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Course Material

P.G. DIPLOMA
(ADVANCED MARITIME LAWS)

1.2.5. INTERNATIONAL TRADE AND MARINE TRANSPORT SERVICES

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INTRODUCTION TO INTERNATIONAL TRADE LAW

International trade is mainly concerned with the economic exchanges or trade relations occurring worldwide. International trade law includes the appropriate rules and customs for handling trade between countries or between private companies across borders. It concentrates on the challenges and prospects of global trade. International trade is basically exchange of goods, services etc. across international borders or territories. Over the past two decades it has become one of the fastest growing areas of international law.

The body of rules for transnational trade in the 21st century derives from medieval commercial laws called the lex mercatoria and lex maritima — respectively, “the law for merchants on land” and “the law for merchants on sea.” Modern trade law (extending beyond bilateral treaties) began shortly after the Second World War, with the negotiation of a multilateral treaty to deal with trade in goods: the General Agreement on Tariffs and Trade (GATT). International trade law is based on theories of economic liberalism developed in Europe and later the United States from the 18th century onwards.

Definitions of International Trade Law

It can be defined as the economic activity of buying and selling where the transaction crosses a border or cross border transaction. So it is basically cross border sale of goods. Now the cross border sale of goods is not limited to the role of commodities or manufactured goods, it also includes services or may involve the movement of capital from one state to another through loans or investment. Hence international trade is concerned with the movement of goods, services, capital and in some circumstances labor across the borders.

Prof. Schwarzenberger defines it as “a branch of public international law that encompassed such matters as the ownership and exploitation of natural resources, the production and distribution of goods, invisible economic and financial transactions and currency and finance.”

International trade law is not about the relations of the states. Trade is not interstate activity. Trade is about voluntary exchange between individuals that takes place across borders and the regulations of international trade is concerned with limitations on the ability of states to interference with these cross border exchanges. In other words the starting assumption of the modern international regulations of trade is that the borders and other barriers to cross border economic exchange must be limited, if not eliminated. International Trade is concerned with removing the impediments that sovereignty places in the way of trading across borders or international trade is about the irrelevance of the sovereignty of states. So, it can be said that states impede trade development.

Similarities & Distinctions between the International Economic Law, International Trade Law, International Business Law and International Commercial Law

International Economic Law

A broad interpretation of international economic law could encompass both the conduct of sovereign states in international economic relations, and the conduct of private parties involved in cross-border economic and business transactions. This interpretation evolved as economic interrelationships among countries continue to grow, and new challenges appear on the horizon.

When it comes to sources of International Economic Law it is not derived from a single source, but it has its genesis in many. National, regional, and international law (public and private), policy and customary practices are all components of international economic law. International economic law encompasses a wide spectrum of subjects including trade in goods and services, financial law, economic integration, development law, business regulation and intellectual property. This expansive scope presents a challenge for identifying relevant information.

General Issues covered in International Economic Law include: Markets, Interdependency, Role of States Intervention & Non-Intervention, Economic Development, Trade Theories, and Permanent Sovereignty over natural resources, Nationalization and Expropriation of foreign owned property.

Scope:

1. It covers broad subjects like the Law of Economic Transactions, Government Regulations of Economic Matters and Related Legal Relationships including Litigation and International Institutions for Economic Relations.
2. Int. Economic Law cannot be separated or compartmentalized from general or public Int. Law. The activities and cases relating to IEL contain much practice, which is relevant to general principles of Int. Law.
3. George Schwarzenberger said, “IEL as a branch of Public Int. Law that encompassed such matters as the ownership and exploitation of natural resources, the production and distribution of goods, invisible economic or financial transactions and currency and finance. [**** he emphasized economic sovereignty].
4. Ignaz Seidl, Hohenveldern, says, “IEL, in its widest meaning, refers to those rules of Public Int. Law, which directly concern economic exchange between the subjects of Int. Law. [****he expanded the scope by saying, economic exchanges involve not only states but also multilateral enterprises or arrangements between states and nationals of other states. He has emphasized on relative sovereignty].

International Trade Law

International trade law focuses on how countries conduct trade in goods and services across national borders. The international, regional and national organizations address the export and import issues that arise in the international trade in goods and services. Institutions also provide assistance and support through market and country reports, and economic analyses promoting international trade.

Definitions

Int. Trade is all about the economic activity of buying and selling where the transactions cross a border or cross-border Sale of Goods. However, cross-border exchanges are not only limited to Sale of Goods but also movement of services, Capital and Labor etc.

General Issues

Tariff Regulations, Cross-border transactions including movement of services, Capital and Labor. Subsidies, Anti-Dumping.

Institutions

International Trade law is developed and regulated by various institutions with specific objectives of combating the aforementioned general issues. These institutions include ITO, GATT, and WTO.

International Financial and Development Law

International Financial Law considers the role of central banks including regional banks in international economic relations and the development of economic and monetary policy. This is achieved through institutional mechanisms such as International Monetary Fund (IMF), Organization for Economic Co-operation and Development (OECD) etc. The general issues that are covered in International Financial Law are balance of payment, foreign exchange, inflation, etc.

International Development Law on the other hand aims to promote social and economic development through program and financial assistance to developing countries. This is achieved through institutional mechanisms such as:

- The World Bank Group: The World Bank comprises of the International Bank for Reconstruction and Development (IBRD) and the International Development Association (IDA) and International Centre for Settlement of Investment Disputes (ICSID) that offers loans, advice, and other resources to over 100 developing countries.

- Regional Development Banks: Asian Development Bank (ADB), European Bank for Reconstruction and Development (EBRD), Islamic Development Bank (IDB), United Nations - Regional Cooperation for Development.
- UN & its Initiative on Global Development: Group of 77 (G-77), United Nations Conference on Trade and Development [UNCTAD], United Nations Industrial Development Organization (UNIDO).

Private International Trade Law

Private international law is also commonly referred to as conflict of laws. When dealings or commercial transactions between individuals take place in the international arena, private international law is that body of conventions, model laws, and legal instruments that help to regulate these interactions. Private international law often dictates whether the private laws of the home country or the foreign country are applicable to cross-border transactions. Private international law initiatives that work towards harmonization of laws relating to cross-border commercial transactions include United Nations Commission on International Trade Law (UNCITRAL) - Conventions, Model Laws and other Texts, The Hague Conference and International Institute for the Unification of Private Law [UNIDROIT].

International Business Law

International Business Law basically deals with Antitrust/competition concerns, the environment, emerging issues in electronic commerce, and taxation. The resources of regulation include national laws, government agency rules, policies, guidelines, and the status of a country in relation to pertinent treaties or international conventions. International Business Law includes European Commission- Competition, US Antitrust Laws— The Sherman Act, 1889, Indian Competition Act etc.

International or Transnational Commercial Law

Central arrangements for International Sale of Goods are setting a legal context generally known as International or transnational Commercial Law. Modern Int. Commercial law has evolved through the principles of Lex Mercatoria-Law of Merchants. This means, a medieval body of customary rules that were used in international commercial transactions to supplement the then incomplete commercial law of states. Before the rise modern state system, the Lex Mercatoria was common in all European States. This law that was applied in settling the merchants disputes through their own courts, known as, Pepowder Courts, Which operated like modern Private International Arbitration.

In 19th & 20th Century states developed their own commercial laws. For example, Uniform Commercial Code in USA; The Sale of Goods Act in Britain; Code of de Commerce in France. Codification and development of commercial law also started.

Relation between Int. Law & Int. Economic & Trade Law

1. International Trade law was not seen as state practice because it was a transaction between individuals. Whereas principles of International law evolved or emerged from state practice.
2. Economic and Trade law is treaty based not customary law. Whereas Int. Law is based on customary principles.
3. Int. Trade law is based on promotion on individual economic exchange and promotion of individual welfare. Whereas int. law is based on state centric or state oriented i.e., relations between states--- [***State Welfare].
4. Int. law is based on the concept of state sovereignty or political sovereignty. Whereas economic and trade law are based on economic sovereignty.
5. Territorial or State borders are important to Int. law. Whereas Int. trade law is about getting rid of state and state borders.
6. According to Prof. Carreau, "classical IL was founded on the notion of state sovereignty. Whereas the concept of interdependence is fundamental to economic and trade law".
7. According to Prof. Colliard, "there were Int. economic relations, organizations and there were int. rules about both (Int. Law & Int. Economic law) and thus reality of Int. Economic law is beyond question.

Why do we need to study International Trade Law?

Countries are endowed by nature with different elements of productive power. It is inevitable when there are differences in the countries regarding minerals, natural vegetation, climate, soils and other physical and geographical conditions. This necessitates trade of one country with another. National laws drafted with state's economic, political and social interests cannot be applied to international transactions.

In most countries, it represents a significant share of gross domestic product (GDP). While international trade has been present throughout much of history (see Silk Road, Amber Road), it's economic, social, and political importance has been on the rise in recent centuries. Industrialization, advanced transportation, globalization, multinational corporations, and outsourcing are all having a major impact on the international trade system. Increasing international trade is crucial to the continuance of globalization. International trade is a major source of economic revenue for any nation that is considered a world power. Without international trade, nations would be limited to the goods and services produced within their own borders. So to maintain uniformity in international system, international trade law is required.

Traditional and Modern International Trade Law

a) Traditional international trade law – exchange of goods between states.
b) Modern international trade law – exchange of goods, services, capital etc. between the subjects of international law.

Advantages of International Trade

(i) Optimal use of natural resources: International trade helps each country to make optimum use of its natural resources. Each country can concentrate on production of those goods for which its resources are best suited. Wastage of resources is avoided.

(ii) Availability of all types of goods: It enables a country to obtain goods which it cannot produce or which it is not producing due to higher costs, by importing from other countries at lower costs.

(iii) Specialization: Foreign trade leads to specialization and encourages production of different goods in different countries. Goods can be produced at a comparatively low cost due to advantages of division of labor.

(iv) Advantages of large-scale production: Due to international trade, goods are produced not only for home consumption but for export to other countries also. Nations of the world can dispose of goods which they have in surplus in the international markets. This leads to production at large scale and the advantages of large scale production can be obtained by all the countries of the world.

(v) Stability in prices: International trade irons out wild fluctuations in prices. It equalizes the prices of goods throughout the world (ignoring cost of transportation, etc.)

(vi) Exchange of technical know-how and establishment of new industries: Underdeveloped countries can establish and develop new industries with the machinery, equipment and technical know-how imported from developed countries. This helps in the development of these countries and the economy of the world at large.

(vii) Increase in efficiency: Due to international competition, the producers in a country attempt to produce better quality goods and at the minimum possible cost. This increases the efficiency and benefits to the consumers all over the world.

(viii) Development of the means of transport and communication: International trade requires the best means of transport and communication. For the advantages of international trade, development in the means of transport and communication is also made possible.

(ix) International co-operation and understanding: The people of different countries come in contact with each other. Commercial intercourse amongst nations of the world encourages exchange of ideas and culture. It creates co-operation, understanding, and cordial relations amongst various nations.

(x) Ability to face natural calamities: Natural calamities such as drought, floods, famine, earthquake etc., affect the production of a country adversely. Deficiency in the supply of goods at the time of such natural calamities can be met by imports from other countries.

(xi) Other advantages: International trade helps in many other ways such as benefits to consumers, international peace and better standard of living.

Disadvantages of International Trade

Though foreign trade has many advantages, its dangers or disadvantages should not be ignored.

(i) Impediment in the Development of Home Industries: International trade has an adverse effect on the development of home industries. It poses a threat to the survival of infant industries at home. Due to foreign competition and unrestricted imports, the upcoming industries in the country may collapse.

(ii) Economic Dependence: The underdeveloped countries have to depend upon the developed ones for their economic development. Such reliance often leads to economic exploitation. For instance, most of the underdeveloped countries in Africa and Asia have been exploited by European countries.

(iii) Political Dependence: International trade often encourages subjugation and slavery. It impairs economic independence which endangers political dependence. For example, the Britishers came to India as traders and ultimately ruled over India for a very long time.

(iv) Mis-utilisation of Natural Resources: Excessive exports may exhaust the natural resources of a country in a shorter span of time than it would have been otherwise. This will cause economic downfall of the country in the long run.

(v) Import of Harmful Goods: Import of spurious drugs, luxury articles, etc. adversely affects the economy and well-being of the people.

(vi) Storage of Goods: Sometimes the essential commodities required in a country and in short supply are also exported to earn foreign exchange. This results in shortage of these goods at home and causes inflation. For example, India has been exporting sugar to earn foreign trade exchange; hence the exalting prices of sugar in the country.

(vii) Danger to International Peace: International trade gives an opportunity to foreign agents to settle down in the country which ultimately endangers its internal peace.

(viii) World Wars: International trade breeds rivalries amongst nations due to competition in the foreign markets. This may eventually lead to wars and disturb world peace.

(ix) Hardships in times of War: International trade promotes lopsided development of a country as only those goods which have comparative cost advantage are produced in a country. During wars or when good relations do not prevail between nations, many hardships may follow.

ROLE OF MARITIME TRANSPORT IN INTERNATIONAL TRADE

The maritime sector encompasses a wide range of services, the transportation of goods and passengers being the primary one. Other related services included in this sector are various port services (such as pilotage, towing and tug assistance, emergency repairs, anchorage berth and berthing services, etc.) and auxiliary or supporting services (such as storage and warehousing, maritime cargo handling services, customs clearance services, etc.). The market structure of various segments of these services is different. For example, within the shipping services, tankers and bulk carriers have competitive markets whereas liner services and coastal services are restricted by private agreements and government policies, respectively. While many countries have opened up some auxiliary services, such as storage and warehousing services to foreign service providers, custom clearance services are mostly regulated by government policies.

