owned Vessels, signed at Brussels on April 10, 1926,[146] and the Additional Protocol signed at Brussels on May 24, 1934. The Convention sought to settle, to some extent, the question of jurisdictional immunity of State-owned vessels.

(ii) Treaty on International Commercial Navigation Law, Montevideo, March 19, 1940,[147] adopted at the Second South American Congress on Private International Law. In Articles 34 to 42, the Convention makes provisions in regard to vessels belonging to the State.

(iii) and (iv) The Geneva Conventions on the High Seas, 1958,[148] and on the Territorial Sea and Contiguous Zone,[149] adopted at the 1958 UN Conference on the Law of Seas. Both the Conventions draw a distinction between government ships "used only on Government non-commercial service" and other government ships. Further, they recognize the immunity of the former ships from the jurisdiction of any State other than the flag State, while the latter ships are treated on a par with private merchant ships.

72. Referring to the provisions of the aforesaid Geneva Conventions, Dr. T. K. Thommen, in his report on "International Legislation on Shipping" expresses the view that "It is not, however, always clear when a government ship is engaged in purely non-commercial service and when it is not."

PART XV

Protection of Sub-marine cables

73. The existing legislation on the question of protection of sub-marine cables is the Convention on the Protection of Submarine Cables, Paris, of March 14, 1884.

146. L.N.T.S. Vol. CLXXVI, 1937, No. 4062.
147. *British Shipping Laws Series*, Vol. 8 on "International Conventions of Merchant Shipping" by Dr. Nagendra Singh, at p. 1099.
148. *Ibid.*, at p. 1145.
149. *Ibid.*, at p. 1139.

PART XVI

Liner Conferences

74. "The governments of several nations assist their shipping industry, and in this context the question of flag discrimination assumes importance. The Convention on the Intergovernmental Consultative Organization mentions in paragraph (b) of Article 1 that one of the purposes of the Organization is "to encourage the removal of discriminatory action affecting shipping engaged in international trade so as to promote the availability of shipping services to the commerce of the world without discrimination." The Convention thus affirms the principle of non-discrimination between vessels on the basis of the flag. It is, however, specifically provided in the Convention that assistance and encouragement given by a State for the development of national shipping and for purposes of security would not be discriminatory, provided that such assistance and encouragement are not designed to restrict the freedom of shipping of all flags to participate in international trade.[150]

75. At the Second Session of UNCTAD, Mr. Rouanet of Brazil, while speaking before the Fourth Committee of the Conference, referred to the possibility of recommending that the governments of developing countries give consideration to the need for appropriate legislation on maritime transport to provide the measures needed to promote expansion of their merchant marines and to obtain more control over decisions affecting the carriage of goods to and from their territories. He suggested that a second recommendation could be addressed to the governments of developed countries—particularly the large maritime powers—inviting them to consider regulating, by appropriate legislation, the practices and policies of their national shipowners and, through them, international liner conferences, in order to encourage practices consistent with the interests of the developing countries. He suggested that the

150. UNCTAD Document, TD/32/Rev. 1.

UNCTAD Secretariat should circulate periodical information on progress made by the developed countries in enacting legislation to regulate the practices of their national shipping liner.[151] Mr. Boum of the Cameroons emphasized that it was indispensable that Shipper's Council should act in conformity with the legislation of the countries concerned, so that none of their decisions could run counter to the national interests.[152] However, Mr. Richard of Sweden, while agreeing that national legislation could influence the policy of the liner conferences, pointed out that that might lead to disputes which would be harmful not only to shipowners but to shippers.[153] Mr. Schuld of the Netherlands pointed out that views as to how much regulation was necessary were bound to be different between countries in which shipping was a purely private sector and those in which there was active government participation in shipping. He stated that in his country, where shipping was a private activity, it would be impossible for the government to participate in international regulation unless it was clear that such regulation was in the general interest.[154]

76. Some of the activities of the international bodies in the matter of liner conferences are as follows :

(i) The Fifth Regular Assembly of Latin American Shipowners Association (ALAMAR) met in Bogota in November 1967 and decided to establish an *Ad Hoc* Committee of Latin American Shipping Conferences to prepare a model statute for shipping conferences. In 1967-68 ALAMAR studied the question of establishment of a multilateral shipping line.

