the Commission's desire to strengthen the close co-operation and effective co-ordination between the Commission and UNCTAD.

"5. *Requests* the Secretary-General, should it be decided to convene the Working Group referred to in paragraph 3 above, to invite States members of the Commission and intergovernmental and non-governmental organizations active in the field to be present at the meeting of the Working Group, if they choose to do so."

3. To assist the Commission in its consideration of the subject this report provides information:

(a) On the third session of the UNCTAD Committee on Shipping (chapter I, *infra*);

(b) On the deliberations at the Sixth Committee and the resolution of the General Assembly (chapter II, *infra*);

(c) On the first session of the UNCTAD Working Group on International Shipping Legislation (chapter III, *infra*);

(d) On problem of co-ordination of current work to implement the decision of the Commission referred to in paragraphs 1 and 2 above (chapter IV, *infra*).

I. THIRD SESSION OF THE UNCTAD COMMITTEE ON SHIPPING

4. The UNCTAD Committee on Shipping at its third session, held from 9 to 25 April 1969 in Geneva, considered the question of creation of a Working Group on International Shipping Legislation.²

5. Pursuant to paragraph 4 of the Commission's decision (quoted in paragraph 2, *supra*) the Chairman of

¹ Report of the Commission on the work of its second session, (A/7618), para. 133.

* For action by the Commission with respect to this subject, see part two, section II, A, report of the Commission on the work of its second session (1969), paragraphs 114-133. See also part two, section III, A, report of the Commission on the work of its third session (1970), paragraphs 147-166.

** A/CN.9/41.

² UNCTAD, *Official Records of the Trade and Development Board, ninth session, Report of the Committee on Shipping on its third session* (TD/B/240) (herein cited as Report of the Committee on Shipping), chapter V, paras. 67-81.

the second session of UNCITRAL attended the meeting of the Committee and made a statement at the Committee's 44th meeting on 15 April 1969. In his statement the Chairman informed the Committee of the Commission's decision on international legislation on shipping at its second session and of the Commission's desire for close co-operation and effective co-ordination between UNCITRAL and UNCTAD.³

6. With respect to co-operation between UNCTAD and UNCITRAL it was stated by several developing countries at the meeting that the UNCTAD Working Group, if established, "should review existing legislation, identify areas which required legislation, send its directives and guidelines to UNCITRAL and request UNCITRAL to proceed on the basis of such suggestions and guidelines in the drafting of the requested legislation".⁴ Statements were also made by other representatives concerning the need for liaison and collaboration between UNCTAD and UNCITRAL and the advisability of avoiding duplication of work.⁵

7. At its 55th meeting on 25 April 1969 the Committee unanimously adopted resolution 7 (III) the Creation of a Working Group on International Shipping Legislation.⁶ According to the resolution the Working Group consists of representatives of thirty-three States,⁷ elected for a three-year term, and has the following terms of reference:

"(a) To review economic and commercial aspects of international legislation and practices in the field of shipping from the standpoint of their conformity with the needs of economic development, in particular of the developing countries, in order to identify areas where modifications are needed;

"(b) In the light of this review, to make recommendations and prepare the necessary documentation relating thereto to serve as a basis for further work Commission on International Trade Law for the drafting of new legislation or other appropriate action and, when necessary, to consider other measures to implement fully the provisions of paragraph 1 of resolution 14 (II);

"(c) To report its findings and recommendations to the Committee on Shipping."

8. In its resolution referred to in paragraph 7 above, the Committee on Shipping requested the Secretary-General to convene the UNCITRAL Working Group on International Legislation on Shipping immediately on receipt of the first report of the UNCTAD Working

Group and the recommendations of the Trade and Development Board thereon.⁸ It further requested the Secretary-General to schedule the meetings of the Working Group on International Shipping Legislation of the United Nations Commission on International Trade Law in such a way that the reports of the UNCTAD Working Group on International Shipping Legislation may be considered by the Committee on Shipping at its session following next upon that of the UNCTAD Working Group.⁹