The maritime service industry's trade linkages are obvious and manifest: low freight rates can boost trade and greater volume of trade, can in turn, and lead to the growth in maritime services. It is now generally agreed that liberalization in this sector will foster competition, resulting in lower costs of transportation, thereby boosting international trade. However, in spite of the expected benefits of liberalizing trade in maritime services, the sector continues to witness significant barriers, such as reservation of cargoes for ships of specific flags, restrictions on foreign maritime service suppliers from having access to and operating in a market, and discriminatory access to port facilities.

The General Agreement on Trade in Services (GATS) creates possibilities for liberalizing trade in maritime transport services under a multilateral framework of rules and discipline. In the Uruguay Round negotiations, this sector witnessed relatively limited liberalization. At the end of the Uruguay Round, negotiations continued in maritime transport services along with telecommunication services, movement of natural persons and financial services. While negotiations were successfully completed in other three areas, participants could not reach an agreement on maritime services and, thus, negotiations were suspended.

Although India has the largest merchant shipping fleet among the developing countries and ranks seventeenth in the world in terms of gross registered tonnage (grt) and fifteenth in terms of deadweight tonnes (dwt), the country has not been successful in exporting its maritime services or emerging as a forerunner in the arena of international trade. Given the locational advantage, strong maritime tradition and rich hinterland, India has the potential for expanding trade in this sector. It is therefore important to identify the country's opportunities and constraints to trade in maritime transport services for the current round of GATS 2000 negotiations.

Maritime Transport Is 'Backbone of Global Trade and the Global Economy'

Following is UN Secretary-General Ban Ki-moon's message on World Maritime Day, to be observed on 29 September:

> "*Everybody in the world benefits from shipping, yet few people realize it. We ship food, technology, medicines, and memories. As the world's population continues to grow, particularly in developing countries, low-cost and efficient maritime transport has an essential role to play in growth and sustainable development.*
>
> *Shipping helps ensure that the benefits of trade and commerce are more evenly spread. No country is entirely self-sufficient, and every country relies on maritime trade to sell what it has and buy what it needs. Much of what we use and consume in our everyday lives either has been or will be transported by sea, in the form of raw materials, components or finished articles.*
>
> *Maritime transport is the backbone of global trade and the global economy.*
>
> *The jobs and livelihoods of billions of people in the developing world, and standards of living in the industrialized and developed world, depend on ships and shipping. The shipping industry has played an important part in the dramatic improvements in global living standards that have taken millions of people out of acute poverty in recent years. It will be just as critical for the achievement of the 2030 Agenda for Sustainable Development, the plan agreed by all global leaders last year for people, peace, planet prosperity and partnership.*
>
> *Yet the vast majority of people are unaware of the key role played by the shipping industry, which is largely hidden from view.*
>
> *This is a story that needs to be told. And that is why the theme for World Maritime Day 2016 is "Shipping: indispensable to the world."*
>
> *The theme focuses on the critical link between shipping and the everyday lives of people all over the planet. The International Maritime Organization plays a vital role as the international regulatory body for an industry that spans the globe.*

The importance of shipping in supporting and sustaining today's global society makes it indispensable to the world and to meeting the challenge of the 2030 Agenda for Sustainable Development."

INTERNATIONAL MARITIME TRANSPORT AND ITS GROWING ROLE IN THE GLOBAL ECONOMY

The international seaborne trade and world maritime transport in the global supply chains

Maritime transport remains the backbone of international trade and the global economy, supporting strongly the ongoing processes of globalization. It has strong position in global supply chains, deter-mining to great extent their effectiveness and elasticity (see fig. 1). In 2007, the volume of international seaborne trade reached 8.02 billion tons. It means that over 80 per cent of world merchandise trade by volume is being carried by sea. The recent growth in trading commodities volume transported by sea – a 4.8 per cent increase year-on-year – was higher than recorded in the last decades. Indeed, during the past three decades, the annual average growth rate of world seaborne trade is estimated at 3.1 per cent. Still relatively strong demand for maritime transport services is fuelled by growth in the world economy and international merchandise trade being stimulated by dynamic increase in production and consumption in the main world centers (see fig. 1). In 2007, the world gross domestic product (GDP) grew at 3.8 per cent while world merchandise exports expanded by 5.5 per cent over the previous year.

In the recent years economic growth was driven primarily by emerging developing countries and transition economies. It has proceeded, despite rising energy prices with their potential implications for transport costs and trade and despite growing global risks and uncertainties. There were many other factors determining increase in economic activity worldwide. Among them factors such as soaring non-oil commodity prices, the global credit crunch, a depreciation of the US dollar, and an unfolding food crisis should be count. The world economy and trade have, so far, sustained all these negative tendencies with sufficient resilience.

As a result of growing world economy and consequently international seaborne trade, the world merchant fleet expanded by 7.2 per cent during 2007 to 1.12 billion deadweight tons (dwt) at the beginning of 2008. It means that the world tonnage grew 1.5 times faster than the word merchandise trade in volume terms carried by sea. In 2007 historically high demand for shipping capacity was reached. The shipping industry responded to growing needs of the global supply chains by ordering new tonnage. It applied predominantly to the dry bulk vessels. All types of vessel orders were at their highest level ever, reaching over 10,000 ships with a total tonnage of almost 500 million dwt, including 222 million dwt of dry bulk carriers. Such a huge influx of new tonnage into the world fleet over recent years has contributed to the decrease in the average age of the world fleet to 11.8 years. This tendency, despite the ongoing global financial and economic crisis will be continued in the next years.

It is to some extent a result of very high dynamic of growth in container shipping. The world containership fleet reached in mid of 2008 approximately 13.5 million TEUs, of which 11.5 million TEUs were on fully cellular containerships. This fleet includes 54 containerships of 9,000 TEU and above, which are operated by five companies: CMA CGM , COSCON and CSCL, Maersk and MSC.

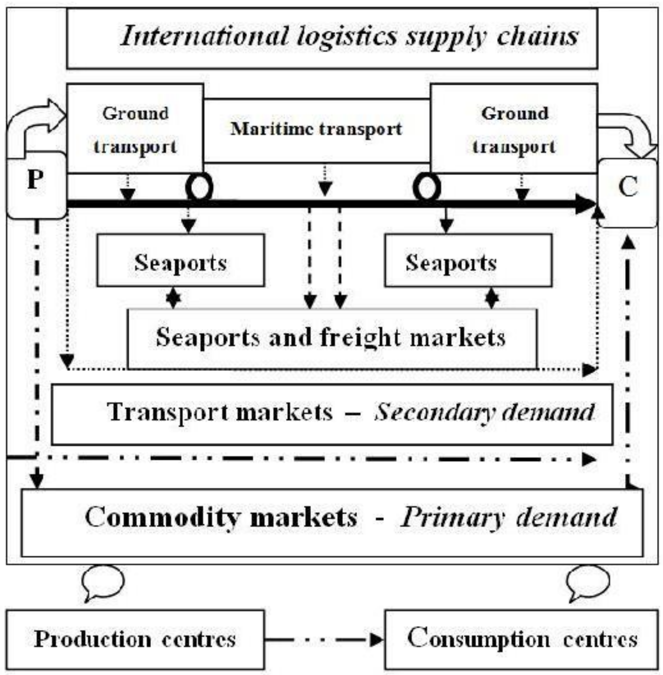


Figure 1. International maritime transport in the global logistics supply chains

The main tendencies and occurrences in the development of maritime transport in the global scale

Characteristic feature of the contemporary maritime transport, as far as vessels' ownership is concerned, is very high concentration of the world tonnage in a relatively small group of countries. As of January 2008, nationals of the top 35 ship owning countries together controlled 95.35 per cent of the world fleet. It is a slight increase over the previous year figure. All external factors unequivocally indicate that such tendency will gradually go ahead in the next years, partially as an effect of still growing international competition and already achieved position of the main shipping countries (economies of scale). Greece continues to maintain its predominant position, followed by Japan, Germany, China, and Nor-way; together, these five countries hold a market share of 54.2 per cent.

Due to the still ongoing flagging out practices in the world scale, the controlled by nationals of the ship-owning countries tonnage is, however, spread in second and many open and international registers run by foreign countries, so called *flag of convenience.* Due to that, 32 per cent of the Greek con-trolled fleet use the national flag, versus 68 per cent using foreign flags. The Japanese-controlled fleet is 93 per cent foreign flagged. The German-controlled fleet uses a foreign flag for 85 per cent of it tonnage. More than half of the German controlled fleet is comprised of containerships (50.7 million dwt). As regards the Norwegian-controlled fleet with 46.9 million dwt, which still maintaining its fifth- place ranking. 69.7 per cent of this tonnage is registered under a foreign flag, and the remaining 30.3 per cent mostly under the Norwegian International Ship Register (NIS). The Chinese-controlled fleet is 40 per cent registered in China, versus 60 per cent that uses a foreign flag.

The 35 economies with the largest fleets registered under their flag account for 1,033 million dwt, corresponding to 92.42 per cent of the world fleet. The top 5 registries together account for 49.3 per cent, and the top 10 registries account for 69.5 per cent of the world's dwt. It means that the level of concentration of worldwide flagged out tonnage and reregistered in the countries running open, international ships registers is almost similar to the group of main ship-owning (controlling) countries.

The 10 largest open and international registries that cater almost exclusively to foreign-controlled ships are Panama, Liberia, the Bahamas, the Mar-shall Islands, Malta, Cyprus, the Isle of Man, Anti-gua and Barbuda, Bermuda, and Saint Vincent and the Grenadines. Although they are in principle open to vessels from practically any country, most of them in fact specialize in some countries of owner-ship, or in certain vessel types. Among the top 35 registries, 15 cater almost exclusively for nationals of their own country. They are e.g. Greece, China, the Republic of Korea, India, Germany, Japan, Italy and the United States. A low participation of foreign-controlled tonnage may be due to two reasons. First, the country's laws may not allow for the use of its national flag if there is no adequate "genuine link" between flag and ownership. Second, although the country's registry might in theory is open to foreigners, its tax or employment regime or other regulations may make the registry unattractive to foreign ship owners. Finally, among the top 35 flags of registration, there are three "second" or "international" registries, i.e. registries that allow for the use of the national flag, albeit under conditions that are different from those applicable for the first national registry. They include notably the Norwegian International Ship Register (NIS), the Danish International Register of Shipping (DIS), and the French International Register (RIF). While the DIS is almost only used by Danish-controlled ships, both the NIS and the RIF also cater to some foreign-controlled tonnage.

The above indicated tendencies noticed in the international maritime transport on its supply- and demand side as well as in its contemporary existing regulatory mechanism, especially relating to merchant fleet distribution on the basis of tonnage ownership (real control) and vessels registration (fleet management), have great impact on world fleet operational productivity and its effectiveness. As maritime transport constitutes very important link in global supply chains, servicing the primary markets (see fig. 1), such trends and tendencies have to influence significantly efficiency and elasticity of logistics supply chains and the international seaborne trade. To examine the scope and intensity of their impact on secondary and primary markets use by global supply chains, indices of operational productivity for the world fleet need to be analyzed.

The main indexes of this kind are defined in tons and ton-miles per deadweight ton (dwt). They show the still changing relations between the growth in the supply of tonnage and the growth in total seaborne trade as well as in ton-miles performed by the world fleet, which corresponds with a distance one ton was carried over. Consequently, as the growth in the supply of the fleet outstrips the growth in total sea-borne trade (it befell e.g. in 2007) the tons of cargo carried per deadweight ton (dwt) decreases. In 2007 the global average of tons of cargo carried per dwt of cargo carrying capacity was 7.7 (see tab. 1) ; in other words, the average ship was fully loaded 7.7 times during that year. During the same year, the ton-miles performed per deadweight reached 31.6; thus, the average dwt of cargo carrying capacity transported one ton of cargo over a distance of 31,600 nautical miles in 2007, i.e. 87 miles per day.

Year	Tons carried per dwt	Thousands of ton-miles performed per dwt
1970	7.9	32.7
1980	5.4	24.6
1990	6.1	26.0
2000	7.5	29.7
2006	8.0	32.8
2007	7.7	31.6

Table 1. Operational productivity of the total world fleet in the period 1970 – 2007 (selected years)

The indices of operational productivity of the world fleet presented in tab. 1 indicate that it varies significantly on the yearly basis. It is a result of freight markets dynamic which reflects the perpetual changing in supply and demand for shipping services (fig. 1) and indirectly is connected with the level of overcapacity generated by shipping opera-tors accomplishing a strategy of flexible and efficient demand fulfillment on the highly competitive freight markets. The level of world tonnage overcapacity (tonnage oversupply) presents tab. 2.

Table 2. Tonnage oversupply in the world shipping in selected years (percentages).

Year	1990	2000	2004	2005	2006	2007
	9,7	2,3	0,7	0,7	1,0	1,1

Explaining the changing operational productivity in the world tonnage, it is worthy to note too, that ship operators usually in response to high oil prices, are interested in reduction the service speeds of their vessels, thus saving fuel. Such a strategy was typical for shipping operators, e.g. especially in liner ship-ping in 2007. However, with lower service speeds, more vessels are required on a given route, which on one hand helps to reduce overcapacity, while at the same time leading to a reduced operational productivity. Capacity constraints and congestion at ports also have a negative impact on the fleet's productivity, as ship capacity is tied up while queuing. All these factors stemming from primary and secondary markets (fig. 1) – their dynamic and forms of existing connections have influenced the level of operational productivity of the world merchant fleet.