(ii) The Third Joint Meeting of the ECA Working Party on Intra-African Trade and the OAU Expert Committee on Trade and Development (Geneva, January 1969), noted that shipping

151. In his Statement of Feb. 19, 1968 : Doc. TD/II/C.4/S.R. 14.

152. In his Statement of Feb. 7, 1968 : Doc. TD/II/C.4/S.R. 4.

153. In his Statement of Feb. 13, 1968 : Doc. TD/II/C.4/S.R. 9.

154. In his Statement of Feb. 20, 1968 : Doc. TD/II/C.4/S.R. 15.

countries had not cooperated as fully as could have been expected in the UNCTAD studies on conference lines. The meeting further recommended that assistance be sought by the African countries from developed countries to establish and expand their merchant marines.

(iii) Since the agreement reached between European Conference lines and the National Shippers Council of Europe, embodied in the Note of Understanding of December 1963, Joint Plenary Meetings have been held in London (1964), Brussels (1965), Amsterdam (1966), Marseilles (1967) and Hamburg (1968). A great deal of the discussion at these meetings has been directed towards achieving more uniform patterns of procedure in liner trade matters through adoption of joint recommendations.

PART XVII

Carriage of Goods by Sea (including relations between Shippers and Shipowners)

77. Dr. C. John Colombos, in his book on *The International Law of the Sea* points out: "A contract for the carriage of goods in a ship is usually described as "a contract of affreightment" and is expressed in writing in a document called a "bill of lading" (or charter-party, when the vessel is chartered)". In case "the shipowner agrees to carry a complete cargo of goods, or to make available a ship for such purpose, the contract of affreightment is generally contained in a document called the charter-party. The shipowner lets, and the charterer hires, the ship for the purpose of carrying goods in it. Where the agreement is for the purpose of carrying goods which forms only a part of the intended cargo of the ship, the contract of affreightment for each parcel of goods shipped is usually expressed in a document called the "bill of lading".[153]

155. Dr. T. K. Thommen, in his report on "International Legislation on Shipping".

Dr. Colombos also points out that the terms embodied in a contract of affreightment "vary in form in different countries and the law on the subject was beginning to grow seriously confused. Uuiformity was, therefore, highly desirable on this ground".

78. The existing legislation on the subject, apart from bills of lading and charter-parties which have been dealt separately in the present note, is as follows :

(i) The Hague Rules 1921, adopted by the International Law Association at its Hague Conference of 1921.[156] which was attended by a representative body of jurists, shipowners and merchants. Under the rules the rights and liabilities of cargo owners and shipowners respectively were formulated and defined.

(ii) Warsaw—Oxford Rules of 1924 concerning C. I. F. contracts, adopted by the Oxford Conference of the International Law Association.[157] The rules provide for rights and duties of buyer and seller in regard to sale and purchase of goods on C. I. F. terms. However, it may be pointed out that the law repsecting C. I. F. and F. O. B. contracts, is very largely customary although certain countries have codified it, and is to be determined by reference to custom, especially as interpreted by the courts and also through standard definition promoted by international commercial associations.