9. At the first part of the ninth session of the UNCTAD Trade and Development Board, held in August to September 1969, the Board took note with satisfaction of the report of the Committee on Shipping on its third session and agreed, as an exceptional measure, in accordance with the wish expressed in paragraph 6 of resolution 7 (III) of the Committee on Shipping, to consider at its resumed ninth session in February 1970 the report of the UNCTAD Working Group on International Shipping Legislation on its first session and to forward this report to the Working Group on International Legislation on Shipping of the United Nations Commission on International Trade Law in time for its first session.¹⁰

II. THE TWENTY-FOURTH SESSION OF THE GENERAL ASSEMBLY

10. During the debate in the Sixth Committee of the General Assembly on the Commission's report on its second session, several speakers touched upon the question of international legislation on shipping. The report of the Sixth Committee stated:¹¹

"24. Most representatives who commented on the decision of UNCITRAL to include international legislation on shipping among the priority topics in its programme of work, recognized that UNCITRAL was competent to consider such legislation and to decide on topics and methods of work in that connexion. Many drew attention, however, to the need for UNCITRAL to take account of the work of other organizations in the field so as to avoid wasteful duplication or unnecessary expenditure. It was also observed that collaboration in this particular field had been helped by the creation of the Joint Shipping Legislation Unit of the United Nations Office of Legal Affairs and the UNCTAD secretariat.

"25. Some representatives, while accepting the competence of UNCITRAL in the field of international legislation on shipping, doubted the wisdom of UNCITRAL's decision to include the subject in its working programme at the present stage. These representatives took the view that it would be preferable

³ *Ibid.* The text of the Chairman's statement appears in annex IV to the Report of the Committee on Shipping.

⁴ *Ibid.*, para. 70.

⁵ *Ibid.*, paras. 72, 74 and 76.

⁶ *Ibid.* For the text of the resolution, see annex I, p. 26.

⁷ Algeria, Argentina, Belgium, Brazil, Bulgaria, Canada, Ceylon, Chile, Colombia, Czechoslovakia, Ethiopia, Federal Republic of Germany, France, Gabon, Ghana, Greece, India, Indonesia, Iran, Iraq, Ivory Coast, Japan, Mexico, Norway, Pakistan, Philippines, Poland, Spain, Sweden, Union of Soviet Socialist Republics, United Arab Republic, United Kingdom of Great Britain and Northern Ireland and United States of America.

⁸ Resolution 7 (III) of the Committee on Shipping, para. 7. Report of the Committee on Shipping, annex I, p. 26.

⁹ *Ibid.*, para. 8.

¹⁰ TD/B/L.185/Add.1(E). Draft report of the Trade and Development Board on the first part of its ninth session, para. 103.

¹¹ Report of the Sixth Committee on agenda item 90: Report of the United Nations Commission on International Trade Law on the work of its second session (A/7747), paras. 24-27.

for UNCITRAL not to commence considering the substance of the question until the other international organizations concerned had considered its economic and other aspects. Under this view, the Commission should, for the time being, confine its task to that of co-ordination.

"26. Representatives of developing countries stressed that UNCITRAL's work in this field was of importance for the economy of these countries and expressed the hope that their countries would be equitably represented in the bodies responsible for drafting new legislation. These representatives stated that present-day legislation in the field reflected, in many respects, an earlier economic phase of society, as well as attitudes and practices which seemed unduly to favour ship-owners at the expense of shippers. They also observed that the developing countries were particularly interested in legislation on freight rates, charter parties, standard clauses in bills of lading, and the limitations on the ship-owner's liability resulting from exemption clauses. Some delegations expressed the opinion that international shipping legislation is a priority topic that provides UNCITRAL with the best opportunity of contributing to a change in the *status quo* and the creation of more just and equitable conditions for the developing nations in the field of international trade.

"27. One representative suggested that, in dealing with international legislation on shipping, UNCITRAL should take account of the Treaties of Montevideo of 1889, as revised in 1940 and 1944, which had greatly benefited private international law."

11. The General Assembly in resolution 2502 (XXIV), with reference to the present subject, stated that the Assembly:

"2. *Endorses* the inclusion by the United Nations Commission on International Trade Law, on the basis indicated in its report of International legislation on shipping among the priority topics in its programme of work;

...

