INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

CONSTITUTION OF THE MARITIME SAFETY COMMITTEE OF THE INTER-GOVERNMENTAL MARITIME CONSULTATIVE ORGANIZATION

ADVISORY OPINION OF 8 JUNE 1960

1960

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

COMPOSITION DU COMITÉ DE LA SÉCURITÉ MARITIME DE L'ORGANISATION INTERGOUVERNEMENTALE CONSULTATIVE DE LA NAVIGATION MARITIME

AVIS CONSULTATIF DU 8 JUIN 1960

This Opinion should be cited as follows:

"*Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization, Advisory Opinion of 8 June 1960: I.C.J. Reports 1960, p. 150.*"

Le présent avis doit être cité comme suit:

« *Composition du Comité de la Sécurité maritime de l'Organisation intergouvernementale consultative de la Navigation maritime, Avis consultatif du 8 juin 1960: C. I. J. Recueil 1960, p. 150.* »

Sales number 229
N° de vente : 229

INTERNATIONAL COURT OF JUSTICE

1960
8 June
General List:
No. 43

YEAR 1960

8 June 1960

CONSTITUTION OF THE MARITIME SAFETY COMMITTEE OF THE INTER-GOVERNMENTAL MARITIME CONSULTATIVE ORGANIZATION

Interpretation of Convention for Establishment of Inter-Governmental Maritime Consultative Organization.—Conditions for election to Maritime Safety Committee.—"Largest ship-owning nations".—"Important interest in maritime safety".—Compliance with latter qualification implied in case of largest ship-owning nations.—Meaning of "elected" in Article 28 (a) *of Convention.—Words connoting objective test excluding discretionary choice.—Registered gross tonnage as criterion.*

ADVISORY OPINION

Present: President KLAESTAD; *Vice-President* ZAFRULLA KHAN; *Judges* BASDEVANT, HACKWORTH, WINIARSKI, BADAWI, ARMAND-UGON, KOJEVNIKOV, MORENO QUINTANA, CÓRDOVA, WELLINGTON KOO, SPIROPOULOS, Sir Percy SPENDER, ALFARO; *Deputy-Registrar* GARNIER-COIGNET.

In the matter of the Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization,

THE COURT,

composed as above,

gives the following Advisory Opinion:

By a letter dated 23 March 1959, filed in the Registry on 25 March, the Secretary-General of the Inter-Governmental Maritime Consultative Organization informed the Court that, by a Resolution adopted on 19 January 1959, a certified true copy of which was transmitted with the Secretary-General's letter, the Assembly of the Inter-Governmental Maritime Consultative Organization had decided to request the Court to give an Advisory Opinion on the question set out in the Resolution, which was in the following terms:

> *"The Assembly*
>
> *Considering* that differences of opinion have arisen as to the interpretation of Article 28 *(a)* of the Convention for the Establishment of the Inter-Governmental Maritime Consultative Organization;
>
> *Considering* that the Convention provides in Article 56 that questions of law may be referred to the International Court of Justice for an advisory opinion;
>
> *Resolves*
>
> To submit to the International Court of Justice, in accordance with Article 65, paragraph 2, of its Statute, a request for an advisory opinion on the following question of law:
>
> Is the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization, which was elected on 15 January 1959, constituted in accordance with the Convention for the Establishment of the Organization?
>
> *Instructs* the Secretary-General to place at the disposal of the Court the relevant records of the First Assembly of the Organization and its Committees; and in accordance with Article IX of the Agreement between the United Nations and the Inter-Governmental Maritime Consultative Organization to inform the Economic and Social Council of the United Nations of the present resolution."

In accordance with Article 66, paragraph 1, of the Statute of the Court, notice of the request for an Advisory Opinion was on 9 April 1959 given to all States entitled to appear before the Court.

The Secretary-General of the Inter-Governmental Maritime Consultative Organization having on 14 July 1959 transmitted to

the Court the documents likely to throw light upon the question, and the President considering that the States Members of the Organization as well as the Organization itself were likely to be able to furnish information on the question, those States and the Organization were on 5 August 1959 informed in accordance with Article 66, paragraph 2, of the Statute that the Court would be prepared to receive written statements from them within a time-limit, fixed by an Order of the same date, at 5 December 1959. Written statements were received on behalf of the Governments of Belgium, France, Liberia, the United States of America, the Republic of China, Panama, Switzerland, Italy, Denmark, the United Kingdom of Great Britain and Northern Ireland, Norway, the Netherlands, and India.

These written statements were communicated to the Inter-Governmental Maritime Consultative Organization and to the States Members of the Organization. Public hearings were held on 26, 27, 28 and 29 April, and on 2, 3 and 4 May 1960, when the Court was addressed by the following:

The Honourable Rocheforte L. Weeks, former Assistant Attorney-General, President of the University of Liberia, and

The Honourable Edward R. Moore, Assistant Attorney-General, representing the Government of Liberia;

Dr. Octavio Fábrega, President of the National Council of Foreign Affairs, in the capacity of Ambassador Extraordinary and Plenipotentiary on Special Mission, representing the Government of Panama;

The Honourable Eric H. Hager, Legal Adviser of the Department of State, representing the Government of the United States of America;

M. Riccardo Monaco, Professor of the University of Rome, Chief of the Department of Contentious Matters of the Ministry for Foreign Affairs, representing the Government of Italy;

Mr. W. Riphagen, Professor of International Law at Rotterdam, Legal Adviser of the Ministry for Foreign Affairs, representing the Government of the Netherlands;

Mr. Finn Seyersted, Director of Legal Affairs in the Norwegian Ministry for Foreign Affairs, representing the Government of Norway;

Mr. F. A. Vallat, Deputy Legal Adviser to the Foreign Office, representing the Government of the United Kingdom of Great Britain and Northern Ireland.