79. At the Second Session of the UNCTAD, Mr. Khalil of the U. A. R. referred to absence of principles governing relations between shippers and shipowners. He also emphasized the need to have international legislation on carriage of goods by sea.[158] In this regard it may be pointed out that the "area of particular concern is that commonly covered by that

156. 30th Report, Vol. 2, pp. 254 to 266.
157. *British Shipping Laws Series*, Vol. 8, p. 1092.
158. UNCTAD Doc. TD/II/C.4/S,R. 14.

part of maritime law which governs the existing relationships and arrangements between parties engaged in the international carriage of goods and persons, and centered on the rights and duties of the passenger, shipper, insurer, assured, carrier and receiver, including all intermediary and interconnected parties, such as banks, port authorities, etc., and their servants, agents and independent contractors".[159] Dr. T. K. Thommen, in his report on "International Legislation on Shipping" raises the question of the advisability of allowing the carrier excessive privileges *vis-a-vis* the cargo-owner. The question deserves to "be examined from the standpoint of economic progress of the developing countries, bearing in mind, at the same time, the general interest of the shipping trade and the export-import business of the trading nations".[160] The need is to harmonize and develop international shipping law to meet these requirements.

80. As pointed out above, carriage of goods is governed by contract between the parties. Although in theory the parties to a contract of carriage enjoy complete freedom of contract, subject of course to the Hague Rules in the case of bills of lading and the mandatory provisions of the law applicable to contracts generally, in actual practice it would appear to be doubtful whether the majority of cargo owners generally enjoy any appreciable freedom of contract. Bills of lading and charter-parties are standard contracts printed in advance with a large number of clauses protecting the interest of the ship owners to the maximum extent possible. They are usually drafted by experts employed by associations in which the interest of the shipowner generally predominates. With the exception of those relatively few cargo-owners who are able to assert themselves by virtue of their powerful economic position the cargo-owners generally have no alternative but to accept these printed standard form contracts. Courts of law, when

159. UNCTAD Doc. TD/B/C. 4/ISL/2.
160. *Ibid.*

seized of cases arising from these contracts, are not likely to interfere with the "freedom" of contract unless their terms are contrary to the mandatory provisions of the applicable law or are so oppressive and unconscionable that it is unlikely that the Courts would enforce them. In most cases, therefore, it would appear that the cargo-owner is relatively at a disadvantage". In order to remedy this situation, it may be necessary to examine the provisions of various standard charter-parties and bills of lading in common use and to work out modification with a view to maintaining a balance between the conflicting interests of the carrier on the one hand and the cargo owner on the other—"a fair balance of equities as between parties concerned". It may also be necessary in this connection to review the Hague Rules and comparable legislation and practices covering shipping, marine insurance and general average with a view to reducing the gap between various interests.

81. Some of the activities of the international bodies in the matter of carriage of goods by sea, are as follows :

(i) The UNIDROIT prepared (a) a draft Convention on the Contract of International Combined Carriage of Goods and (b) a draft Convention on the Contract of International Forward Agency of Goods. A draft Convention on the Contract for the Carriage of Passengers and Luggage by Inland Waterways is to be completed by the UNIDROIT.

(ii) Joint Plenary Meetings of representatives of the Liner Conferences and European Shippers' Council, were convened under the auspices of the European National Shipowners' Association (CENSA). Their recommendations refer to 'introduction of, and alterations in, shipper's contracts and agreements, and provide for advance consultation by the Conference concerned with an appropriate shippers' body

on the introduction of new contracts or alterations of principle to existing contracts or agreements. They also refer to "measurement rules" which set out recommended basic rules for the measurement of cargo in the interest of facilitating port operations and shippers' estimations of freight costs.

(iii) The International Law Association issued a questionnaire to its regional branches on the question of transport of goods by sea.

(iv) The CMEA Standing Committee on Foreign Trade approved a revised version of the General Conditions for Commodity Deliveries by Foreign Trade Organizations of the Member Countries of the Council (1968), which also include regulations for the transport of goods by water including maritime transport. The Consultative Conference of Representatives of Charterers' and Shipowners' Organizations are working on the standardization of shipping and chartering documents.

(v) The International Chamber of Shipping, under the guidance of its Shipping Documentation Committee, has continued its work on the standardization and simplification of documentation, and the establishment of forms suitable for universal use. The Chamber is preparing a standard manifest aligned with the standard bill of lading to meet the content and layout requirements of the cargo declaration recently recommended by IMCO to member governments.