"10. *Recommends* that the United Nations Commission on International Trade Law should:

"(a) Continue its work on the topics to which it decided to give priority, that is, the international sale of goods, international payments, international commercial arbitration and international legislation on shipping;

...

"(d) Give special consideration, in promoting the harmonization and unification of international trade law, to the interests of developing and land-locked countries;

"11. *Recommends further* that the United Nations Commission on International Trade Law should continue to collaborate fully with international organizations active in the field of international trade law;"

III. THE FIRST SESSION OF THE UNCTAD WORKING GROUP ON INTERNATIONAL SHIPPING LEGISLATION

12. The UNCTAD Working Group on International Shipping Legislation held its first meeting in Geneva from 1 to 12 December 1969. The report of the Working Group on its first meeting appears in document TD/B/289.

13. The Working Group adopted the following work programme:

1. Bills of lading.
2. Charter parties.
3. General average.
4. Marine insurance.
5. Economic and commercial aspects of international legislation and practices in the field of shipping not covered by items 1 to 4 above.
6. Consideration of other measures to implement fully the provisions of the last clause of paragraph 2 (b) of resolution 7 (III) of the Committee on Shipping.¹²

14. The Working Group decided that the topics in its programme of work would be taken up in the order stated.¹³ Accordingly, the first priority item to be dealt with is bills of lading. It was further agreed that the secretariat of UNCTAD should undertake a major study of that topic.¹⁴

15. The Working Group adopted the following list of topics for the programme of work on the first priority topic, bills of lading:

"The Working Group shall review the economic and commercial aspects of international legislation and practices in the field of bills of lading from the standpoint of their conformity with the needs of economic development in particular of the developing countries and would make appropriate recommendations as regards, *inter alia*, the following subjects:

"(a) Principles and rules governing bills of lading, including:

"(i) Applicable law and forum including arbitration,

"(ii) Conflict of laws between conventions and national legislation,

"(iii) Responsibilities and liabilities in respect of carriage of goods,

"(iv) Voyage deviation and delays;

"(b) Study of standard forms and documentation, including an analysis of common terms;

"(c) Trade customs and usages relating to bills of lading;

"(d) Third party interests at ports of call."¹⁵

16. A representative of the UNCITRAL secretariat, attending the session of the Working Group, informed the meeting of the decision of UNCITRAL with respect

¹² TD/B/289, para. 17. Foot-notes to the report are not reproduced herein.

¹³ *Ibid.*, para. 26.

¹⁴ *Ibid.*, para. 27.

¹⁵ *Ibid.*, para. 31.

to international legislation on shipping and of the desire of UNCITRAL to co-ordinate its work in this field with that of the UNCTAD Working Group.¹⁶

17. At this meeting of the UNCTAD Working Group, the need for co-operation between UNCTAD and UNCITRAL in the field of international shipping legislation was emphasized by many representatives. Thus, the report noted that the representatives of the socialist countries of Eastern Europe, supported by the representatives of the developing countries, expressed the hope that UNCITRAL would not act without first having received the recommendations and studies of the UNCTAD Working Group.¹⁷

18. The representative of the Secretary-General of UNCTAD suggested that it might be possible for the Committee on Shipping in the future to forward its comments on the report of the Working Group directly to UNCITRAL or its Working Group on International Legislation on Shipping. He further suggested since the Committee on Shipping was to meet in March/April 1971, that UNCITRAL might postpone its fourth session at least until May 1971.¹⁸

19. The Trade and Development Board, at its meeting on 9 February 1970, took note of the report of the UNCTAD Working Group and directed that this report be forwarded to UNCITRAL together with the comments made thereon by members of the Board.¹⁹ The Board further decided that the UNCTAD Working Group should hold its second session from 30 November to 11 December 1970 and, should that not be possible, that the Working Group should meet not later than early February 1971.

IV. CO-ORDINATION OF FURTHER WORK

20. At its second session, the Commission's resolution on international shipping legislation requested the Secretary-General "to prepare a study in depth giving *inter alia* a survey of work in the field of international legislation done or planned in the organs of the United Nations, or in intergovernmental or non-governmental organizations".²⁰ The Secretary-General was requested to submit this study to the Commission at its third session.