* * *

The question submitted to the Court in the Request for an Advisory Opinion, cast though it is in a general form, is directed

to a particular case, and may be formulated in the following manner: has the Assembly, in not electing Liberia and Panama to the Maritime Safety Committee, exercised its electoral power in a manner in accordance with the provisions of Article 28 *(a)* of the Convention of 6 March 1948 for the Establishment of the Inter-Governmental Maritime Consultative Organization?

The Statements submitted to the Court have shown that linked with the question put to it there are others of a political nature. The Court as a judicial body is however bound, in the exercise of its advisory function, to remain faithful to the requirements of its judicial character.

* * *

The Convention referred to in the Request for an Advisory Opinion establishes a body known as the Inter-Governmental Maritime Consultative Organization (hereinafter called "the Organization"). Its purposes are set out in Article 1 of the Convention, the most important of which is concerned with maritime safety and efficiency of navigation.

The Organization consists of an Assembly, a Council, a Maritime Safety Committee and such subsidiary organs as the Organization may at any time consider necessary, and a Secretariat.

The Assembly consists of all the Members of the Organization meeting in regular session once every two years. Among its functions is "to elect ... the Maritime Safety Committee as provided in Article 28" (Art. 16 *(d)*).

The Council consists of sixteen Members. Its principal functions are to receive the recommendations of the Maritime Safety Committee, and to transmit them to the Assembly or to the Members when the Assembly is not in session, together with its own comments and recommendations. Matters within the scope of the duties of the Maritime Safety Committee may be considered by the Council only after obtaining the views of that Committee thereon (Art. 22).

The Maritime Safety Committee's principal duties are set out in Article 29. They include the consideration of any matter within the scope of the Organization and concerned with aids to navigation, construction and equipment of vessels, manning from a safety standpoint, rules for prevention of collisions, handling of dangerous cargoes, maritime safety procedures and requirements and any other matters directly affecting maritime safety. It is called upon to maintain close relationship with such other inter-governmental bodies concerned with transport and communications as may further the object of the Organization in promoting maritime safety.

The composition of the Committee and the mode of designating its Members are governed by Article 28 *(a)* which reads as follows:

> "The Maritime Safety Committee shall consist of fourteen Members elected by the Assembly from the Members, governments of those nations having an important interest in maritime safety, of which not less than eight shall be the largest ship-owning nations, and the remainder shall be elected so as to ensure adequate representation of Members, governments of other nations with an important interest in maritime safety, such as nations interested in the supply of large numbers of crews or in the carriage of large numbers of berthed and unberthed passengers, and of major geographical areas."

* * *

The Court is called upon to appreciate whether, in not electing Liberia and Panama to the Maritime Safety Committee, the Assembly complied with that provision. For this purpose, the Court must, in the first place, recall the circumstances in which the Assembly proceeded to the election of the Committee and asked for an advisory opinion.

The Assembly began its consideration of the election of members of the Maritime Safety Committee on 14 January 1959. It had before it a working paper prepared by the Secretary-General of the Organization, headed as follows:

> "Election of Members of the Maritime Safety Committee, as provided in Article 28 of the Convention.
>
> Merchant fleet of the IMCO Members according to the Lloyd's Register of Shipping Statistical tables 1958."

Thereunder were set out, in descending order of total gross registered tonnage, the names of Members with the figures of their registered tonnage. On this list Liberia was third and Panama eighth.

The Assembly also had before it a draft United Kingdom resolution which was in the following terms:

> "The Assembly,
>
> *Desiring* to elect the eight Members of the Maritime Safety Committee which shall be the largest ship-owning nations,
>
> *Having taken note* of the list prepared by the Secretary-General (doc. IMCO/A. 1/Working Paper 5) showing the registered tonnage of each Member of the Organization

Resolves

that a separate vote shall be taken for each of the eight places on the Committee;

that the voting shall be in the order in which the nations appear in the Secretary-General's list, and

that those eight nations which first receive a majority of votes in favour shall be declared elected."

The representative of the Government of Liberia submitted both a separate draft Resolution and an amendment to that of the United Kingdom, to the effect that for the purposes of Article 28 *(a)* the eight largest ship-owning nations should be determined by reference to the figures for gross registered tonnage as they appeared in *Lloyd's Register of Shipping* current at the date of the election. He submitted that Article 28 *(a)* laid down the rules to be followed for electing members of the Committee and that these rules had to be strictly observed. Under Article 28 *(a)* the Assembly had to elect the eight largest ship-owning nations. That, he submitted, was not an election in the usual sense of the word, for once those eight nations had been determined, the Assembly was bound to elect them. The representative of Panama supported these submissions.

There was no challenge that the figures in the Secretary-General's Working Paper, which were identical with the figures shown in the latest issue of *Lloyd's Register of Shipping* and which set out country by country the gross registered tonnage of each nation, were in any way incorrect.