Eventually, as regards world maritime transport development and global tendencies viewed in that sector of the world economy, it is necessary to emphasize that it generates costs to shippers, i.e. ex-porters and importers of goods carried by sea, hence determining to some extend the final commodities' prices in overseas consumption centers. Total transport costs implicating costs of carriage goods on sea routes; contribute significantly to shaping the volume, structure and patterns of trade as well countries' comparative advantages and trade competitiveness (see fig. 1).

The share of global freight payments in import value has reached on the average 5.7 per cent in the world scale in the recent five years. It was higher than it the previous years due to the fact that the rate of increase in the world total value of imports (*c.i.f*) was more than two times lower over the foregoing years than the growth rate of total freight paid for transport services. Developing countries and economies in transition have recorded the highest freight costs. Freight costs expressed as a percentage of the value of imports for both country groups, have reached almost 8.0 per cent, while developed countries have the lowest freight costs, which are estimated at ca. 5.1 per cent of the value of imports in last two years. It is a result of still existing significant diversification in the commodity structure of external trade between well and less developed countries.

While bulk trade, including tanker and dry cargo dominates world seaborne trade, containerized trade, as a fast growing market segment, is at the heart of globalized production and trade. Containerized goods are mostly manufactured goods, which tend to have higher value per volume ratios than bulk car-goes - like oil and other commodities - and travel longer distances, as they are sourced more globally. Given their higher value, on average, transport costs on valorem basis matter less for high value goods than low value raw materials. Therefore, if higher transport cost were to lead to regionalization, lower value manufactured goods (clothing, textile) would likely be much more affected than higher value goods or goods, the production of which involves significant capital or startup costs.

Higher transport costs are of more relevance for bulk cargo. To minimize the incidence of transport costs on low-value/high-volume goods, importers of bulk cargo are more likely to source from nearby providers. For example, oil requirements in the Americas are more likely to be sourced from locations such as South America or Mexico or, in Asia, from neighboring Asian oil exporting countries.

Future developments in transport costs, production and trade patterns will depend, *inter alia*, on: a/ the rise in oil prices and other relevant factors including the potential for substitution of oil by more affordable alternative sources of energy; b/ the share of transport costs in the overall production costs; c/ whether shifting production closer to the market is cost efficient, i.e. whether transport cost savings outweigh the potential rise in production costs (wage differentials, cost of energy used in production, environmental regulation) and, importantly, d/ the type of goods traded/ transported (e.g. bulk or manufactured), their value, weight, handling requirements.

MARITIME TRANSPORT SERVICES IN THE WORLD ECONOMY

During the second half of the twentieth century, globalization and improvements in transport facilities led to a significant expansion of international trade. The growth of international trade, in turn, led to the growth in maritime services since more than three-fourths of world trade volume is carried by sea.

World sea-borne trade registered its fourteenth consecutive annual increase in 1999, reaching over 5200 million tonnes in volume. It is predicted that, by the year 2005, seaborne cargo will total 5350 million tonnes. In 1999, the world merchant fleet expanded to 799 million dwt, representing a 1.3 per cent increase over the previous year. The tonnage ownership of developed countries decreased marginally by 0.3 per cent, while major open registry countries and developing countries increased their fleet by 0.3 per cent and 0.1 per cent respectively. Although ships registered in major open-registry countries are mainly owned by developed countries, the share of tonnage owned by developing countries have shown an upward trend, reaching nearly one-third of the total tonnage in 1999.

In terms of structure of the traffic, in 1997, tanker traffic (that is, the transport of crude oil and refined products) accounted for 45 per cent of the total volume of sea-borne trade, while dry bulk traffic (that is, the transport of iron ore, grain, coal, bauxite and phosphates) and liner traffic (that is, relatively high-value traffic carried by container ships, roll-on-roll-off vessels, etc.) accounted for 23 per cent and 32 per cent respectively.

World total freight payments, as a proportion of total import value (the freight factor); have shown a downward trend, falling from a high of 6.6 per cent in 1980 to 5.2 per cent in 1990 and further down to 5.1 per cent in 1998. The freight rates are, however higher for developing countries (8.1 per cent in 1998) than for developed countries (4.1 per cent). This difference in freight rates can be explained largely by the fact that the developed countries have more efficient and bigger ships that can carry larger volume of cargoes compared with developing countries and stronger competition from shipping lines serving developed markets.

There has been significant growth in containerization in the 1990s. Containership tonnage increased by 5 million dwt (9 per cent) in 1997 over the previous year. World container port traffic has increased to 165 million TEUs (twenty-foot equivalent unit) in 1998, which was 6.7 per cent over 1997. Of these, 88.5 million TEUs or 53.6 per cent were handled at the ports of developing countries. In the 1990s developing countries have been able to catch up with ports operated in advanced western maritime countries. Of the top 20 container ports in 1999, eleven are from developing and socialist countries of Asia.

Under this competitive global scenario, all countries face the challenge of continuously having to upgrade and modernize their maritime transport system in order to cope with the rapid increase in volume of cargo throughput. This requires the adaptation of new and improved technology in both the vessels as well as the landside operations of ports and land transport facilities. Economies that are not able to provide such operating environment face the risk of losing their market share. The increasing size and sophistication of ships and port facilities require heavy capital investment, which is often beyond the means of the public sectors of many developing countries. Hence, there has been an increasing shift in this sector towards privatization, global alliances and international networking.

Although governments of both developed and developing countries have acknowledged that a liberalized maritime transport sector would enable investors to freely operate shipping, port and related services and, thus, facilitate trade, economic and strategic reasons have often interfered in the process of liberalizing this sector. Consequently, this sector continues to witness a significant interplay of discriminatory and non-discriminatory regulations.

Regulations and Developments in Shipping

The market structures of tanker and dry bulk traffic are widely different from that of liner traffic. Tanker and dry bulk traffic have competitive markets. On the other hand, conferences and cartels are commonly seen in liner shipping. The first conference was formed in August 1875 by the lines trading between the UK and India (Kolkata). At present, there are around 300 conferences in the industry. The main aims of conferences are to restrict competition and ensure stability of rates. The conference members jointly set a schedule of freight rates applicable to all members. They also set the maximum frequency of sailing by each company. To safeguard their interests and enjoy a near-total monopoly, "closed conferences" vigorously deny entry to new members and cargo allocation and freight rates are imposed by the cartels themselves. "Open conferences", on the other hand, do not bar entry and exit. Although closed conferences have been banned in the US, they are still common in the UK and other European countries.

Prior to the 1970s, world liner trade was dominated by conferences controlled by the developed countries and it was very difficult for companies from developing countries to gain entry into them. Since the 1970s, the share of traffic held by conferences has diminished owing to the introduction of containerization and the emergence of independent shipping lines, including many Asian-owned lines. During this period there was a rapid growth of East Asian economies. Developing countries in Asia more than doubled their share of world ship registration from 7.8 per cent in 1980 to 16.8 per cent in 1997, while the figure for industrial countries dropped from more than 50 per cent to 27.4 per cent. These developments encouraged the shipping lines to merge their conference rights into multinational consortia. In the 1990s, competitive pressure from the developing economies and the growing demand for global logistics brought about the disintegration of the consortia and the advent of huge global alliances that united the Asia-Europe, transpacific and transatlantic trades. For example, Neptune Orient Lines (NOL) (Singapore) has taken over American President Lines (APL) (USA) and DSR-Senator Linie (Germany) has been taken over by Han Jin (Korea). These alliances go much further than traditional conference agreements, as alliance partners not only agree on uniform terms of carriage, but also share slots, terminals, container inventories, and intermodal transport depots and services as well costs and revenues. By the end of 1997 the major global and trade related alliances represented nearly 50 per cent of the world fleet. Parallel with these developments there has been a move towards privatisation of the state-owned shipping companies (for example, the Australian National Lines).

The first attempt at international regulation of the conference system was the UN Code of Conduct for Liner Conferences, which came into force in 1983 and was intended as a multilateral cargo-sharing scheme. The main aims of the code were: (a) to increase the developing countries' share in world shipping tonnage to a more equitable level; and (b) to increase their share of income generated by world liner shipping. These aims were to be achieved by reserving cargo for national flagships that may be owned by either public and/or private sector and by regulating liner trade by having shippers and/or governments represented in the newly instituted shipping lines.

The attempt of the UN Code of Conduct for Liner Conferences to open the restricted "club" of the conferences to shipping lines of developing countries through cargo-sharing agreement (the 40:40:20 formula) has largely failed because the Code was only implemented, in spite of its wide membership (more than 70 contracting parties), on a marginal part of the world traffic, between Western Europe and West Africa. By volume, this accounted for less than 3 per cent of the world liner trade.

In many countries, the conference system has coexisted within a framework of bilateral intergovernmental cargo-sharing agreements that are either the result of historical and colonial links, or developed to deal with state trading economies, such as China and the USSR. Many others, including many Asian countries have adopted the Code and signed bilateral agreements to reserve cargo for their national flagships on either a 40:40:20 or a 50:50 basis. However, in practice, these are mainly confined to government owned/contracted cargoes and were not applied to private cargoes owing to difficulties in implementation of the scheme.

Prior to the 1960s, external trade was mainly through ships flagged in the country and manned by nationals. During the 1960s and 1970s many developed countries “deflagged” their fleets, that is, transferred the ships registered in these countries to open registries, so that the ship-owners could enjoy the benefits of the low labor costs allowed by these registries. One effect of this process of “deflagging” was to effectively sever the link between flag and ownership and of the development of “third traffic” which means trade between two countries carried in ships belonging to neither. The entire developed countries' bulk fleet has now been “deflagged” as well as an increasing part of the liner fleet. To slow down this process of deflagging, at least for liner fleet, many developed countries have since the early 1980s adopted a series of fiscal measures and created “second registries” to retain the national flag. These measures also allow for more flexible conditions of manning. For instance, countries such as Norway, France, Germany, Spain, South Korea and Australia have instituted “second registries”. In Japan, a ministerial authorization is required to de-flag from the Japanese registry. If the authorization is refused, the ship-owner is entitled to a special tax treatment in compensation. Although many developed countries provide fiscal concessions such as lower rates of taxes, investment allowance, etc., only some, for example the USA, provide direct subsidies for national flagships.

In spite of a move towards liberalization and emergence of mega-carriers and mega-alliances, the global picture remains very fluid. Alliances are often unstable, their membership varies constantly and the competition authorities monitor their activities closely. For instance, shipping companies who were members of the transatlantic agreement TIACA were heavily fined in the late 1990s for illegal fixing of landleg tariffs by the competition directors of the EU. The multiplication of decisions by competition authorities (such as the grant of anti-trust immunity to tolerated outsider agreements), the individual exemptions given to consortia and the authorization of mergers often creates a risk of conflict of law.

Developments in Ports and Allied Services

The growth of international trade and increase in shipping activities have led to considerable pressure on the operating environment of major seaports and allied services. As a consequence, ports across the world are adopting new and improved technology in order to handle the increasing volume of cargo. Also, with increasing size and sophistication of ships, container ships now make only a few calls in three or four harbors at each end of the trade while the rest of the traffic is served by smaller feeder ships. This has enhanced competition among the harbors to develop as "hub" ports catering for large container ships. Since development of ports requires heavy capital investment, which is often beyond the means of the public sector, many developing countries have opened up their port sector for private and foreign investment. For instance, long-term leases, joint ventures and build-operate-transfer options are being explored and exploited in various ports, such as Jawaharlal Nehru Port Trust (JNPT), Pipavav, etc. (India); Colombo (Sri Lanka) and Karachi (Pakistan).

With these developments in shipping and port services there has been a shift towards multi-modalism and increasing use of information technology. It is essential for international trade to be supported by an efficient transport system capable of carrying goods reliably, safely and without damage or loss, providing just-in-time (JIT) door-to-door delivery of goods, and point-to-point information to all interested parties. The high volume and speed of container movement requires comprehensive and reliable control systems. The introduction of computerization and electronic data interchange (EDI) systems has greatly improved communications in this industry. Several major ports around the world such as Rotterdam, Hong Kong and New York are in the process of developing "electronic port communities" that use electronic commerce to connect various agencies involved in the movement of containers through the port including shippers, forwarders, banks, insurers, customs, terminal operators and land and ocean carriers. Increasingly, shippers are demanding full interactivity with these agencies right from the stage of handing over the cargo till it reaches the consignee at the final destination. Improvements in the capacity and reliability of inland transport systems has diverted traffic to a few large and efficient sea ports and heightened the competition between neighboring ports.

Liberalization in Maritime Transport Services

The above discussion highlights that there has been progress towards liberalizing trade in maritime transport services and various countries have unilaterally opened up this sector to facilitate trade. This move towards globalization stems not only from market forces, including those brought about by mergers and global alliances among major shipping lines, but also from technological developments and organizational changes affecting the industry.

Regional organizations have also taken initiative to liberalize the maritime sector. For example, in 1993 the OECD countries signed an "understanding on common shipping policy principles" with the newly independent states and central and east European countries. The OECD countries have also initiated dialogues with non-OECD countries to discuss strategies and targets for the GATS 2000 negotiations.

However, there are various restrictions on free and open access to maritime transport services in both developed and developing countries which limit maritime service suppliers from having access to and entering or operating in a foreign market. The European Communities of Ship owners' Association has identified some of these restrictions in their 1997–98 report. These are restricted/regulated access to port and port services, preferential cargo allocation, restrictions on establishment of owned branch offices, discriminatory measures favoring the use of national carriers, cumbersome procedure and/or personal harassment during port calls, abusive tariffs for services (often not rendered), unrealistic and unjustifiable liability claims by customs. These restrictions are primarily imposed through domestic legislation and regulation. The current round of GATS negotiations, which began in January 2000, is expected to play an important role in reducing these barriers while recognizing the freedom of member countries to regulate their maritime industry for national security and other strategic reasons.