21. Information relevant to the work under way in the organs of the United Nations and in other organizations, as referred to in the above resolution, was requested in a questionnaire which was transmitted on 8 August 1969 to the organizations principally involved in this field. The replies so far received appear as annex II to the Report of the Secretary-General on the Register

¹⁶ *Ibid.*, annex III.

¹⁷ *Ibid.*, para. 36.

¹⁸ *Ibid.*, para. 54. Current plans call for the UNCTAD Committee on Shipping to meet 22 March to 2 April 1971. It is estimated that the Committee's recommendations can be transmitted to UNCITRAL within two weeks of the end of the session.

¹⁹ See document TD/B/299.

²⁰ UNCITRAL, Report on the Second Session (1969), para. 133, sub-para. 2.

of Organizations and Register of Texts (A/CN.9/40/Add.1). Examination of these replies shows that the current project directly relevant to the Commission's field of work is the Draft Convention on the International Combined Transport of Goods, the current status of which is discussed *infra* at paragraph 22. In addition, since the receipt of these replies, UNCTAD has instituted the programme of work with respect to international shipping legislation which has been described, *supra*, in paragraphs 4 to 9 and 12 to 19.

22. The Secretary-General also instituted a study of the substantive law of this field. When this study was instituted, no priorities were established within the general field of international shipping legislation. For this reason, the preliminary work towards a study in depth has dealt with the items embraced within resolution 14 (II) adopted by UNCTAD on 25 March 1968 to which the resolution of UNCITRAL had made reference.²¹ After the commencement of this work, the UNCTAD Working Group on Shipping in December 1969 established a programme of study in the field of international shipping legislation on the six subjects listed in paragraph 12, *supra* and decided that top priority should be given to bills of lading with special reference to the aspects of the subject listed in paragraph 15, *supra*. The resolution of the UNCTAD Working Group emphasized the study of the "economic and commercial aspects" of the rules governing bills of lading, but it appears that attention to the existing legal rules may be necessary in evaluating their economic and commercial effects.²² Should the Commission desire, an oral report on the development of the study requested by the UNCTAD Working Group could be presented during its third session.

23. In view of the above decision by UNCTAD to give top priority to bills of lading, it may be relevant to note certain other recent developments in this field. In January 1970 a revised draft was released of a Draft Convention on the International Combined Transport of Goods (TCM); this draft resulted from the work of the second session of the Round Table on the Legal Aspects of Combined Transport Operation (Institut International pour l'unification du droit privé (UDP), 1970 — Etudes: XLII Transport combiné — Doc. 39). This Draft Convention proposes revised rules of carrier responsibility where a contract for international carriage by two different modes of transport bears the heading "Combined Transport Document governed by the TCM Convention". This proposed convention is still in the course of formulation, but preliminary examination of this draft

²¹ The specific subjects mentioned in paragraph 1 (b) of Resolution 14 (II) of the second UNCTAD conference were: "(i) charter parties; (ii) marine insurance, and (iii) amendments to the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, 1924."

²² See the itemization of topics for the programme of work on bills of lading at paragraph 15, *supra*. See also the Working Paper on International Shipping Legislation submitted by the UNCTAD secretariat to the UNCTAD Working Group (TD/B/C.4/ISL/2). This document, as well as the report of the UNCTAD Working Group on International Shipping Legislation (TD/B/C.4/ISL/4), will be available at the third session of UNCITRAL.

indicates that certain of its provisions may call for attention under the above resolutions of the Commission.²³

24. The wide scope that was initially envisaged for the study in depth of international shipping legislation has made it impossible to complete a general study prior to the third session of UNCITRAL. In addition, for reasons that will be suggested below (para. 25), when priorities for work were established by the UNCTAD bodies and plans were developed for an intensive study in the field of bills of lading, questions arose with respect to the appropriate co-ordination of the work of UNCITRAL and UNCTAD. In view of these developments since the last session of the Commission, it has been thought appropriate to refer to the Commission the question of what work should be carried forward by the UNCITRAL secretariat in view of the work now in process by UNCTAD and other organizations engaged in work in this field.