The Government of the United States submitted a proposal to defer the election of the Committee until the Assembly's second regular session and in the meantime to establish a provisional Committee open to all the Members of the Assembly.

The Liberian Government's amendment to the United Kingdom's draft resolution was replaced by a joint amendment of that Government and the United States of America which was essentially in the same terms. Neither the proposal of the United States nor the joint amendment was adopted by the Assembly.

At the meeting of 15 January 1959, the Assembly adopted the United Kingdom draft resolution, thus expressing, according to the terms of the Resolution, its desire "to elect the eight Members of the Maritime Safety Committee which shall be the largest ship-owning nations". The President asked the Assembly to vote on the eight countries to be elected under Article 28 *(a)* country by country in the order given in the *Lloyd's Register of Shipping Statistical Tables 1958*. Liberia and Panama failed to be elected, the votes being, respectively, eleven in favour and fourteen against, with three abstentions, and nine in favour and fourteen against, with five abstentions. Liberia and Panama abstained on the latter vote.

on the ground that from the moment Liberia failed to be elected they considered the election was null and void.

At its next meeting, held the same day, the Assembly elected the other six Members of the Committee.

After the election had taken place, the Assembly proceeded to consider a draft resolution by Liberia to the effect that the Assembly should request an advisory opinion from this Court on the legal issues which had arisen in connection with the interpretation of Article 28 *(a)*, and should ask a Committee to formulate the questions to be put to the Court and refer the matter back to the Assembly for approval. The draft Liberian resolution was approved in principle. On 19 January 1959 the Assembly adopted the Resolution set out in the Request for an Opinion.

* * *

The debates which took place prior to the election revealed a wide divergence of views on the relevant requirements of Article 28 *(a)*.

The United Kingdom representative, speaking at the seventh meeting of the Assembly, held on 14 January 1959, stated:

> "The United Kingdom delegation felt it would be wrong for the Assembly ... to pretend to ignore the essential difficulty, namely, the special position of Liberia and Panama. There was clearly no question of dealing with the problem of flags of convenience, which lay outside the limits of discussion. What the Assembly had to do was to choose eight countries which, on the one hand, had an important interest in maritime safety and, on the other hand, were the largest ship-owning nations, as these were the criteria laid down in Article 28 of the Convention."
>
> "... What the Assembly had to do was to consider how far governments were interested in maritime questions and to see to what extent they were able to make a contribution in various fields connected with safety... It was obvious that in all those fields neither Liberia nor Panama was, at the moment, in a position to make any important contribution to maritime safety..."
>
> "As to the second criterion he had mentioned, namely, relative importance as a ship-owning nation, he would emphasize that that expression was being used for the first time, but it was perfectly clear. Vessels had really to belong to the countries in question, which was obviously not the case with Panama and Liberia."
>
> "Thus, neither from the point of view of interest in maritime safety nor from that of tonnage could Liberia or Panama be included amongst the eight maritime countries referred to in Article 28 *(a)* of the Convention."

He added that according to the Convention those eight places should be allotted to the largest ship-owning nations, but that did not necessarily mean those countries whose fleets represented the

largest gross registered tonnage. The names and nationalities of the owners or shareholders of the shipping companies should not be taken into account in that connection, as that would introduce an unnecessarily complicated criterion.

The representative of the Netherlands stated that the concept of the largest ship-owning nations was not necessarily identical with that of the nations having the largest registered tonnage; on the contrary, a country's registered tonnage might in no way reflect its actual importance as a ship-owning nation.

The argument was also put forward that the members to be elected to the Maritime Safety Committee "on the strength of their tonnage" should be those nations which were in a position to make a contribution to the work of the Committee through their knowledge and experience in the field of maritime safety, which requirement Liberia and Panama did not fulfil.

For his part, the representative of the United States of America explained the way in which that country interpreted Article 28 *(a)*. He stated:

> "That Article called on the Assembly to elect from among the Member Governments which had an important interest in maritime safety the eight nations which were the largest shipowners, as shown by the statistical tables in *Lloyd's Register*... Article 28 stipulated that no less than eight should be 'the largest ship-owning nations' and not merely 'large ship-owning nations' ... they should be elected automatically."

Later he said that he could not accept the argument advanced by the United Kingdom representative to the effect that the ability of countries to contribute to the work of the Maritime Safety Committee by their expert knowledge and experience was a criterion of eligibility separate from that of status as one of the largest ship-owning nations. In no circumstances should the two nations whose combined registered tonnage represented 15 per cent. of the active fleet of the entire world be excluded from membership of the Committee.

Other States, Members of the Assembly, participated in the debate, but in so far as they expressed any views on the interpretation to be placed upon Article 28 *(a)* these appear to be reflected in the statements above referred to.

It is in these circumstances that the question whether the Maritime Safety Committee was constituted in accordance with Article 28 *(a)* comes before the Court.

* * *

The Court will now proceed to consider the answer which should be given to the question submitted to it.

One of the functions of the Assembly is, in accordance with Article 16 *(d)* of the Convention, "to elect the Members ... on the Maritime Safety Committee as provided in Article 28". The scope and character of this function of the Assembly are accordingly to be found in Article 28. This function can only be exercised under the conditions laid down by that Article.