MARITIME TRANSPORT SERVICES IN THE INDIAN ECONOMY

Maritime transport services have played a crucial role in the development of India's economy since over 90 per cent of the country's trade volume (77 per cent in terms of value) is moved by sea. The Indian peninsula is strategically located between the Atlantic Ocean in the west and Pacific Ocean in the east, with a 6,000 km long coastline, and 12 major and 139 operable minor and intermediate ports. At present, India has the largest merchant shipping fleet among the developing countries and ranks seventeenth in the world in shipping tonnage. Indian maritime services sector not only facilitates the transportation of national and international cargoes but also provides a variety of other services, such as cargo handling services, ship repairing, freight forwarding, lighthouse facilities and training of maritime personnel.

Shipping

The salient features of India's shipping policy are the promotion of national shipping to increase self-reliance in the carriage of country's overseas trade and protection of the interest of exporters and importers. India's national flagships provide an essential means of transport for the import of crude oil, petroleum products, coal and fertilizers, export of iron ore and exports and imports of various general (liner) cargoes. National shipping also provides for a second line of defence in times of emergency – merchant ships help in transporting supplies, men and material for the navy. Indian shipping makes significant contributions to the foreign exchange earnings of the country. The foreign exchange earnings/savings of Indian shipping companies increased by over 50 per cent in the 1990s. The gross foreign exchange earnings/savings increased from around Rest. 2,698 crores in 1991–92 to Rs 5,490 crores in

1998–099. The net foreign exchange earnings/savings increased from around Rs 1,558 crores to Rs 3,307 crores during the same period.

There are a few large and medium sized national shipping companies and a host of smaller companies that together carried around 30 per cent of India's overseas trade in 1999. While the share of Indian vessels in the transportation of POL products and other liquid cargo is around 55 per cent, their share in bulk and liner cargoes is 15 per cent and 11.4 per cent respectively. Shipping Corporation of India Ltd. (SCI) is the largest shipping company in India and is publicly owned. In June 2000, SCI owned 115 ships (99 overseas vessels and 16 coastal vessels) and accounted for around 45 per cent of the total Indian tonnage. The Great Eastern Shipping Co. Ltd. (owning 34 overseas vessels and 21 coastal vessels in June 2000); Essar Shipping Co. Ltd. (owning 10 overseas and 9 coastal vessels) and Varun Shipping Co. Ltd (owning 10 overseas vessels) are some of the large companies in the private sector.

On the eve of independence, India had only 60 vessels and the Indian shipping tonnage was 1.92 lakhs grt. In July 2000, Indian fleet comprised of 517 vessels and the shipping tonnage is 7.02 million grt (Table A4 in Appendix A.) The Ninth five-year plan has proposed a growth target of 2 million grt over the Eighth five-year plan taking the total shipping tonnage to 9 million grt.

The average age of the Indian fleet is lower than that of the world fleet (16 years compared to 19 years of the world fleet). An analysis of the age profile of Indian fleet shows that in July 2000, around half of Indian ships were in the age group 10 to 19 years, around 22 per cent were in the age group below 10 years and the remaining were in the age group of 20 years and above.

The Indian shipping industry is governed by the Merchant Shipping Act (MSA), 1958, and the Director General of Shipping is the regulatory authority for all activities of shipping, such as shipping administration, maritime safety, maritime training, examination and certification, shipping development, etc. The Director also ensures implementation of various international conventions relating to safety requirements, prevention of oil pollution and other mandatory requirements of the International Maritime Organization (IMO).

Recognizing the role of the shipping industry in the context of overall growth strategy, in general, and the promotion of trade and foreign exchange earnings, in particular, the Indian government has made several amendments to the MSA to encourage the modernization and diversification of this industry. Since the 1990s, the government has simplified the regulatory procedures for raising resources from commercial markets and external borrowing in order to facilitate the acquisition of new and second hand vessels at competitive prices. The shipping companies are now allowed to retain sales proceeds of their ships abroad and utilize them for fresh acquisition. Government approval is no longer required for raising foreign exchange loans from abroad by mortgaging the vessels with the lender. The government has also granted automatic approval for foreign direct investment up to a limit of 74 per cent and non-resident Indians (NRIs) are permitted to invest up to 100 per cent with full repatriation benefits.

Apart from cabotage, the government also provides cargo support for Indian lines by implementing the policy of buying (importing) on FOB basis and selling (exporting) on CIF basis. The government owned/controlled cargo is channeled by the chartering wing of the Ministry of Surface Transport, “Transchart”. As per this policy, the first right of refusal for carriage of such cargoes is given to Indian vessels. However, in case of non-availability of suitable Indian vessels, foreign flag vessels can be used for transportation of these cargoes.

In the past, Indian ships had to be repaired at Indian yards, which were not competitive either in terms of costs or time. This restriction has been removed and shipping companies can now get their ships repaired in any shipyard without seeking prior approval of the government. The Reserve Bank of India authorizes foreign exchange for imported capital goods for ship repair/dry docking and spares without any value limits.

Previously, shipping companies required a license from the Director General of Shipping to operate a liner service. The government has now delicensed many liner routes. Moreover, foreign ships calling at Indian ports do not require a license for overseas trade. For coastal trade, licenses are given to foreign flag vessels on a case-by-case basis as per the cabotage regulations. The government has also set up the National Shipping Policy Committee (NSPC) under the Chairmanship of Director General of Shipping to provide fiscal, financial, administrative and legislative measures for growth and development of shipping in India. The Committee submitted its report in July 1997. Following the recommendation of the NSPC, the government has made changes in the procedure of employment of Indian seafarers and has redefined the functions of the existing Seamen’s Employment Offices. Indian shipping companies have now been given freedom to select persons of their choice by having their own roster rather than going through Seamen’s Employment Offices.

Taking into account the stringent standards of training and certification of merchant marine personnel introduced by the IMO, the government has taken a positive initiative to upgrade the training institutions. In 1997, government issued the guidelines for setting up training institutes in the private sector and subsequently, many private training institutes have been set up conforming to the standards of Director General of Shipping. In order to enhance training facilities in the existing government institutes, a sum of Rs 338 crores has been proposed in the Ninth five-year plan for acquiring simulators and other advanced equipment.

Despite positive steps taken by the government and large size of its commercial fleet, India is a small player in the international shipping market and its export possibilities in this sector are, at present, quite limited. This is because India does not have adequate numbers of large modern tankers and high-speed containership. As a consequence, Indian fleet has been slow to enter the emerging shipping sector, particularly the high value, high volume container trade. This is evident from the fact that in July 2000, India had only 10 cellular container vessels which accounted for around 0.14 grt (0.18 million dwt) of Indian tonnage.

Liberalisation and reforms of the 1990s have made the environment of shipping more competitive both in terms of cargo and resource mobilisation markets. In this environment, only those industries that have developed a comparative advantage can thrive. Indian shipping lags far behind its international competitors with respect to resource mobilisation, technological modernisation and expansion. As a consequence, although the volume of India’s overseas trade has more than doubled in the 1990s, the share of Indian ships in the trade has declined. In the post-independence period the share of Indian ships in the overseas trade increased steadily to over 40 per cent in 1987–88 but thereafter declined to around 30.8 per cent in 1998–99 and their share in liner cargo is only around 14 per cent. Currently, the Indian economy is paying around Rs 15,000–18,000 crores per annum to foreign flagships which carries as much as 69 per cent of our overseas trade. The amount of outgo will increase progressively with the growth of Indian trade if the share of Indian shipping does not improve.

India is a signatory to the UN Code of Conduct for Liner Conferences, which provides for a reservation of 40 per cent of tonnage in the liner trade for domestic flagships. The Indian government has ratified the Code but has not enforced it by requisite legislation in order to allow the Indian shippers to take advantage of the low level of liner freight rates to increase exports. Also, the government feels that under the present regime of liberalisation, shippers should be given the freedom to hire vessels at competitive prices. A modified cargo support scheme was approved by the Ministry of Surface Transport in March 1994 to provide support to Indian flag vessels on three routes: India-UK-Continent (30 per cent), India-Japan/Far East (20 per cent), India-US-Atlantic/EC/Canada (25 per cent). This scheme seeks voluntary compliance of shippers and has not taken off owing to their strong opposition. The shipping industry has repeatedly pointed out that without a strong cargo support scheme, the share of Indian ships in India's overseas trade is likely to decline in the future.

Indian shipping industry is highly susceptible to recessions in the world trade and global shipping industry. For instance, in the second half of 1990s the slow growth of the Far-Eastern economies led to an over-tonnage situation and this put pressure on the freight rates. Many global shipping giants were able to sustain the falling freight rates but this adversely affected Indian shipping companies, especially the smaller ones.

In the past, manning costs were much lower in Indian ships as compared to foreign ships. However increases in salaries and overstaffing has considerably reduced this cost advantage. Even so, the retention of trained manpower for Indian ships, especially at the level of officers is becoming increasingly difficult because net take-home salary differentials between Indian and foreign shipping companies are widening. Presently, Indian floating staff working on board foreign ships do not have to pay taxes on their income as long as they are on board a vessel for over 183 days during a financial year. This is as per Section 6 of the Income Tax Act which lays down qualifications for non-resident status for Income Tax purposes. Also, floating staff working on Indian ships in the overseas circuit can obtain NRI status if they are in international waters for more than 183 days in a financial year and, hence, can save around 40 per cent of their salary. Since Indian ships visit Indian ports where long stay is a norm, it often becomes difficult to ensure 183 days in international waters. As a result, the Indian shipping companies find it difficult to retain their staff. This problem is even worse for the coastal shipping sector. The increase in pay packages of the personnel has not helped in any way to check their continuing drift to foreign flag employment where they earn their salaries in foreign currencies without any tax liabilities. On the other hand, higher salaries have affected the profitability and global competitiveness of Indian shipping companies.

Indian shipping industry has pointed out that despite its vital role in the growth and development of the country's economy and trade, shipping is not recognised as an infrastructure industry and, therefore, does not enjoy the developmental benefits that are available to other infrastructure sectors. Nor is shipping recognised as an export industry in spite of its substantial foreign exchange earnings. At present, Indian shipping is being taxed at the highest level in the world. In the 1990s the government withdrew the exemptions that were available under Section 33AC and 80I of the Income Tax Act and introduced a Minimum Alternative Tax. This has resulted in an effective tax rate of 22 per cent which may seem low compared to other domestic industries and services, but is higher than what is paid by any of India's international competitors.

Thus, the major challenges before the Indian shipping industry today are the steep competition from large and sophisticated international shipping lines, constraints on fiscal and financial front and the declining share of national shipping in the carriage of the country's overseas trade.

Ports and Allied Services

Ports have a vital role in the development of the Indian economy since they are the traditional gateway to international trade. India has 12 major ports: six on the west coast and six (including Ennore) on the east coast and 139 operable minor and intermediate ports. The major ports are under the purview of the Ministry of Shipping (previously they were under the Ministry of Surface Transport – MOST) and are governed by the Major Port Trusts Act, 1963 which enables them to conduct regulatory and commercial functions. The intermediate and minor ports are administratively under the state governments and are governed by the Indian Ports Act 1908, which delineates the regulatory power of the Port Authority. Other acts applicable to the port sector includes The Dock Workers (Regulation and Employment)

Act 1948 and Dock Workers (Safety, Health and Welfare) Act of 1986 which regulates the conditions of employment, service and other matters relating to dock workers.

The traffic through Indian ports increased from 20 million tonnes in 1952 to around 80 million tonnes in 1980–81 to 287.36 million tonnes in 1998–99 (the growth in traffic between 1951 and 1996 is presented in Table A7 in Appendix A). In 1999–2000, major ports handled around 271.9 million tonnes while the traffic through minor ports was around 62 million tonnes. The Ninth five-year plan (1997–2002) stipulates a growth in traffic of 424 million tonnes through major ports in the year 2001–2002. Increase in traffic in the 1990s was primarily due to the adoption of the policy of liberalisation and export led growth, which boosted international trade. India's exports and imports grew from US$18.1 billion and US$24.1 billion, respectively in 1990–91 to about US$31.8 billion and US$36.7 billion, respectively in 1995–96 at a cumulative growth rate of around 10 per cent per year.

In 1999–2000, the bulk of traffic through major ports (116.7 million tonnes or 43 per cent) constituted of petroleum crude and liquid cargo while containerised cargo was only around 27.6 million tonnes (10 per cent). In the 1990s major ports handle around 90 per cent of the total volume of traffic and almost all of the containerised cargo calling at Indian ports. Out of the 11 major ports (excluding Ennore), six are 70 to 130 years old while four were established between 1952 and 1979. Over the years, the growth in port capacities have been inadequate to support the growing volume of cargo throughput. In the 15 year period between 1980–81 to 1994–95 the port capacity has grown only by 9.4 per cent while the growth in traffic has been 146 per cent. In spite of several port development projects initiated by the government the capacity of major ports was 258 million tonnes in 1999–00 which was much less than the 271.9 million tonnes of traffic handled by these ports.

In the 1990s minor/intermediate ports, though numerous, handle only around 10 per cent of the total traffic. However, towards the end of 1990s there has been a noticeable increase in the traffic flow through minor ports (62 million tonnes in 1999–2000 as compared to 38 million tonnes in 1998–99). The traffic through minor ports is mainly concentrated in the states of Gujarat, Maharashtra and Andhra Pradesh. These three states accounted for 48.8 million tonnes (78 per cent), 5.9 million tonnes and 3.8 million tonnes, respectively of the total traffic (which was 62 million tonnes in 1999–00), through minor/intermediate ports during the year 1999–00.