25. In this connexion, the Commission may wish to consider the following alternatives:

(a) One alternative would involve continuation of the study of various aspects of the law of international shipping legislation that was commenced before the UNCTAD Working Group decided to establish a programme of work with top priority for bills of lading. In examining this alternative, the Commission may wish to consider the following problems: (i) On the one hand, a general study not directed to the analysis and solution of specific legal problems tends to duplicate the work of substantial dimension that has been produced in existing treaties and other scholarly writing.²⁴ In addition, such general studies embrace such a wide field that the completion of satisfactory work necessarily requires a substantial period of time. As a consequence, such a general study may not be completed by the time specific recommendations are presented by UNCTAD and may not be addressed to the specific issues on which recommendations for legislative change will be offered. (ii) On the other hand, if a study addresses itself more narrowly to points on which the present legal rules have been the subject of criticism, the study might duplicate the work under way as a result of the work programme developed by the UNCTAD Working Group. Problems of co-ordination might also arise, since such a study might present issues to UNCITRAL for decision

²³ See TCM art. 11(b)(ii), on applicability of the 1924 International Convention for the Unification of Certain Rules relating to Ocean Bills of Lading (the Hague Rules) with respect to goods carried on deck; *contrast* art. I(c) of the Hague Rules. *Compare* TCM art. 9(1) on period of carrier responsibility (e.g. while in possession prior to loading or after discharge from ship) with Hague Rules art. I(e); *compare* TCM art. 9 on scope of responsibility for acts of agents with Hague Rules art. IV(2) (a); *compare* TCM art. X-3 on computation of limits of liability with Hague Rules art. IV(5) as amended by art. 2 of the 1968 Protocol. *See also* TCM arts. 14 and 15 on choice of forum and arbitration tribunal.

²⁴ The existing general studies include, *inter alia*, the report prepared by Dr. Thommen for UNCTAD (TD/32/Rev.1), surveying the history and subject areas of international shipping legislation and setting out the work being done in the various international and intergovernmental organizations, which will be available to members of the Commission.

at the same time these issues are presented to the UNCTAD organs for decision.

(b) A second alternative would be for the UNCITRAL secretariat to collect and analyse the legal materials that are relevant to the economic and commercial issues as they emerge from the UNCTAD study. In examining such a co-ordinated programme, the Commission may wish to give attention to the following considerations: On the one hand, the development and issuance of separate studies and reports by UNCITRAL and UNCTAD on the same or similar issues may be difficult to reconcile with the declared goals of co-ordination and avoidance of duplication. On the other hand, for UNCITRAL to institute its studies after the receipt of recommendations from UNCTAD would involve delay. The Commission may wish to consider whether this dilemma, to some degree, may be avoided by an approach involving close attention by the UNCITRAL secretariat to the work in process in UNCTAD, and the development of preliminary studies which would make it more feasible for the UNCITRAL secretariat to present studies of the relevant legal issues within a reasonably short time after the receipt of the UNCTAD studies and recommendations.

26. As was provided in the decision quoted in paragraph 2 above, the Commission at its second session authorized "the Secretary-General, either on his own initiative or at the request of the Chairman" to convene the Working Group on International Legislation on Shipping prior to the commencement of the third session of the Commission.

27. The Chairman of the second session of the Commission did not request the convening of the Working Group. On behalf of the Secretary-General, the Legal Counsel of the United Nations addressed an inquiry to the States members of the Working Group seeking their advice with respect to the convening of the Working Group. In his inquiry the Legal Counsel drew attention to the report of the UNCTAD Working Group on Shipping Legislation and especially to paragraph 36 of the report that indicated strong support for the view "that UNCITRAL would not act in this field without having first received the recommendations and studies of the UNCTAD Working Group". It was indicated in the inquiry that the Secretary-General would convene the Working Group if the majority of the members of the Working Group should desire a meeting.

28. Three members, Italy, the United Kingdom and the USSR, replied to the inquiry of the Legal Counsel. None of their replies requested the convening of a meeting of the Working Group. The Secretary-General, therefore, decided not to convene the meeting before the commencement of the third session of the Commission.

29. In the light of any decisions the Commission reaches with respect to the co-ordination of the work of UNCITRAL and UNCTAD (see paragraph 25, *supra*), the Commission may wish to consider the question of a meeting and terms of reference of the UNCITRAL Working Group.