Article 28 *(a)* provides that the fourteen Members of the Committee shall be elected by the Assembly from the Members, Governments of those nations having an important interest in maritime safety, of which not less than eight shall be the largest ship-owning nations. The remainder of the members are to be elected so as to ensure adequate representation of other nations with an important interest in maritime safety such as nations interested in supplying large numbers of crews or in the carriage of large numbers of passengers and of major geographical areas.

It has been contended before the Court that the Assembly was entitled to refuse to elect Liberia and Panama, by virtue of a discretion claimed to be vested in it under Article 28 *(a)*. The substance of the argument is as follows: The Assembly is vested with a discretionary power to determine which Members of the Organization have "an important interest in maritime safety" and consequently in discharging its duty to elect the eight largest ship-owning nations, it is empowered to exclude as unqualified for election those nations that in its judgment do not have such an interest. Furthermore, it was submitted that this discretionary power extended also to the determination of which nations were or were not "the largest ship-owning nations".

In the first place, it was sought to find in the expression "elected", which applies to all Members of the Committee, a notion of choice which was said to imply an individual judgment on each member to be elected and a free appraisal as to the qualifications of that member. This was said to apply to both the election of the eight largest ship-owning nations and to that of the remainder of six. The contention assumes a meaning to be accorded to the word "elected" and then applies that meaning to Article 28 *(a)* and interprets its provisions accordingly. In so doing it places in a subordinate position the specific provision of the Article in relation to the eight "largest ship-owning nations".

The meaning of the word "elected" in the Article cannot be determined in isolation by recourse to its usual or common meaning and attaching that meaning to the word where used in the Article. The word obtains its meaning from the context in which it is used. If the context requires a meaning which connotes a wide choice, it must be construed accordingly, just as it must be given a restrictive meaning if the context in which it is used so requires.

An example is provided in Articles 16 *(d)* and 17 *(c)* and *(d)*, where the words "elect" and "elected" are also used. Whatever the margin of choice or individual appraisal which exists in the Assembly in relation to the election of any Member of the Council, that margin of choice or appraisal is one which is no greater than is permitted by the terms of those Articles read with Article 18. The words "elect" and "elected" are construed accordingly.

So, too, in relation to the word "elected" in Article 28, where first therein appearing. Here it is used for the designation of all fourteen Members of the Committee, that is to say, of the two categories of Members, and for the first of these the words employed are "shall be" which, on their face, are mandatory. If these words involve an obligatory designation, to which question the Court will hereafter direct itself, there is an evident contrast between, on the one hand, such a designation and, on the other hand, a free choice.

If the words "of which not less than eight shall be the largest ship-owning nations" do involve an obligatory designation of such nations that satisfy that qualification, the use of the word "elected" to cover the designation of two categories, one of which would be determined on the basis of a definite and pre-established criterion whilst the other would be a matter of choice, cannot convert the designation of the eight nations into an elective procedure which would be contrary to the pre-established criterion.

In the second place it is contended that "having an important interest in maritime safety" is a dominant condition in the qualification for membership on the Committee and being one of the "eight largest ship-owning nations" is a subordinate condition. These two conditions are said to be of a cumulative character with the possession of "an important interest" as the controlling requirement. According to this view fulfilment alone of the condition by any State of being one of the eight largest ship-owning nations does not by itself confer eligibility on a Member State to be appointed to the Committee inasmuch as, it is contended, the word "elected" connotes a discretion in the Assembly to choose from among those qualified under the condition of having an important interest in maritime safety.

It is further claimed that the words "ship-owning nations" have a meaning which embraces consideration of many factors, and that the Assembly was, in the exercise of its discretion, entitled to take those factors into account in the election of the Committee.

* * *

The words of Article 28 *(a)* must be read in their natural and ordinary meaning, in the sense which they would normally have in their context. It is only if, when this is done, the words of the

Article are ambiguous in any way that resort need be had to other methods of construction. (*Competence of the General Assembly for the Admission of a State to the United Nations, I.C.J. Reports 1950*, p. 8.)

From the terms of Article 28 *(a)* it is clear that the draftsmen deliberately contemplated that the preponderant control of the Committee was in all circumstances to be vested in "the largest ship-owning nations". This control was to be secured by the provision that not less than eight of the fourteen seats had to be filled by them. The language employed—"of which not less than eight shall be the largest ship-owning nations"—in its natural and ordinary meaning conveys this intent of the draftsmen.

The words "having an important interest in maritime safety" clearly express a qualification for membership on the Committee which is required of each group referred to in Article 28 *(a)*. But, in the context of the whole provision, possession of this interest is implied in relation to the eight largest ship-owning nations as a consequence of the language employed. This particular condition of being one of the eight such nations describes the nature of the required interest in maritime safety and constitutes that interest.

This interpretation accords with the structure of the Article. Having provided that "not less than eight shall be the largest ship-owning nations", the Article goes on to provide that the remainder shall be elected so as to ensure adequate representation of "other nations" with an important interest in maritime safety—nations other than the eight largest ship-owning nations, "such as nations interested in the supply of large numbers of crews" etc., as contrasted with "the largest ship-owning nations". The use of the words "other nations" and "such as" in their context confirms this interpretation.