PART XVIII

Bill of Lading

82. A bill of lading is a receipt for goods shipped on board a vessel, signed by the shipowner, or by the master or other agent of the shipowner. This document contains the terms upon which the goods were delivered to, and received

by the ship. An endorsement of the bill of lading, by the custom of merchants internationally accepted, confers upon the endorsee all the rights and liabilities of the shipper as if the contract contained in the bill of lading had been originally made with him. The bill of lading is a document of title, entitling its holder to delivery of the goods. Until 1924 there was no uniformity in the laws of maritime nations in regard to contracts of affreightment covered by bills of lading. The terms embodied in the bill of lading varied from one country to another, and the law on the subject was far from clear. Shipowners could avoid liability by inserting escape clauses or exceptions in the documents, and in the course of years these exceptions grew in number and complexity to such an extent that it became difficult to ascertain what rights were conferred on the shippers or the consignees of goods as against the shipowners. Bills of lading are not only contracts of affreightment, but also, unlike charter-parties, documents of title. They pass from hand to hand and from country to country, conferring on their holder both rights and liabilities. Persons not parties to the original contract become interested in the bills of lading. This situation made it necessary to unify the laws of different nations in regard to bills of lading and define the carrier's rights and obligations.[161] Dr. A.N. Yiannoponlous, in his article on "The Unification of Private Maritime Law by International Conventions",[162] states : "Already by the end of past century, divergencies in the regulation of the sea-carriers' liability under contracts of affreightment evidenced by bills of lading had attracted attention and had caused concern. The most spectacular conflict in that regard involved the question of validity of "negligence" clauses, namely clauses designed to exonerate the carrier from liability for his or his servants' negligence in connection with damage to the cargo.....Moreover, the

161. UNCTAD Doc. TD/32/Rev. 1.

162. *Law and Contemporary Problems*, Vol. 30 (1965), at p. 386.

national policy favouring the shipper or the carrier was frequently extended in the field of conflict of laws by adoption of choice-of-law rules designed to safeguard application of national laws to bills of lading involving international contracts. Thus, due to a variety off substantive standards and conflict rules, a negligence clause inserted in an international bill of lading could be valid in one country and invalid in another, and the liability of the carrier could differ with the fortuitous or selected forum. As a result, security in international transactions was minimised, the negotiability of bills of lading was imperilled, and world trade was seriously hampered. The United States, having first succeeded in reaching a compromise between the conflicting interests of shippers and carriers in its Charter Act, 1892, took lead in urging uniform international regulation of the sea-carriers' liabilities. After several decades of preparatory work and back-stage negotiations, the International Law Association adopted at its Hague meeting of 1921 a body of rules known as the Hague Rules, 1921".

83. The existing international legislation relating to bills of lading is as follows:

(i) The Hague Rules, 1921, adopted by the International Law Association at the Hague Conference of 1921.[163] The rules were, "at first, intended to be incorporated in bills of lading by the voluntary agreement of the parties to the contract of affreightment, but the movement in favour of compulsory uniform legislation in the various countries eventually resulted in the resolution taken by the delegates to the Diplomatic Conference on Maritime Law, held in Brussels in October 1922, to recommend to their respective Governments the adoption of "The Hague Rules" as a basis of legislation. "The Rules", after having

163. Report for the 30th Conference (1921), at pp. 212 to 218.

been amended by a Special Committee at a meeting also held in Brussels in 1923, were finally approved in the following year.[164]