The productivity and efficiency of Indian ports, are significantly lower than that of other ports in the region (Colombo, Singapore, Hong Kong, etc.). While the Average Ship Turn Around (ASTA) time has declined from 11.9 days in 1984–85 to 4.17 days in 1999–00 and the Average Ship Berth Output (ASBO) improved from 2,314 tonnes per day to about 6,321 tonnes per day during the same period, these improvements in performances of Indian ports do not compare favourably with that of efficient Asian ports. For example, the ASTA time at

Singapore port, particularly for the container ships, is only 6–8 hours. The performances of major ports during 1999–00 is presented in Table A10 in Appendix A. One of the major constraints on the growth of India's international trade has been the low productivity and inefficiency of ports which is reflected in frequent build-up of port congestion resulting in not only loss of valuable foreign exchange paid as demurrage charges to foreign shipping companies but it also adversely affects the growth of national output.

In order to decongest the major ports, the Ninth five-year plan allocated an outlay of Rs 9,428 crores for funding various projects undertaken by the Port Trusts. Additionally, in consonance with the general policy of liberalisation and globalisation, private participation has been encouraged in both major and minor ports. By November 2000, 15 private sector projects involving an investment of about Rs 4,376 crores and capacity addition of 57.30 million tonnes have been approved by the government and are currently under different stages of implementation. It is believed that private participation would mobilise the necessary resources and improve efficiency, productivity and quality of port services and hence make them competitive in the world economy. Following areas have been identified for private sector participation in the port sector:

- Leasing out the existing assets of the ports;
- Construction and operation of container terminals, multipurpose cargo berths, and specialised cargo berths, warehousing and storage facilities, tank farms, container freight stations, and setting up captive power plants, etc.;
- Leasing of equipment for cargo handling and leasing of floating rafts from the private sector;
- Pilotage; and
- Captive facilities for port based industries.

To increase the productivity and efficiency of the ports, the government has announced the following measures:

- The power of the Port Trust Boards to sanction projects have been increased to Rs 50 crores in case of additional/new investments and to Rs 100 crores in case of replacement/renewal of assets.
- The Major Port Trust Act, 1963 was amended by Port Laws (Amendment) Act, 1997 to provide an independent Tariff Authority for Major Ports (TAMP) for fixing and revising the port tariff.
- To provide greater freedom and flexibility to the major ports, the government in the Union Budget 2000–2001 has recommended corporatization of major ports.
- In May 2000 the Major Port Trusts Act 1963 has been amended to enable the major ports to enter into joint ventures with minor ports. The joint venture between major and

minor ports can enhance the traffic handling capacity by diverting the traffic to the minor ports since the major ports have already reached a saturation level.

- The major ports are allowed to enter into joint ventures with foreign ports and foreign companies. Foreign direct investment in port projects is now allowed up to 100 per cent equity.
- An Empowered Committee on Environment Clearances (ECEC) has been constituted in the MOST to provide simplified and transparent guidelines for environment clearance for the expansion of existing port limits.

Many new port development projects have been sanctioned in the 1990s. For example, a new major port Ennore near Madras was sanctioned in April 1993. This project is financed by the Asian Development Bank, which sanctioned US$150.15 million for the project. The Chennai Port Trust is developing the Ennore Port under the “landlord” concept, that is the common infrastructure will be developed by the port, while the berths and equipment therein will be financed by private developers on a “build-operate-transfer” basis. The Ennore port has started functioning from January 2001. P&O Australia has been awarded the contract for operating container terminals in JNPT, while the Port of Singapore Authority is participating in the development of container handling facilities in Tuticorin.

In addition to initiatives taken by the central government, the governments of coastal states have also taken initiatives to develop the minor ports within their jurisdiction. Various port development programmes through private participation have been sanctioned in Gujarat, Maharashtra and Andhra Pradesh. The Pipavav and Mundra ports in Gujarat have been developed as joint ventures between the Gujarat Maritime Board (which has 26 per cent share), private sector (25 per cent) and the public (49 per cent). P&O Australia has been awarded the contract for operating container terminals in Vadhawan (Maharastra). With these efforts by different state governments and participation of private sector in port development projects, share of traffic through minor ports is likely to increase in the future.

In spite of various initiatives taken by the central and state governments, privatisation of port projects in India has been rather slow and hesitant. For instance, it has taken three years to finalise procedures and invite tenders for privatisation of JNPT container terminal. Case studies of some of the BOT port projects in India shows that private investors have not responded as affirmatively as expected owing to the tendency of the Port Trusts to demand an unreasonable share of anticipated earnings, especially during the early stages of operations. Port projects have long gestation periods and require substantial investments. Therefore, a project is commercially viable only when it generates adequate revenue to meet the operation and maintenance costs. The revenue realisation is delayed until the completion of the projects, and for non-captive facilities it is uncertain. Moreover, private investors in major ports do not have the autonomy to fix their own tariff subject to market conditions since tariffs in these ports are regulated by the TAMP. This acts as a constraint on efficiency of the operation of the projects. Also, private investors at major ports cannot implement their own employment policies as the labour hired by the privatised firms in privatised berths are subject to labour laws as defined by the Ministry of Labour. The complexity of rules, lack of a clearly defined action plan, and the long and unpredictable approval process have often made the projects commercially non-viable. A major constraint in the process of privatisation of minor ports has been the lack of adequate infrastructure facilities linking the ports and the hinterland. For instance, although Pipavav is one of the fastest growing state port in India, it is not well connected by railways. In fact, the port authorities not only offered traffic guarantee for a rail link but also agreed to partly finance the Surendranagar-Bhavnagar-Pipavav line.

India has been slow in adapting its port facilities to exploit the opportunities offered by containerisation in shipping. Indian ports started handling container traffic in 1973. Since then, there has been a significant increase in containerisation at international ports to 75–80 per cent of the trade in general cargo while in India it is around 40 per cent. With liberalisation of the economy in the 1990s and growth in international trade, the share of containerised traffic in the total general cargo is steadily increasing (Table A11 in Appendix A). The throughput of container cargo in India was 0.68 million TEUs (7.63 million tonnes) in 1991-92 and this increased to 1.9 million TEUs (24 million tonnes which is around 10 per cent of the whole traffic) in 1998–99. Nevertheless, in 1998–99 container traffic in India was only 1.2 per cent of the total world's container traffic of 164 million TEUs.

Only around 15 per cent of the total container traffic for India is shipped directly to Indian ports. For the rest, Indian ports are largely served by feeder vessels from transhipment hubs of Colombo, Singapore and Dubai. Of late, Salalah in Oman is also emerging as a transhipment port for India bound traffic. India faces stiff competition from these Asian hub ports. In 1998–99 a single port of Singapore or Hong Kong individually handled more than 10 million TEUs, while all Indian ports together handled around 1.9 million TEUs.

The main reason for the slow growth of container traffic through Indian ports is the inefficiency and lower productivity of the ports resulting in longer pre-berthing and berthing time. For instance, the number of containers handled at Indian ports per ship per hour ranges between 7 to 15 compared to 30 in Singapore and 25 in Colombo. A World Bank study in 1995 found that the throughput costs, that is, the total cost of delivery of a containerised or break bulk consignment, including stevedoring, shore handling, storage, customclearance etc., in four major ports of India (Mumbai, Calcutta, JNPT and Chennai) was 45–50 per cent higher for containerised cargo than other ports of the region (namely, Bangkok, Colombo and Singapore). The study concluded that even a moderate reduction of ship time at berth, in line with international output standards, would allow a potential savings to ships of Rs 300 crores (US$100 million) per year based on 1990–91 traffic volumes. Since the 1970s other Asian countries have invested heavily on port and port-related intermodal infrastructure capable of accommodating the latest transport and cargo transfer technology as well as the largest vessel size for their trade. For instance, between 1980 and 1995 China invested over US$18.2 billion in port and allied transport infrastructure. This has increased the efficiency and performance of the neighbouring ports, which has resulted in Indian ports being served mainly by relatively small vessels rather than by larger and more cost-efficient vessels. The feedering of the country's export and import traffic through transhipment ports not only results in a delay of at least three days but involves an additional shipping cost of US$175 to US$200 per TEU. The ultimate burden of these costs is borne by the Indian consumers and exporters.

Multimodalism is still at its nascent stage in India. Many ports in India are serving a close hinterland and operate essentially as a collection and distribution centre for their trading areas. In line with global developments, the Government of India passed the Multimodal Transport of Goods Act in 1993 which provides the legal framework for promoting intermodal transportation in this country. Foreign multimodal operators are allowed to operate under this Act. Currently, there are around 160 multimodal operators in India but none of them is for door-to-door shipment. In order to transport containers multimodally in a smooth and efficient manner, the Railways CONCOR (Container Corporation of India Ltd.) was set up in 1988 and the Central Warehousing Corporation set up a network of Inland Container Depots (ICDs) and Container Freight Stations (CFSs). In India, most of the long distance movement of containers is through the railways since the land transport does not have adequate capacity. The internal road transport systems between the ports and the hinterland were not designed for the current type and volume of traffic and without an expressway system allowing for the efficient operation of multiple axle vehicles it is difficult for road haulers to offer good container services at a reasonable price over the present heavily congested routes. Indian railways primarily concentrate on the transport of bulk cargo and do not have the necessary equipment and systems for a steady flow of container traffic. There is also a lack of periodicity and hence predictability in transportation. For instance, the railways have no fixed timetable for container trains.

Owing to this, advance planning becomes difficult. Moreover, the tariffs are not cost based and international container movement through the railways often act as cross subsidies for its passenger operations leading to high freight values. A World Bank study found that the lack of efficient door-to-door sea container operation in India has led to the shift of some sea container traffic to more costly international air cargo operations.

Inland waterways have an important role in multimodal transport in countries, such as India and Brazil, where there are several river systems interlinking ports and hinterland. The government set up the Inland Waterways Authority of India in October 1986 under the Inland Waterways Authority of India Act (1985) to regulate and develop the inland waterways transport. However, the use of this mode has been very limited owing to various problems, such as narrowing of channels and drafts as a result of heavy siltation and drying of waterways in summer, bank erosion, absence of infrastructural facilities like terminals, and inadequacy of navigational aids. Out of the total length of waterways of about 14,605 km, the length actually utilised for transportation is around 2,300 km. The share of inland waterways in the total freight traffic is less than 5 per cent.

The rapid growth of electronic commerce in recent years has brought about significant changes in the way goods are procured and transported to/from overseas destinations. In India, all major ports are now using electronic data processing (EDP) system in their internal working which includes budgeting, financial accounting, cargo accounting, billing, etc. Computer based cargo containers have been introduced in Mumbai, JNPT, Chennai and Tuticorin ports. Almost all container handling ports have on-line tracking facilities for management and control of cargo/container related operations. Despite the fact that individual ports have followed different systems for the implementation of EDI, these are largely in accordance with the global EDI standards.

Nevertheless, at present there is very little exchange of computer to computer data/ information amongst the major trading/operational partners, such as customs, ports, inland terminals and shippers involved in container trade transactions. Thus, an exporter has to deal with different agencies for processing of documents and obtaining clearances.

The carrier and logistic service providers have been able to extend only a limited inter-connectivity to the shippers. Currently there are more than 80 container handling facilities in India but only a small number of large ICDs/CFSs are using computers for processing of documents and management of terminal operations. As customMIS systems are not based on EDIFACT standards, computer interface between the ports and customs is not possible. A shipper or his representative, therefore, has to use a different format for dealing with customs and the ports. Also, the customrules are complex and subject to various interpretations. The frequent and comprehensive inspection of cargoes often leads to significant delays.

In order to make Indian ports more attractive and cost effective to shippers and shipping companies, India will not only have to develop very large container terminals and improve the productivity and capacity of her ports, but also improve port service quality and intermodal infrastructure which can efficiently serve the containerised foreign trade from door to door.

Although India has taken positive steps towards liberalising trade in maritime transport services, it is a marginal player in the world market and its export possibilities in this sector, as of now, are quite limited owing to infrastructural constraints, low productivity and efficiency and lack of sufficient funds for modernisation and expansion. On the whole, India does not have comparative advantage in maritime transport services and given the uncertain growth prospect and increasing competition from strong maritime nations, it is difficult for India to gain greater access in foreign markets.

Agreements Affecting Maritime Transport Services

In the past, India had bilateral shipping agreements with countries, such as Bulgaria, Poland and erstwhile Soviet Union. These agreements provided for the sharing of cargo with partner countries on the principles of parity and equality and supported the growth of Indian shipping companies. For example, as per the bilateral agreement between India and the Soviet Union, Indian and Soviet vessels served the trade between India and the Black Sea. This trade contributed towards substantial earnings of Indian shipping companies. With the break up of the Soviet Union, the bilateral agreements are no longer valid. Currently, India does not have any bilateral agreements but the government is considering proposals for bilateral agreements with Ukraine, South Africa, European Union, Latvia, Romania, Morocco, Vietnam, Lithuania, Egypt, South Korea and France.

India has agreements to avoid double taxation with more than 40 countries. These agreements, inter-alia, cover taxes payable on profits earned by the shipping enterprises of the contracting parties from international traffic and provide for full or partial exemption of such profits from double taxation. These agreements are oriented to encourage free flow of trade between contracting parties by providing such exemptions.