The argument based on discretion would permit the Assembly, in use only of its discretion, to decide through its vote which nations have or do not have an important interest in maritime safety and to deny membership on the Committee to any State regardless of the size of its tonnage or any other qualification. The effect of such an interpretation would be to render superfluous the greater part of Article 28 *(a)* and to erect the discretion of the Assembly as the supreme rule for the constitution of the Maritime Safety Committee. This would in the opinion of the Court be incompatible with the principle underlying the Article.

The underlying principle of Article 28 *(a)* is that the largest ship-owning nations shall be in predominance on the Committee. No

interpretation of the Article which is not consonant with this principle is admissible.

It was to express this principle that the words "of which not less than eight shall be the largest ship-owning nations" were written into the Article. These words cannot be construed as if they read "of which not less than eight shall represent (or be representative of) the largest ship-owning nations". Whichever were the largest ship-owning nations they were necessarily to be appointed to the Committee; that they each possessed an important interest in maritime safety was accepted as axiomatic; it was inherent in their status of the eight largest ship-owning nations.

* * *

The history of the Article and the debate which took place upon the drafts of the same in the United Maritime Consultative Council, which at the request of the Economic and Social Council of the United Nations drew up the text of the Convention for recommendation to Member Governments, confirm the principle indicated above.

The first draft of the Article underwent a number of changes as it evolved. As drafted in July 1946 by a Committee which met in London, it read as follows:

> "The Maritime Safety Committee shall consist of twelve Member Governments selected by the Assembly from the Governments of those nations having an important interest in maritime safety and owning substantial amounts of merchant shipping, of which no less than nine shall be the largest ship-owning nations and the remainder shall be selected so as to ensure representation for the major geographical areas. The Maritime Safety Committee shall have power to adjust the number of its members with the approval of the Council."

The nine largest ship-owning nations were self-evidently nations owning substantial amounts of merchant shipping. The first nine largest ship-owning nations were to be on the Committee in any event. In this respect the use in the original English text of the definite article "the", which is maintained throughout each draft and finds expression in Article 28 *(a)*, has a significance which cannot be ignored. It was inserted with evident deliberation. This accords with the record of the various drafts and the discussions which took place on them.

The three nations representative of major geographical areas comprising the "remainder" had to satisfy the dual qualification

both of having an important interest in maritime safety and also owning a substantial amount of shipping.

At this stage there was a deliberate intention on the part of the drafters to confine the membership of the Committee to a very limited number of nations and to have it controlled by the nine largest ship-owning nations. This is apparent in the Report of the Drafting Committee. This Report stated that the proposed Committee "will include the largest ship-owning nations" (as distinct from nations owning substantial amounts of merchant shipping) and that this "is of great importance to its successful operation". Provision was also made, it continued, "for representation of other ship-owning nations from all parts of the world" (other, as distinct from the nine largest), "thus giving recognition to the world-wide interest in the problems involved".

To have suggested that, although a nation was the largest or one of the nine largest ship-owning nations it was within the discretion of the Assembly to determine that it was not a nation "owning substantial amounts of merchant shipping" or did not have an "important interest in maritime safety" would have been unreal. Those qualifications were patently inherent in a nation being one of the nine largest ship-owning nations.

The second draft was submitted by the United States at the Conference of the United Maritime Consultative Council held in Washington in 1946. It followed the form of the first draft. Apart from substituting the word "having" for "owning" substantial amounts of merchant shipping, the substantive alteration was to omit the provision in the Drafting Committee's draft which enabled the Maritime Safety Committee to adjust the number of its Members with the approval of the Council. The proportion between the largest ship-owning nations and the remainder was to be unchangeable. There was to be no freedom for the Members of the Assembly to depart from what were contemplated to be clear provisions governing the proportion between the two.

This predominance on the Committee of the nine did not seem acceptable to some Members of the Conference, India especially, which had put forward to the Drafting Committee its own proposal which, however, that Committee had not felt empowered to substitute for the original wording of the Article because it invoked a matter of principle.

A third draft was then put forward by the Drafting Committee, which was in two versions. The first was based on the United

States' draft and, in fact, followed it word for word. It sought to restrict the whole of the membership to nations having both important interests in maritime safety and substantial amounts of shipping. The nine largest ship-owning nations spoke for themselves in terms of both these criteria but the remainder of three would have to satisfy the Assembly that they qualified under both. The intention of this draft was to confine the whole Committee to nations having substantial amounts of shipping.

The alternative draft (submitted by the Drafting Committee after discussion of the amendment proposed by India) is of special importance. It reflects the struggle of those who sought to reduce the predominance in the Maritime Safety Committee of the nine largest ship-owning nations, and to prevent it from being under the exclusive control of nations "having substantial amounts of shipping". The Indian delegate was to point out during the debate on the drafts, which took place in the United Maritime Consultative Council on 28 October 1946, that other countries "who did not actually own or have a large number of merchant vessels" had also important interests in maritime safety.

The alternative draft accordingly struck out the words "and having substantial amounts of shipping", retained the total membership at twelve, but altered the ratio between "the largest ship-owning nations" and the remainder from nine and three to seven and five.

This was the subject of debate at the meeting of the United Maritime Consultative Council on 28 October 1946.

Objection was taken by the representative of Denmark to the Indian proposal, on the ground that it meant that the Maritime Safety Committee would be composed of twelve Member Governments of which not less than seven "would have to be the largest ship-owning nations". He could not agree unless the total number were increased to fourteen, "of which nine would have to be the largest ship-owning nations". The Indian representative considered that a ratio of seven (largest ship-owning nations) to five (other nations) was a fair ratio. The United States representative said that "the underlying principle which was generally accepted by all" was that "the largest ship-owning nations should be in predominance in the Maritime Safety Committee".