(ii) The International Convention for the Unification of Certain Rules relating to Bills of Lading, Brussels, August 25, 1924,[165] adopted by the Diplomatic Conference on Maritime Law, 1924, as a result of the efforts of the Comité Maritime International and the International Law Association. The Convention had been adopted by 28 countries as of December 1967. The Convention applies only to a contract of carriage which is covered by a bill of lading or any similar document of title. The definition also includes a bill of lading or similar document of title issued under or pursuant to a charter-party. Such a bill of lading will come within the definition only from the moment at which it "regulates the relations between a carrier and a holder of the same". It would appear, therefore, that the Convention does not apply to a bill of lading issued by a shipowner to a charterer until the charterer has endorsed the document for valuable consideration in favour of a third person. On endorsement of the bill of lading, the endorsee obtains the protection of the provisions of the Convention which the charterer himself could not claim, and the obligations mentioned in the Convention are imposed on the shipowner. Under Article 2 of the Convention, the carrier is subject to the responsibilities and liabilities, and entitled to the rights and immunities set forth in the Convention in relation to the loading, handling, storage, carriage, custody, care and discharge of the goods which he has undertaken to carry. Article 1(e) of the Convention states that "carriage of

164. Colombos, in his book on *International Law of the Sea*, at p. 312.

165. *British Shipping Laws Series*, Vol. 8, at p. 1086.

goods" covers the period from the time when the goods are loaded on, to the time they are discharged from the ship". Article 2 of the Convention refers to the obligations and immunities of the carrier in regard to the whole operation of carriage beginning with the loading and ending with the discharge of goods. It is not clear from the wording of this article whether the carrier is obliged to perform, or undertake responsibility for, the entire loading and discharging, or whether he is only responsible for that part of the loading or discharging which takes place on the ship's side of the ship's rail, or whether his responsibility is limited to that part of the loading or discharging which he has agreed to perform. The language of the article would seem to show that the carrier is responsible for the entire operation of loading and discharging and cannot contract out of this responsibility. However, the English Courts seem to have taken the view that the carrier is responsible only for that part of the loading or discharging which he has undertaken to perform. Article 3 refers to the responsibility of the carrier to "load, handle, stow, carry, keep, care for, and discharge the goods carried". If, accordingly, the entire operation of carriage is governed by the Convention, it would appear to be strange that the carrier should still be free to contract out of the obligations imposed on him in relation to loading and discharging. This is particularly so in the light of paragraph 8 of Article 3. Article 3(1) states that the "carrier shall be bound before and at the beginning of the voyage to exercise due diligence" to make his ship seaworthy. The absolute undertaking of seaworthiness is not a principle accepted by the Convention. The carrier has discharged his responsibility if he has exercised due diligence to make the ship seaworthy. His duty to exercise such due

diligence is limited to a period before and at the beginning of the voyage. If therefore he has exercised due diligence to make the ship seaworthy before and at the beginning of the voyage, he will not be held liable if the master negligently fails to remedy a defect which has developed since the voyage began. Article 4 enumerates the carrier's rights and immunities. Article 4(2) (a) states that "neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from act, neglect or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship". The carrier is absolved from all liabilities arising from the act, neglect or default of his servant in the navigation or management of the vessel. This protection and the provision in Article 3 relating to seaworthiness considerably secure the position of the shipowner. It may, however, be pointed out that a distinction can be drawn between negligence in the navigation or management of the ship and negligence otherwise than in such navigation or management. The shipowner is protected only from the consequences of the former. English Courts have held that if the cause of the damage is traced to negligence in taking reasonable care of the cargo, the ship is liable. On the other hand, if the damage arises from negligence in taking reasonable care of the ship, as distinct from the cargo, the ship shall not be liable. The Convention has not defined the meaning or effect of the words "navigation or management", and decisions of the courts reveal the difficulties in drawing a logical distinction between negligence in the navigation or in the management of the vessel and negligence otherwise than in such navigation or management. It is difficult to understand the logic of any such distinction, for the two types of activities