MODULE-II

Brettonwoods Institutions and International Trade

HISTORY AND DEVELOPMENT OF INTERNATIONAL TRADE LAW

Ancient Times

Trade existed before the nation states came into being and even before international law came into picture. People have always brought and sold to others outside their family or community or town. Some examples can be found in the ancient Greeks and Romans and even in the Italian city states. Douglas Irwin traced the views of ancient Greeks and Romans regarding foreign trade. They reflected high degree of ambivalence about trading with foreigners for non-economic reasons. Merchants were regarded as inferior social class. Commercial activity was considered as a disruption of to domestic life exposing the citizens to bad manners and corrupt morals of barbarians. Plato acknowledged the gains from division of labor but the writers were reluctant to extend this view to foreign trade. The doctrine of universal economy was developed by some philosophers according to whom God has created sea, geographic separation and diversity in endowments in order to promote foreign trade. Imposition of tolls and some agreements existed between the city states. For ex: - In 2500 B.C. a commercial treaty existed between the King of Egypt and Babylonia.

Medieval Times

Trade regulations were mainly governed by lex mercatoria (law of merchants). As to the origin of lex mercatoria it is not certain as some thinkers assert that it originated in Italy while other believe that it came from the Romans. Under Roman law there was jus gentium i.e. the law governing the economic relations between the foreigners and Roman citizens. Lex mercatoria originated from the international economies relations flourishing in Western Europe in the 11th century.

Lex mercatoria has been variously described by its advocates as “a set of general principles and customary rules spontaneously referred to or elaborated in the framework of international trade, without reference to a particular national system of law.” It is also explained as “a hybrid legal system finding its sources both in national or international law and in the vaguely defined region of general principles called ‘Transnational law’“

Mercantile law is a cosmopolitan law based on customary rules applied to cross border disputes by the merchant tribunals of various Europeans trade centers. Italian city commercial law is found mainly in the statutes of merchant guilds. It was binding on all who traded within the city. Guild councils had power to deal with the case. Fairs used to be held and this contributed to the development of the merchant law.

Modern Times

The era of modern international trade law started in the late 17th century and gained momentum in the beginning of the 18th century. At the start of the modern era the practice of mercantilism still prevailed, mainly because of the colonies. Various countries like U.K., France, and Portugal etc. depended on their colonies for the growth of their trade and economies. The trade was mainly conducted by the various trading companies established for this purpose, who in turn paid royalty to their respective governments.

In 19th century the belief in free trade started gaining ground, especially in England. After India came under the direct control of the British government, the monopoly of East India Company was done away with. Likewise free trade was encouraged in other colonies of Britain. Free trade is usually most strongly supported by the most economically powerful nations, though they often engage in selective protectionism for those industries which are strategically important. Like at present it is done by the U.S.A. in matters of agricultural produce.

However, the Great Depression in the United States in 1919 saw the decline in the concept of free trade. All those countries which traded with the United States were also severely affected. There was a growth in the policy of protectionism. Countries strived to protect their economies. Something similar is being witnessed even today. The pangs of recession in U.S.A. have again affected the world economy. During recessions there is often strong domestic pressure to increase tariffs to protect domestic industries.

World War I & II wreaked havoc on the economies of almost all the countries involved in the war whether directly or indirectly. Various industries collapsed. Cross border trade suffered majorly. At the end of both the wars huge reparations paid by Germany severely affected its economy. During 1917, Russian Revolution in Russia changed the way countries traded with each other and their economic structure forever. There was rise of Socialism. U.S.S.R. encouraged trade only among the States which formed it. It discouraged any contact whatsoever with the capitalist powers. After World War I League of Nations was set up to prevent future wars (though it was not successful). It set up ILO to deal with the labour relations and mandate system to deal with colonies of the defeated nations. Efforts were made to boost trade so as to encourage the war-time shattered economies. However, before the West could fully recover from the ravages of the war, it was embroiled into World War II, which caused even greater destruction. After the W.W.II many steps were taken, esp. by the Allied powers to regulate trade to boost their economies wrecked by the consequences of the war. United Nations was established to protect the "future generations from the scourge of war".

Efforts were made to establish an international trade organisation. However, for some reasons it could not be established and instead GATT was established. It was established as a temporary arrangement. However, it continued to function for some decades before it was replaced by WTO. Now various regional trade organizations have been established like MERCOSUR in South America, the North American Free Trade Agreement (NAFTA) between the United States, Canada and Mexico, and the European Union between 27 independent states to regulate trade between them.

ROLE OF TRADE THEORIES IN DEVELOPMENT OF INTERNATIONAL TRADE LAW

1) Mercantilism (16th – 18th century)

According to this theory the prosperity of a nation depends upon its supply of capital and the global volume of trade is unchangeable. Economic assets, or capital, are represented by bullion (gold, silver and trade value) held by the state, which is best increased through a positive balance of trade with other nations (exports minus imports). Country can grow rich and prosperous by acquiring more and more precious metals especially gold. So a state should direct all its economic activities towards acquiring more and more precious metals. A country should export more than what it imports. *Beggar thy Neighbour* principle. Mercantilists used tariffs to discourage imports and export subsidies to encourage exports. This led to some of the first instances of significant government intervention and control. During these times trade was hindered by narrow trade policies.

2) Theory of Absolute Advantage

Adam Smith in his book 'The Wealth of Nations' (1776) states that a nation's standard of living indicates its' wealth and not the governments stock of precious metals. According to him, a country can certainly gain by trading with other nations. He explained the 'Theory of Absolute Advantage' by saying that, "trade between the countries would be mutually beneficial, if one country, could produce one commodity, at an absolute advantage over the other country, and the other country could, in turn, produce another commodity, in an absolute advantage over the other." So a country has an absolute advantage in the production of a good relative to another country if it can produce the good at lower cost or with higher productivity. For example :- Country A produces 1 Unit of Good 'X' with 10 Units of Labour and 1 Unit of Good 'Y': 20 Units of Labour. Country B produces 1 Unit of Good 'X' with 20 Units of Labour and 1 Unit of Good 'Y' with 10 Units of Labour. Hence, when Country A and B enter into a trade agreement, Country A will specialize in the production of Good 'X', while Country B will specialize in the production of Good 'Y'.

3) Theory of Comparative Advantage

This theory was propounded by the British Economist David Ricardo ('The Principles of Political Economy', 1817). He modified the absolute advantage theory. He argues that any two countries can very well gain by trading even if one of the countries is having an absolute advantage in both the goods over another provided that the extent of absolute advantage is different in the two commodities in question, i.e., comparative advantage is greater in respect of one good than in that of the other. So a country should specialize in producing and exporting goods in which its comparative advantage is greatest or comparative disadvantage is smallest and it should export goods on which its comparative disadvantage is greatest.

Ricardo explained his theory with the help of the following example:

England produces a given quantity of cloth with the labor of 100 men and it produces a given quantity of wine with the labor of 120 men. Now, Portugal produces the same quantity of cloth with the labor of 90 men and the same quantity of wine with the labor of 80 men. So, here Portugal enjoys an absolute advantage over England in the production of both cloth and wine. That means it can produce a given quantity of cloth or wine with fewer labor inputs than England. According to the theory, trade will still be mutually advantageous when England exports to Portugal the cloth produced by the labor of 100 men in exchange for wine produced by the labor of 80 Portuguese, as England has imported wine that would require the labor of 120 Englishmen to produce. And Portugal also would gain by this transaction by exporting wine produced by 80 men's labor, than cloth that it would require 90 of her laborers to produce.

Similarly the law of comparative advantage can be explained with the help of another simpler example where a lawyer is contemplating the hiring of a typist for his law office. Here, two cases can be distinguished, first, where the lawyer's typing is totally inadequate and second, where the lawyer can type faster and more accurately than any other professional typist available in the market. Now, the comparative advantage theory relates to this second case where the lawyer is better off hiring the typist. For the lawyer the income from exporting legal services to others is greater than the cost of importing the typing services. The lawyer makes more money by specializing in the production of legal services, exporting these services and importing the typing services, than he could make by doing both the tasks himself.

Free Trade

Trade in goods and services between the countries or within countries should flow unhindered by government imposed restrictions. Restrictions include tariffs and taxes and non-tariff barriers such as legislation and quotas. Adam Smith has defined free trade as 'that system of commercial policy which draws no distinction between domestic and foreign commodities and therefore neither imposes additional burden on the latter, nor grants any special favours to the former." The advantage is that it creates income by reallocating and transferring jobs from lower productivity to the higher productivity sectors of the economy. It does not equalize the standard of living in any two countries but it makes both the countries better off in terms of real income.

Protectionism

The economic policy of restraining trade between nations, through methods such as tariffs on imported goods, restrictive quotas, trade restriction imposed by Government to discourage imports and anti- dumping laws. This policy is adopted to encourage home industries by the use of bounties or by the imposition of high customs duties on foreign products. Often criticized as harming the people it is meant to help, instead of aiding them; these critics often support free trade. However, academic economists are generally supporters of free trade.

Fair Trade

Fair Trade is an unorganized social movement and market- based model of international trade which promotes the payment of a fair price as well as social and environmental standards in areas related to the production of a wide variety of goods. The movement focuses in particular on exports from developing countries to developed countries. Most widely recognized definition of Fair Trade created by trade four international fair trade networks (Fair trade Labeling Organizations International, International Fair Trade Association, Network of European World shops and European Fair Trade Association)

"Fair trade is a trading partnership, based on dialogue, transparency and respect, which seeks greater equity in international trade. It contributes to sustainable development by offering better trading conditions to, and securing the rights of, marginalized producers and workers. Fair trade organizations (backed by consumers) are engaged actively in supporting producers, awareness raising and in campaigning for changes in the rules and practice of conventional international trade".

Free Trade v. Fair Trade

One of the most popular recent arguments in favour of protectionism is that trade should be "fair" rather than free. It is unfair that other countries protect their domestic producers or dump their products on the U.S. market at low prices. Fairness should be seen as a process. A transaction is fair if consenting adults are free to enter into it without being coerced. It is fair that consumers are able to buy foreign products without having to pay a higher price due to some government intervention such as a tariff or import quota.

Codification and Progressive Development of International Trade Law

Article 13 of the UN Charter mandates the codification and progressive development of international law. Article 13 states, "The General Assembly shall initiate studies and make recommendations for the purpose of promoting international co-operation in the political field and encouraging the progressive development of international law and its codification." The organs and specialised agencies of the UN have developed international trade law through General Assembly resolutions and international conventions in form of hard and soft law.

UN Conference on Trade and Development (UNCTAD)

UNCTAD was established by the UN General Assembly Resolution in 1964 to deal with trade, investment and development issues. It formulates principles and policies on international trade and trade related problems of economic development. It meets every 4 years to make proposals for putting policies into effect.

UN Commission for International Trade Law (UNICITRAL)

Established by UN General Assembly resolution in 1966 (Resolution 2205(XXI of 17 December 1966). It is the core legal body of the United Nations system in the field of international trade law. It codified the rules of international trade relating to international sale of goods, international payments, international commercial arbitrations and carriage of goods etc. by organizing different conventions

International Monetary Fund (IMF)

It is concerned with monetary liquidity. It was established to achieve exchange rate stability and to help member countries to finance short term balance of payments. It creates a structure for international assistance of national government activities affecting foreign exchange, including institutional means of extending ‘credit’ or ‘drawings’ to national governments for use in their dealings in foreign exchange matters.

International Bank for Reconstruction and Development (IBRD)

It facilitates the investment of capital for productive purposes to promote private foreign investment and to promote balanced growth of international trade. It lends funds for development of economic facilities. It promotes free flow of capital internationally. It gives loans to member countries or to private business enterprises.

World Trade Organisation (WTO)

It came into effect in 1995 to liberalize and supervise trade. It facilitates implementation of multilateral and plurilateral trade agreements. WTO provides a forum for negotiating among its members. Administers rules governing settlement of disputes and administers trade policy review mechanism. It co-operates with the IMF and IBRD for global economic policy making.

Regional Trade Organizations

Organisation for economic co-operation and development (OECD) – It originated in 1948 to help administer the Marshal Plan for the reconstruction of Europe after World War II. It deals with economic issues. European Union (EU) - A union of 27 states came into force in 1993. It develops policies for the freedom of movement of people, goods, services and capital. 16 of its members have developed a common currency (Euro). North American Free Trade Agreement (NAFTA) – A trilateral trade bloc created by the governments of US, Canada and Mexico. They declared North American region as free trade area.

International Non-Governmental Organizations

International Chamber for Commerce (ICC) – It promotes trade and investments across frontiers and help business corporations meet the challenges of globalization. It has close working relationship with UN and WTO. World Economic Forum (WEF) – it brings together top business leaders, international political leaders, intellectuals and journalists to discuss most pressing global economic issues. It produces research reports and engages its members in sector specific initiatives.

SOURCES AND SUBJECTS OF INTERNATIONAL TRADE LAW

Introduction

Law is a set of rules recognized and enforced by State. Sources are nothing but methods by which these rules are made in relation to International Law. Sources can be classified into Formal Sources/ Primary Sources (law creating) and Material Sources/Secondary Sources (law identifying).

A Formal/Primary Source of law is a process by which a legal rule comes into existence i.e. it is law creating. Hence in International Trade Law, Conventions, Customs and General Principles of Law are considered formal sources as these are created after following a procedure. These are also known as Hard Law Sources.

A Material / Secondary are those sources of law concerned with the substance and content of legal obligations i.e., they are law identifying. In this sense, state practice, judicial decisions, the writings of jurists and now even General Assembly Resolutions are all considered as material sources. A few mentioned here, though are not in Article 38 are considered as material or secondary sources. These can be called Soft Law Sources.