In the result, the matter was held in abeyance for informal discussions between maritime experts from the United Kingdom and the United States of America and representatives of Denmark and India.

There emerged a final draft which followed the alternative draft, and which increased the total membership to fourteen, of which not less than eight were to be the largest ship-owning nations. This draft was in the following terms:

> "The Maritime Safety Committee shall consist of fourteen Member Governments selected by the Assembly from the Governments of those nations having an important interest in maritime safety, of which not less than eight shall be the largest ship-owning nations, and the remainder shall be selected so as to ensure adequate representation of other nations with important interests in maritime safety and of major geographical areas..."

This was the draft which came before the United Nations Maritime Conference at Geneva, held in February and March 1948, and a working party on Maritime Safety was set up on 27 February. At the meeting of the Working Party held on 28 February 1948, a proposal was made by India to fashion the draft along the lines of the present Article 17. It met with opposition and was rejected. India then proposed the addition to the draft article of words to the effect of those now appearing in the text of Article 28 *(a)*, namely, "such as nations interested in the supply of large numbers of crews or in the carriage of large numbers ... of passengers". This proposal was also rejected by the Working Party but was subsequently incorporated in Article 28 *(a)* after the words "of other nations with an important interest in maritime safety". The present text in all essential aspects was adopted on 1 March 1948 "subject ... to drafting changes". No further discussions are recorded and the text which presently appears in the Convention was finally adopted on 5 March 1948.

Under the first three drafts of the Article, the nine largest ship-owning nations had in any event to be on the Committee. When the subsequent drafts increased the total membership to fourteen, altered the ratio on the Committee between the largest ship-owning nations and other countries, and effected the other amendments already indicated, the intention that it should be obligatory upon the Assembly to appoint to the Committee a predominating number of the largest ship-owning nations remained constant; instead, however, of being at least the nine largest, it was to be at least the eight largest.

The determination to retain the predominance of the largest ship-owning nations finds expression in Article 28 *(a)*, the terms of which exclude the possibility of an interpretation which would authorize the Assembly to refuse membership on the Committee

to any one or more of the eight largest ship-owning nations.

It has been suggested that the word "elected" where it first appears in Article 28 *(a)* was deliberately chosen in order to confer on the Assembly a wide authority to appraise the relative qualifications of Member States for election to the Committee. The fact is, however, that this word found its way into the Article at some time between 1 March 1948, when the Article was adopted "subject ... to drafting changes", and four days after, namely, on 5 March 1948. It replaced the word "selected" which had appeared in every draft of the Article since 1946.

There was apparently no explanation for, or any discussion on, the alteration. It was a mere drafting change. If the word "elected" had the special significance sought to be attached to it, it seems unlikely that the word would have found its way into the Article in this manner.

What Article 28 *(a)* requires the Assembly to do is to determine which of its Members are the eight "largest ship-owning nations" within the meaning which these words bear. That is the sole content of its function in relation to them. The words of the Article "of which not less than eight shall be the largest ship-owning nations" have a mandatory and imperative sense and precisely carry out the intention of the framers of the Convention.

* * *

The Court must now consider the meaning of the words "the largest ship-owning nations".

In the opinion of the Netherlands Government, set out in its Written Statement, "the term 'ship-owning nations' is ... not suitable for legal analysis; it cannot be decomposed into elements which have any specific legal connotation ... even the fact that the merchant fleet, flying the flag of a particular State, is owned by nationals of that State cannot in itself qualify that State as a ship-owning nation". Registration and the right to fly the flag and national ownership of merchant vessels "may, together with other factors", it contended, "be relevant for the determination by the Assembly whether or not a State can be considered as a 'ship-owning nation' ", but "they do not either separately or jointly impress upon a State the quality required...".

The view of the Government of the United Kingdom, which appears to express the common view of that Government and that of the Netherlands, is set out in the Written Statement of the United Kingdom as follows:

> "The expression 'the largest ship-owning nations' has no apparent clear-cut or technical meaning... It is submitted that the intention of those words was to enable the Assembly in the process of election to look at the realities of the situation and to determine according to its own judgment, whether or not candidates for election to the Maritime Safety Committee could properly be regarded as the 'largest ship-owning nations' in a real and substantial sense ... these words, while intended to guide the Assembly, were at the same time deliberately framed so as to enable the Assembly to deal with the matter on the basis of the true situation and the real interest in maritime safety of the State concerned."

This submission asserts an authority in the Assembly to appraise which nations are ship-owning nations and which are the largest among them, the words "the largest ship-owning nations" providing but a guide. The Assembly would be free "to look at the realities" on the basis of "the true situation", whatever in its opinion and that of its individual members these might be considered to be. It would be bound by no ascertainable criteria. Its members in casting their votes would be entitled to have regard to any considerations they might think relevant.

If Article 28 *(a)* were intended to confer upon the Assembly such an authority, enabling it to choose the eight largest ship-owning nations, uncontrolled by any objective test of any kind, whether it be that of tonnage registration or ownership by nationals or any other, the mandatory words "not less than eight shall be the largest ship-owning nations" would be left without significance. To give to the Article such a construction would mean that the structure built into the Article to ensure the predominance on the Committee of "the" largest ship-owning nations in the ratio of at least eight to six would be undermined and would collapse. The Court is unable to accept an interpretation which would have such a result.