are so closely inter-connected. The very purpose of the operation of the vessel is the transport of goods. Any negligence in the navigation or management of a vessel intended for the transport of goods is a negligence affecting the very purpose to be accomplished. In the days when the modern developments in communications were not visualized, there was probably some reason for giving this immunity to the shipowner, for he had little control over the operation of the vessel after it had begun its voyage. Article 3(6) provides that notice of loss or damage should be given in writing to the carrier or his agent before the removal of the goods, or if the loss or damage was not apparent, within three days. If such notice is not given, the article states, the carrier is deemed to have delivered the goods in conformity with the bill of lading. Whether this provision has legal effect or not is doubtful. In any case, the onus of proving loss or damage lies on the person asserting it, whether notice has been given or not. The article further provides : "In any event the carrier and the ship shall be discharged from all liability unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered". Article 4 (5) of the Convention limits the liability of the shipowner to a maximum of £100 per package or unit unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading.

(iii) The Rules for C.I.F. Contracts (Warsaw-Oxford Rules), 1932,[166] adopted at the Oxford Conference of the International Law Association. Rule 7 provides in regard to duties of seller as to bills of lading.

166. *Ibid.*, at p. 1992.

(iv) Protocol of February 23, 1968, amending the 1924 Convention of Bills of Lading, signed at Brussels as a result of efforts of the Comité Maritime Inter national. The Protocol deals chiefly with raising the limits of liability of the carrier.

84. Some of the problems concerning bills of lading, that need remedying, are as follows :

(i) Dr. T. K. Thommen, in his report on "International Legislation on Shipping" expresses the view that the 1924 Convention was intended to apply to both outward and inward bills of lading. He points out that the Carriage of Goods by the Sea Act of 1924 of the U.K., adopting the Hague Rules, provides in Section 1 that the Rules shall apply only to "ships carrying goods from any port in Great Britain". He further states : "As the Act has no application to inward bills of lading, a carrier of goods consigned to persons in England can avoid the Hague Rules by excluding any reference to the Rules and by referring to English Law as the proper law of the contract. Similarly, in respect of an outward bill of lading, it would seem that, in view of the Privy Council decision in the *Vitae Food Products* v. *Unus Shipping Co.*, a carrier can avoid the Hague Rules by choosing the law of a foreign State as the proper law of the contract and by not referring to the Hague Rules in the bills of lading unless the foreign law applies to both inwards and outwards bills of lading and the shipment is to that State. This is a striking example of the effect of a Convention being whittled down by partial adoption and divergent interpretation".

(ii) At the Second Session of the UNCTAD, Mr. Khalil of the U.A.R. expressed the view that the 1924 Convention was adopted at a time when most of the present developing countries were under colonial

rules, so that the Convention mainly served the shipowners' interests. He also referred to the inadequacy of the Convention and the practices relating to bills of lading, and conflicts between charter-party and bill of lading.[167] The 1924 Convention needs revision so as (a) to remedy the vagueness of certain provisions of the Convention, and (b) to fill in certain gaps which appear to exist in the Convention in regard to shipowner's freedom of action in regard to clausing of the bill of lading. It may also be necessary to deal with the problem of conflict between charter-party and bill of lading and to examine the advisability of compulsorily applying the Hague Rules to the bills of lading, as is done in the Netherlands in cases where the Netherlands Code is applicable. The question of clausing the bills of lading, so as to avoid "dirtying", which impairs its negotiability, may also be looked into.

(iii) (a) Many difficulties are encountered by cargo owners when receiving goods from a chartered vessel under a bill of lading containing a "demise clause". (b) Also it is necessary to clarify as to how much reliance the receivers of cargo and third party endorsees can place on the statements in bills of lading as to how much cargo has been shipped. (c) Cargo owners are also placed at a financial disadvantage when strike or similar esculpatory clauses in the bills of lading often apparently entitles shipowners to discharge their cargo at ports other than the port of destination, leaving to the cargo ownert he risk and expense of removing his goods to the original port mentioned in the bill of lading. (d) Another difficulty relates to jurisdiction clauses inserted in many standard bills

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167. While speaking before the Fourth Committee of the UNCTAD. Doc. TD/II/C. 4/SR. 14.