The Law of International trade Law draws from both International Laws as well as from the Domestic Laws of the states concerned. Knowing that International economic Law being a Part of classical International Law, the sources that are enumerated in Article 38, Paragraph 1, of the statute of the International court of Justice are also sources of International Economic Law. The methods by which rules have been discovered or created are known as the sources of International Law. But there has not been a codified rule as such to determine as to what are the sources of international Law. Even the International Law commission has made an attempt with regard to this. Because of the absence of a codified rule on the sources of International Law,

Article 38 of the statute of the ICJ has become relevant which directs the court to apply:

1. International convention whether general or particular establishing rules expressly recognized by the contesting states.
2. International Customs as evidence of a general practice accepted as law.
3. General Principles of law recognized by civilized nations.
4. Subject to article 59 judicial decisions and juristic works as subsidiary means for the determination of rules of law.

One of the important sources that have been introduced in the International Trade Law is the law created by International organizations and the other sources include the International economic soft Law and International development contracts.

It is Important to note that International Law is dynamic and fast changing with the Passage of time. So there has to be new sources to serve the needs of the international community more effectively.

The Classical Sources of International Trade Law

They are divided into Primary sources and secondary sources:

Primary sources include

a) International Treaties
b) International custom
c) General Principles of Law recognized by civilized Nations

Secondary sources include

a) Judicial Decisions and Juristic Works

International Conventions/Treaties

At present, International treaties are the most important source of International Trade Law. Article 38(1)(a) of the statute of the ICJ lays down that the court while deciding any dispute shall apply international conventions, whether general or particular, establishing rules expressly recognized by the contesting states, in preference to the other sources of International Law.

Treaties are Agreements between two or more states or between other subjects of International Law by which they create or intend to create relationship between themselves. They are sometimes referred to as convention, Protocol, accord etc. Thus treaties have acquired a very dominant importance in international law.

Treaties can be Bilateral, Multilateral, Regional Trade Agreements, Commodity Agreements and Constitutional Treaties such as the UN Charter or the Marrakesh Agreement.

Bilateral Treaties

These are treaties or agreements between two States or subjects of International Law. Bilateral Treaties involves treaties like the FNC Treaties and the BIT Treaties.

FNC Treaties are the Friendship, Navigation and commerce Treaties and they involve states granting each advantage in relation to imports and exports, rights of establishment and free movement of services, trade in General and rights of carriage of goods by sea.

BIT also called as the Bilateral Investment Treaties are mostly negotiated between industrialised nations and developing countries. Bilateral Investment Promotion and Protection Agreement (BIPA) is one such bilateral treaty which is defined as an agreement between two States for reciprocal encouragement, promotion and protection of investments in each other's territories by the companies based in either country.

Bilateral treaties are also concluded to avoid double taxation. These are called Double Taxation Avoidance Agreements (DTAA). Some bilateral treaties may frame specific transactions, such as loans from state to state.

Multilateral Treaties

A treaty is said to be Multilateral when it is in force between more than two parties. The multilateral treaties regulate trade between the contracting states in a more general way. Some of these treaties also grant regulatory powers to international organisations such as IMF and OECD and some others seek to unify the law in order to facilitate international trade and financing. Some of the treaties which introduce uniform law are frequently adapted to developments in international trade. E.G: On international carriage of goods by sea. A treaty is always binding on the contracting states. These treaties also aim at international standard of treatment. This plays an essential role on the international economic regulatory scene as well.

At certain circumstances a state can make "reservation" in respect of a Particular treaty Provision when it enters into a multilateral treaty, and if this reservation is valid then the treaty provision for which the reservation is made will not apply to that state.

The purpose of the treaties that create the IMF, the OECD etc is to liberalise trade between the contracting states. Other treaties are aimed at economic integration by way of customs union, a free trade zone or an economic union and such treaties also establish an international organization to implement the treaty programme. Another group of treaties aim at unification of Law. Though many of the treaties are not in force and they are applied to limited number of countries, so many of the treaties achieve only limited or regional unification.

Regional Trade Agreements

These are another kind of multilateral which are different from other multilateral treaties as these mainly involve agreements between countries of a particular region such as NAFTA, SAFTA which have played a very important role in the development of international trade law. These treaties regulate trade within a particular region are means of establishing and promoting regional trade.

Commodity Agreements

The trade being a vast area it is difficult for trade law to cover all the issues in every sectors of trade. Agriculture being one of the sectors which plays a major role in International Trade, it is covered by these commodity agreements. These agreements mainly pertain to agricultural products such as coffee, tobacco etc. It is an undertaking by a group of countries to stabilize trade supplies and prices of a particular commodity for the benefit of the participating countries. It involves consensus on quantity traded, prices, and stock management. E.g. International Tin and Cocoa Agreement.

International Custom

Custom is the original and the oldest source of International Law and was one of the most important of the sources at a time. It is the foundation stone of the modern international Law. Customary rules are those rules which are practised by most of the states, if not by all through ages by way of habit and they should be binding upon the states. It has been mentioned under Article 38 (1) (b) of the ICJ.

There are primarily three elements of custom:

a) **Duration:** When a particular usage is practised by the states for a long duration, it becomes a custom.
b) **Uniformity:** A practice is required to be followed consistently by the states.
c) **Generality:** It is very essential that a usage should be practised by most of the states in order to transform into a custom.

It is very important to note that the international customary rules are applied by the courts only when international conventions are not available.

Problems of customary international law arise in international economic law mainly in respect to the claim of the third world states that resolutions of the United Nations Assembly are binding as customary law. International customary law is created when a general practice, followed by a number of states (state practice), has been accepted as law (*opinion juris*). For instance, the right of a state to issue its own currency rules and its obligation to punish counterfeiters of foreign currency are based upon international customary law.

It is not easy to always assess whether a rule of customary international economic law exists and what its specific content is. for instance, what is the international custom with regard to evaluating the amount of compensation to be paid in the event of nationalisation of certain assets .Different states have different opinions with regard to this. Moreover, many states having declared that damages may be only paid in exceptional circumstances, agree in level of compensation. Such clauses appear so regularly in investment treaties that it may be argued that these treaty provisions in themselves create a rule of International Customary law for reasonable damages.

General Principles of Law Recognised by Civilized Nation

The General Principles recognized by Law recognized by civilized nations was first inserted under Article 38(3) of the permanent court of International Justice and the same text has been included under Article 38(1) (c)of the ICJ. It is a source which at present comes after treaties and custom. It is applies when there is no treaty relevant to the dispute or when there is no customary international law that can be applied to a particular case. General principles are those principles which have been recognized by most of all of the states of the world community in their domestic Law.

The rationality for the inclusion of the General Principles of Law as one of the sources of International Law lies in the fact that a principle which has been found to be generally accepted by certain civilized legal systems may be fairly presumed to be so reasonable as to be necessary to the maintenance of justice under any system. It has been included as a source if in case any other material proves unhelpful.

Some of the principles that are recognized are reciprocity, presumption, estoppel, and *res judicata* .It is very important to note that the principles of Law recognized by many states do not become principles of international Law automatically. It is very important for it to be recognized by the world court. This principle has been recognized in a most authoritative international instrument as a source of international Law. It has been presently used by the courts especially in those cases where no law is applicable on a particular point. E.g. In Barcelona Traction Case (Belgium v Spain) court applied the principle of Estoppel. Similarly in Trail Smelter case (Canada v US) court applied the principle "no state has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the cause is of serious consequence and the injury is established by clear and convincing evidence."

Judicial Decisions and Juristic Works

They are considered to be the secondary sources of International Law. Judicial Decisions are the Subsidiary an Indirect source of International Law. It is because the courts do not create any Precedent, they have no binding force except for the parties of a Particular case As per Article 59 of the stature of the court. The Judicial decisions and the writings of the Jurists have been mentioned in the Article 38(1) (d) of the ICJ. This can be described as a means of Law established by other sources.

Though there are many courts and tribunals which fall under the head ‘judicial decisions’, they do not create a binding rule of international rule. Some of them are the International Court of Justice, Awards of the International Tribunals, Decisions of the Municipal courts, and the regional courts and the International Law commission. .However, these courts have indirectly contributed in the International Law.

As far as International Trade Law is concerned the decisions of WTO are equally binding as the cases of ICJ. Also the judgment enforcements of WTO has been more effective than the ICJ mainly because of the post judicial enforcement mechanism in the form of economic embargoes which is effectively implement by the WTO. Such mechanism however are absent under the ICJ.

The stature of the ICJ lays down the teachings of the most qualified publicists of the various nations are a subsidiary means for the determination of the rules of the Law .Although the juristic works are not an ‘independent source’ of Law ,sometimes juristic opinion does lead to the formation of the international Law.

Theories such as Protectionism, Absolute Advantage Theory and Comparative Advantage Theory throw light on the rules of the international trade law and their writings make it easier to frame a particular rule. The value of this juristic works carry more importance where treaty or customary rules does not exist .or it can be used in developing rules that are sourced in treaties, custom and general principles of law. One very important example is the Paquata Habana Case 175 US (1900)677.

Resolutions of International Institutions

Though most of the resolutions passed by international organizations are not binding on their member states, but however in exceptional circumstances they may have a binding character. For example, the resolutions adopted by an organization for its internal operation like concerning the structure of activities, procedure of decision-making, are always binding. The charter of an organization may also determine that the members and sometimes their subjects are bound by other resolutions. The member states here are obliged by the provision of treaty to give effect to the resolutions of the organization. Sometimes the regulations issued by international organizations.

The international institutions provide excellent base from which to launch new proposals. Thus it can be said that their substance is often not a reflection of present law but a fore runner of future law. They also offer a program for a creation of new law. An important resolution that is the Accord resolution is very important in this context. The text is unanimously adopted by UN organization then made a part of treaty then send for signatures of the member states.

The UN General Assembly Resolutions are only a starting point for development of international custom or soft law. Since countries cannot be forces to implement or follow a particular principle as law they are made to sign these resolutions mainly in the new and emerging areas such as environment law, human rights etc. E.g. Resolution No. 1803 of 1962 dealing with the Permanent Sovereignty over Natural Resources Principle (PSNR), 3201 and 3202 which deals with the New International Economic Order or NIEO.

<u>Subjects of International Trade Law</u>

Who is a subject?

Subject of any rule is a being upon which the rule confer rights and capacity and imposes duties and responsibilities, whereas an object enjoys and is burdened by no such competence. Hence, the law commands its subjects but it merely regulate the use and disposition of its objects.

To identify the subjects of municipal law is easier than identifying the subjects of international Law as there are more players in international law than municipal law.

Theories regarding subjects of international law

a) Realist Theory
b) Fictional Theory
c) Functional Theory

Realist theory

Prof Oppenheim is the main exponent of this theory. According to this theory international law only governs the conduct of States. States alone have the capacity of entering into international treaty, so States alone are the subjects of international law.

Fictional Theory

Just contrary to the above theory, there are certain jurists who have expressed the view that in the ultimate analysis of international law it will be evident that only individuals are the subjects of international law. The chief exponents of this theory are Prof. Kelsen and Westlake. According to Kelsen, State is a fiction and every law has individuals as its only subject. Hence, under international law the duties of the States are ultimately the duties of the individuals. Eventually stating that is no difference between international law and State law. In his view, both laws apply on the individuals and they are for the individuals. He, however, admits that the difference is only this that the State law applies on individuals 'intermediately' whereas international law applies upon the individuals 'mediately'.

Functional Theory

The third view combines the first and second views. This theory accepts Both States and Individuals as subjects of international law and also goes a step- ahead to include international organisations and certain other Non-State entities. This view undoubtedly appears to be far better than the first two views.' Following arguments may be put forward in support of this view:

In the advisory opinion relating to the *Postal Service in Danzig* it was held that there is nothing in international law to prevent individuals from acquiring directly rights under a treaty provided that this is the intention of the contracting parties. A considerable number of decisions of municipal courts rendered subsequently to the advisory opinion of the Permanent Court of International Justice expressly affirmed this possibility. Reference also may be made to the Judgment of ICJ in *Reparation for injuries suffered in the service of the* U.N in which it was held "that the United Nations has the capacity to bring an international claim against the state for obtaining reparation when an agent of the U.N. suffers injury in the performance of his duties in circumstances involving the responsibility of State, The Court, by implication, rejected the proposition that only States are subjects of international law

In the realm of International Trade law the 1965 *Convention on the Settlement of Investment Disputes between States and Nationals of other States is a landmark in this regard.* It is expressly provided in the convention that "disputes between the States and nationals of other States who invest money will be resolved in accordance with the provisions of the said Convention. Thus the traditional view that states only are subjects of international law is not a rule of modern international law. It is now generally recognized that besides States public international organisations, individuals and certain other non- state entities are also the subjects of international law.

<u>Subjects</u>

States

States are sovereign Political Entities. Law of Nations is primarily a law between the states. Despite the increasing range of actors and participants in the international legal system, states remain by far the most important legal persons and despite the rise of globalisation and all that this entails, states retain their attraction as the primary focus for the social activity of humankind and thus for international law.

The state is central to the study of international Trade Law. States as trader is a very important concept and it mainly depends on the Sovereign equality of states. States are the major player in international rule making and are the most common object of analysis in International Law. States decide to go to war. They erect trade barriers. They choose whether and at what level to establish environmental standards. States enter into international agreements and are parties to the major trade organizations. Hence one cannot rule out the importance of the States as a major subject of international law.

Individuals

Traditionally international trade was carried out amongst individuals and not states. Trade links between Sumer and Indus Valley Civilization existed as early as 3 millennium B.C. These trade links between kingdoms and city states led to the development of customary rules of maritime which governed the conduct of individual traders. The first international law governing trade, *Lex Mercatoria(law of merchants)* was developed to settle disputes between domestic and foreign tradesmen who took part in various fairs in Europe.Throughout Europe, mercantile courts were set up, and while it is not possible to state that a Continental *Lex Mercatoria* came into being, a network of common regulations and practices weaved its way across the commercial fabric of Europe and constituted an embryonic international trade law.