In order to determine which nations are the largest ship-owning nations, it is apparent that some basis of measurement must be applied. The rationale of the situation is that when Article 28 *(a)* speaks of "the largest ship-owning nations", it can only have in mind a comparative size vis-à-vis other nations owners of tonnage. There is no other practical means by which the size of ship-owning nations may be measured. The largest ship-owning nations are to be elected on the strength of their tonnage, the tonnage which is owned by or belongs to them. The only question is in what sense Article 28 *(a)* contemplates it should be owned by or belong to them.

A general opinion, shared by the Court, is that it is not possible to contend that the words "ship-owning nations" in Article 28 *(a)* mean that the ships have to be owned by the State itself.

There appear to be but two meanings which could demand serious consideration: either the words refer to the tonnage beneficially owned by the nationals of a State or they refer to the registered tonnage of a flag State regardless of its private or State ownership.

Liberia and Panama, supported by other States, have contended that the sole test is registered tonnage. On the other hand, it has been submitted by certain States that the proper interpretation of the Article requires that ships should belong to nationals of the State whose flag they fly. This submission was rather concretely expressed by the Government of Norway which suggested using the flag-tonnage as a point of departure, reducing this amount by the amount of tonnage not owned by nationals of the flag State and adding the tonnage which does belong to such nationals but is registered under a different flag.

* * *

An examination of certain Articles of the Convention and the actual practice which was followed in giving effect to them throws some light on the Court's consideration of the question.

Article 60 providing for entry into force of the Convention, and which follows the form to be found in a number of multilateral treaties dealing with safety and working conditions at sea, states:

> "The present Convention shall enter into force on the date when 21 States of which seven shall each have a total tonnage of not less than 1,000,000 gross tons of shipping, have become parties to the Convention in accordance with Article 57."

The required conditions having been fulfilled on 17 March 1958, the Convention came into force on that day. As is stated by Legal Counsel of the United Nations in a letter of 10 April 1959:

> "In so far as concerns the requirement of Article 60 that seven among the States becoming parties should 'each have a total tonnage' of the stated amount, no question was raised, and no consideration was given, as to whether the total tonnage figure of any State then a party, as indicated by Lloyd's Register, should be altered for any reason bearing upon the ownership of such tonnage."

Article 60 has a special significance. In the English text this Article speaks of certain States which "have" a total tonnage, whilst in Article 28 *(a)* the reference is to nations "owning" ships.

In the French and Spanish texts however, which texts are equally authentic, the same verb "to own" or "to possess" is used in each Article. There can be, and indeed there is, no dispute that whether the reference in Article 60 is to States which "have" the specified tonnage—as in the English text—or whether it is to States which "own" or "possess" that specified tonnage—as in the French and Spanish texts—that reference is to registered tonnage and registered tonnage only and provides an automatic criterion to determine the point of time at which the Convention comes into force.

The practice followed by the Assembly in relation to other Articles reveals the reliance placed upon registered tonnage.

Thus in implementing Article 17 *(c)* of the Convention, which provides that two members of the Council "shall be elected by the Assembly from among the governments of nations having a substantial interest in providing international shipping services", the Assembly elected Japan and Italy. This was done after it had been reported to the Assembly that the representatives of the Members of the Council who were required under the terms of Article 18 to make their recommendation to the Assembly had

> "therefore examined the claims of countries having a substantial interest in providing international shipping services. They did not feel that they should propose to the Assembly a long list of candidates, as two countries clearly surpassed the others in size of their tonnage; they recommended the election of Japan (with tonnage of about 5,500,000 tons) and of Italy (with a tonnage of nearly 5,000,000)."

The tonnages mentioned are those recorded in the list of the Secretary-General of the Organization, which was before the Assembly in the election under Article 28 *(a)* and which is none other than a copy of *Lloyd's Register of Shipping for 1958*. The registered tonnages of the two countries were taken as the appropriate criterion, there was no suggestion of any other. There were only two Members to be elected under Article 17 *(c)* and there were only two recommendations to the Assembly.

The apportionment of the expenses of the Organization amongst its Members under the provisions of Article 41 of the Convention is also significant. Under Resolution A.20(I) adopted by the Assembly of the Organization on 19 January 1959, the assessment on each Member State was principally "determined by its respective gross registered tonnage as shown in the latest edition of *Lloyd's Register of Shipping*". Those States whose registered tonnages were the largest paid the largest assessments.

Furthermore, the Assembly, when proceeding to elect the eight largest ship-owning nations under Article 28 *(a)*, took note of the Working Paper prepared by the Secretary-General of the Organi-

zation which embodies a list of the ship-owning nations with their respective registered tonnages formulated on the basis of *Lloyd's Register*. Liberia and Panama, countries which were among the eight largest on the list, were not elected by the Assembly but countries which ranked ninth and tenth were elected.

This reliance upon registered tonnage in giving effect to different provisions of the Convention and the comparison which has been made of the texts of Articles 60 and 28 *(a)*, persuade the Court to the view that it is unlikely that when the latter Article was drafted and incorporated into the Convention it was contemplated that any criterion other than registered tonnage should determine which were the largest ship-owning nations. In particular it is unlikely that it was contemplated that the test should be the nationality of stock-holders and of others having beneficial interests in every merchant ship; facts which would be difficult to catalogue, to ascertain and to measure. To take into account the names and nationalities of the owners or shareholders of shipping companies would, to adopt the words of the representative of the United Kingdom during the debate which preceded the election, "introduce an unnecessarily complicated criterion". Such a method of evaluating the ship-owning rank of a country is neither practical nor certain. Moreover, it finds no basis in international practice, the language of international jurisprudence, in maritime terminology, in international conventions dealing with safety at sea or in the practice followed by the Organization itself in carrying out the Convention. On the other hand, the criterion of registered tonnage is practical, certain and capable of easy application.

* * *

Moreover, the test of registered tonnage is that which is most consonant with international practice and with maritime usage.

Article 28 *(a)* was drawn up by maritime experts who might reasonably be expected to have been acquainted with previous and existing conventions concerned with shipping and dealing with safety at sea and allied subjects. In such conventions a ship has commonly been considered as belonging to a State if it is registered by that State.

The Load Line Convention of 1930 affords a suitable example. Article 3 thereof provides:

> "*(a)* a ship is regarded as belonging to a country if it is registered by the Government of that country;
>
> *(b)* the expression 'Administration' means the Government of the the country to which the ship belongs...".

A similar provision was to be found in Article 2 of the Convention for the Safety of Life at Sea, 1929.

Among other international conventions which acknowledge the same principles are the Brussels Conventions of 1910 respecting Collisions, and Assistance and Salvage at Sea; the Conventions for the Safety of Life at Sea of 1914 and 1948, and the Convention for Prevention of Pollution of the Sea by Oil, 1954. Numerous bilateral treaties also give expression to it.

The Court is unable to accept the view that when the Article was first drafted in 1946 and referred to "ship-owning nations" in the same context in which it referred to "nations owning substantial amounts of merchant shipping", the draftsmen were not speaking of merchant shipping belonging to a country in the sense used in international conventions concerned with safety at sea and cognate matters from 1910 onwards. It would, in its view, be quite unlikely, if the words "ship-owning nations" were intended to have any different meaning, that no attempt would have been made to indicate this. The absence of any discussion on their meaning as the draft Article developed strongly suggests that there was no doubt as to their meaning; that they referred to registered ship tonnage. It is, indeed, not without significance that about the time the draft Article was finally settled, *Lloyd's Register for 1948* listed as belonging to the various countries of the world the vessels registered in those countries and that under the heading "Countries where owned" there were given the number and gross tonnage of vessels which are the same as those registered under the flag of each nation indicated.

* * *

The conclusion the Court reaches is that where in Article 28 *(a)* "ship-owning nations" are referred to, the reference is solely to registered tonnage. The largest ship-owning nations are the nations having the largest registered ship tonnage.

The interpretation the Court gives to Article 28 *(a)* is consistent with the general purpose of the Convention and the special functions of the Maritime Safety Committee. The Organization established by the Convention is a consultative one only, and the Maritime Safety Committee is the body which has the duty to consider matters within the scope of the Organization and of recommending through the Council and the Assembly to Member States, proposals for maritime regulation. In order effectively to carry out these recommendations and to promote maritime safety in its numerous and varied aspects, the co-operation of those States who exercise jurisdiction over a large portion of the world's

existing tonnage is essential. The Court cannot subscribe to an interpretation of "largest ship-owning nations" in Article 28 *(a)* which is out of harmony with the purposes of the Convention and which would empower the Assembly to refuse Membership of the Maritime Safety Committee to a State, regardless of the fact that it ranks among the first eight in terms of registered tonnage.

It was contended in the course of the arguments that the Assembly, in assessing the size, in relation to ship-owning, of each country, was entitled to take into consideration the notion of a genuine link which it was claimed should exist between ships and the countries in which they are registered. Article 5 of the unratified Geneva Convention on the High Seas of 1958 was invoked in support of this contention. That Article itself provides:

> "Each State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag..."

The Court having reached the conclusion that the determination of the largest ship-owning nations depends solely upon the tonnage registered in the countries in question, any further examination of the contention based on a genuine link is irrelevant for the purpose of answering the question which has been submitted to the Court for an advisory opinion.

The Assembly elected to the Committee neither Liberia nor Panama, in spite of the fact that, on the basis of registered tonnage, these two States were included among the eight largest ship-owning nations. By so doing the Assembly failed to comply with Article 28 *(a)* of the Convention which, as the Court has established, must be interpreted as requiring the determination of the largest ship-owning nations to be made solely on the basis of registered tonnage.

For these reasons,

THE COURT IS OF OPINION,

by nine votes to five,

that the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization, which was elected on 15 January 1959, is not constituted in accordance with the Convention for the Establishment of the Organization.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this eighth day of June, one thousand nine hundred and sixty, in two copies, one of which will

be placed in the archives of the Court and the other transmitted to the Secretary-General of the Inter-Governmental Maritime Consultative Organization.

(Signed) Helge KLAESTAD,
President.

(Signed) GARNIER-COIGNET,
Deputy-Registrar.

President KLAESTAD and Judge MORENO QUINTANA append to the Opinion statements of their dissenting opinion.

(Initialled) H. K.
(Initialled) G.-C.