Individuals as subjects of ITL gained importance in modern times after the establishment of ICSID, both individuals and juridical persons are subjects under ICSID and can move the ICSID machinery in case of any investment dispute .

An Individual can also become an active subject of International Law if a treaty authorizes him to bring his claim, without interference by his home state.

Non State Entities

MNCs and TNCs

Whether Multinational Corporations and Transnational Corporations are subjects of international trade law, is the most widely debated topic in the world today.

A Multinational Corporation(MNC) or enterprise (MNE),is a corporation or an enterprise that manages production or delivers services in more than one country. It can also be referred to as an *international corporation*. The ILO has defined an MNC as *a, "corporation that has its management headquarters in one country, known as the home country, and operates in several other countries, known as host countries."* The Dutch East India Company was the first multinational corporation in the world. It was also arguably the world's first mega corporation, possessing quasi-governmental powers, including the ability to wage war, negotiate treaties, coin money, and establish colonies. The first modern multinational corporation is generally thought to be the East India Company. It was the first company to share risk and enable joint ownership of companies through issuance of shares of stock which is an important driver for globalization. A Transnational Corporation (TNC) differs from a traditional MNC in that it does not identify itself with one national home. TNCs spread out their operations in many countries sustaining high levels of local responsiveness. Nestle is the best example of a TNC.

Arguments in favour of recognition of MNCs/ TNCs as subjects of ITL

The number of transnational corporations in the world has jumped from 7,000 in 1970 to 40,000 in 1995 and is thought to be around 60,000 today. Transnational corporations hold 90% of all technology and product patents worldwide, and are involved in 70% of world trade. 300 largest corporations account for one-quarter of the world's productive assets. This shows that MNCs and TNCs are not only the major stakeholder but are also the engine which is steering the world economy ahead.

The rise of MNCs/TNCs as the major player in world trade was recognised by the UN way back in 1973. United Nations Economic and Social Council in 1973 concerned by the increasing influence of these corporations in world market constituted a group of eminent persons for the task of advising on the nature and activities of these corporations and their role and impact on the development process. On the basis of their study they made a report titled *Multinational Corporations in World Development,* and after taking public comments, the Group made recommendations that led to the creation of the United Nations Commission on Transnational Corporations (UNCTC) to provide a permanent intergovernmental forum for deliberations on issues related to TNCs.

Arguments against recognition MNCs and TNCs as the subjects of ITL

The First and Second World are against recognizing MNCs as subjects of international law whereas the third world is in favour of such recognition.

The first world comprising the developed capitalist countries like United States, United Kingdom and Canada are afraid of losing their global political dominance. Whereas the second world i.e. the communist countries like Russia and China are opposing MNCs/ TNCs because they consider them as *bouswazee* institution which will only increase the divide between the rich capitalist and poor worker groups. The MNCs according to them promotes capitalism and are against communist ideologies. The third world consisting of recently decolonised developing countries are in favour of recognition of MNCs and TNCs as subjects of International Trade because they are of the view that it will decrease the dominance of western countries in the world market and will promote a rule based international trade law regime in its true spirit which would be less influenced by western politics.

International agreement which recognizes MNCs/ TNCs as subject

The International Centre for Settlement of Investment Disputes (ICSID), established in 1966 pursuant to the *Convention on the Settlement of Investment Disputes between States and*

Nationals of Other States recognises the right to MNCS and TNCs to bring about an investment dispute against State or individual or another corporation. Also the MNCs and TNCs can enter into Bilateral or Multilateral agreements with State in areas like infrastructure development, technical services etc.

International Organizations

International organisations have played a crucial role in the sphere of international personality. Since the nineteenth century a growing number of such organisations have appeared and thus raised the issue of international legal personality. In principle it is now well established that international organisations may indeed possess objective international legal personality. Whether that will be so in any particular instance will depend upon the particular circumstances of that case. Whether an organisation possesses personality in international law will hinge upon its constitutional status, its actual powers and practice. Significant factors in this context will include the capacity to enter into relations with states and other organisations and conclude treaties with them, and the status it has been given under municipal law.

International trade law organizations

- WTO: World Trade Organization

Institutions of the U.N

- UNCITRAL: United nation commission in international trade law
- UNCTAD: United Nations conference on Trade and Development
- UNDP: United Nations Development Programme etc

These organizations play a vital role in regulating world trade regime, especially policy making and also have the capacity to enter into agreement with states or other organizations if required

Regional Organizations: Regional Organisations (ROs)

These are in a sense, international organizations, as they incorporate international membership and encompass geopolitical entities that operationally transcend a single nation state. However, their membership is characterized by boundaries and demarcations characteristic to a defined and unique geography, such as continents, or geopolitics, such as economic blocks. They have been established to foster cooperation and political and economic integration or dialogue amongst states or entities within a restrictive geographical or geopolitical boundary.

- SAARC – South Asian Agreement for Regional Cooperation
- EU- European Union
- OECD – Organization for Economic Cooperation and Development
- OHBLA – Organization for Harmonizing Business Laws in Africa

These regional organizations help promoting trade and determining trade policies in their respective regions. They can also enter into agreements with other subjects of ITL if their charter has such provisions.

International NGOs

International NGOs like the World Economic Forum, International Labour, Association, International Centre for Trade and Sustainable Development (ICTSD) are not subjects of international trade law but there role in promoting global economic integration can never be undermined. They are not active members in any International organization but are impartial spectators and commentators on the policy framed by the international community. They also help the international organizations in policy making, whenever such assistance is required.

BASIC PRINCIPLES AND CONCEPTS OF INTERNATIONAL TRADE LAW

Influences on International Trade Law

Like any field of law, International Trade Law is also influenced by various walks of human life. The most prominent influences on International Trade Law are:

- Economic principles
- Political principles
- Principles of public international trade law
- Principles of private transnational trade law
- Principles of national foreign trade legislations and regulation

Basic Principles of International Trade Law under the WTO System

The WTO establishes a framework for trade policies; it does not define or specify outcomes. That is, it is concerned with setting the rules of the trade policy game, not with the results of the game. Five principles are of particular importance in understanding both the pre-1994 GATT and the WTO: non-discrimination, reciprocity, enforceable commitments, transparency, and safety valves.

Non-discrimination

Non-discrimination has two major components: the most-favoured-nation (MFN) rule, and the national treatment principle. Both are embedded in the main WTO rules on goods, services, and intellectual property, but their precise scope and nature differ across these three areas. This is especially true of the national treatment principle, which is a specific, not a general commitment when it comes to services.

The MFN rule requires that a product made in one member country be treated no less favourably than a "like" (very similar) good that originates in any other country. Thus, if the best treatment granted a trading partner supplying a specific product is a 5 percent tariff, this rate must be applied immediately and unconditionally to imports of this good originating in all WTO members. In view of the small number of contracting parties to the GATT (only 23 countries), the benchmark for MFN is the best treatment offered to any country, including countries that are not members of the GATT.

National treatment requires that foreign goods, once they have satisfied whatever border measures are applied, be treated no less favourably, in terms of internal (indirect) taxation than like or directly competitive domestically produced goods (Art. III, GATT). That is, goods of foreign origin circulating in the country must be subject to taxes, charges, and regulations that are "no less favourable" than those that apply to similar goods of domestic origin.

The MFN rule applies unconditionally. Although exceptions are made for the formation of free trade areas or customs unions and for preferential treatment of developing countries, MFN is a basic pillar of the WTO. One reason for this is economic: if policy does not discriminate between foreign suppliers, importers and consumers will have an incentive to use the lowest-cost foreign supplier. MFN also provides smaller countries with a guarantee that larger countries will not exploit their market power by raising tariffs against them in periods when times are bad and domestic industries are clamoring for protection or, alternatively, give specific countries preferential treatment for foreign policy reasons.

MFN helps enforce multilateral rules by raising the costs to a country of defecting from the trade regime to which it committed itself in an earlier multilateral trade negotiation. If the country desires to raise trade barriers, it must apply the changed regime to all WTO members. This increases the political cost of backsliding on trade policy because importers will object. Finally, MFN reduces negotiating costs: once a negotiation has been concluded with a country, the results extend to all. Other countries do not need to negotiate to obtain similar treatment; instead, negotiations can be limited to principal suppliers.

National treatment ensures that liberalization commitments are not offset through the imposition of domestic taxes and similar measures. The requirement that foreign products be treated no less favourably than competing domestically produced products gives foreign suppliers greater certainty regarding the regulatory environment in which they must operate. The national treatment principle has often been invoked in dispute settlement cases brought to the GATT. It is a very wide-ranging rule: the obligation applies whether or not a specific tariff commitment was made, and it covers taxes and other policies, which must be applied in a non-discriminatory fashion to like domestic and foreign products. It is also irrelevant whether a policy hurts an exporter. What matters is the existence of discrimination, not its effects.

Reciprocity

Reciprocity is a fundamental element of the negotiating process. It reflects both a desire to limit the scope for free-riding that may arise because of the MFN rule and a desire to obtain "payment" for trade liberalization in the form of better access to foreign markets. A rationale for reciprocity can be found in the political-economy literature. The costs of liberalization generally are concentrated in specific industries, which often will be well organized and opposed to reductions in protection. Benefits, although in the aggregate usually greater than costs, accrue to a much larger set of agents, who thus do not have a great individual incentive to organize themselves politically. In such a setting, being able to point to reciprocal, sector-specific export gains may help to sell the liberalization politically. Obtaining a reduction in foreign import barriers as a quid pro quo for a reduction in domestic trade restrictions gives specific export-oriented domestic interests that will gain from liberalization an incentive to support it in domestic political markets. A related point is that for a nation to negotiate, it is necessary that the gain from doing so be greater than the gain available from unilateral liberalization. Reciprocal concessions ensure that such gains will materialize.

Binding and Enforceable Commitments

Liberalization commitments and agreements to abide by certain rules of the game have little value if they cannot be enforced. The non-discrimination principle, embodied in Articles I (on MFN) and III (on national treatment) of the GATT, is important in ensuring that market access commitments are implemented and maintained. Other GATT articles play a supporting role, including Article II (on schedules of concessions). The tariff commitments made by WTO members in a multilateral trade negotiation and on accession are enumerated in schedules (lists) of concessions. These schedules establish "ceiling bindings": the member concerned cannot raise tariffs above bound levels without negotiating compensation with the principal suppliers of the products concerned. The MFN rule then ensures that such compensation—usually, reductions in other tariffs—extends to all WTO members, raising the cost of reneging.

Once tariff commitments are bound, it is important that there be no resort to other, nontariff, measures that have the effect of nullifying or impairing the value of the tariff concession. A number of GATT articles attempt to ensure that this does not occur. They include Article VII (customs valuation), Article XI, which prohibits quantitative restrictions on imports and exports, and the Agreement on Subsidies and Countervailing Measures, which outlaws export subsidies for manufactures and allows for the countervailing of production subsidies on imports that materially injure domestic competitors.

If a country perceives that actions taken by another government have the effect of nullifying or impairing negotiated market access commitments or the disciplines of the WTO, it may bring this situation to the attention of the government involved and ask that the policy be changed. If satisfaction is not obtained, the complaining country may invoke WTO dispute settlement procedures, which involve the establishment of panels of impartial experts charged with determining whether a contested measure violates the WTO. Because the WTO is an intergovernmental agreement, private parties do not have legal standing before the WTO's dispute settlement body; only governments have the right to bring cases. The existence of dispute settlement procedures precludes the use of unilateral retaliation. For small countries, in particular, recourse to a multilateral body is vital, as unilateral actions would be ineffective and thus would not be credible. More generally, small countries have a great stake in a rule-based international system, which reduces the likelihood of being confronted with bilateral pressure from large trading powers to change policies that are not to their liking.

Transparency

Enforcement of commitments requires access to information on the trade regimes that are maintained by members. The agreements administered by the WTO therefore incorporate mechanisms designed to facilitate communication between WTO members on issues. Numerous specialized committees, working parties, working groups, and councils meet regularly in Geneva. These interactions allow for the exchange of information and views and permit potential conflicts to be defused efficiently.

Transparency is a basic pillar of the WTO, and it is a legal obligation, embedded in Article X of the GATT and Article III of the GATS.WTO members are required to publish their trade regulations, to establish and maintain institutions allowing for the review of administrative decisions affecting trade, to respond to requests for information by other members, and to notify changes in trade policies to the WTO. These internal transparency requirements are supplemented by multilateral surveillance of trade policies by WTO members, facilitated by periodic country-specific reports (trade policy reviews) that are prepared by the secretariat and discussed by the WTO General Council. The external surveillance also fosters transparency, both for citizens of the countries concerned and for trading partners. It reduces the scope for countries to circumvent their obligations, thereby reducing uncertainty regarding the prevailing policy stance.

Transparency has a number of important benefits. It reduces the pressure on the dispute settlement system, as measures can be discussed in the appropriate WTO body. Frequently, such discussions can address perceptions by a member that a specific policy violates the WTO; many potential disputes are defused in informal meetings in Geneva. Transparency is also vital for ensuring "ownership" of the WTO as an institution—if citizens do not know what the organization does, its legitimacy will be eroded. The trade policy reviews are a unique source of information that can be used by civil society to assess the implications of the overall trade policies that are pursued by their governments. From an economic perspective, transparency can also help reduce uncertainty related to trade policy. Such uncertainty is associated with lower investment and growth rates and with a shift in resources toward non-tradable (Francois 1997). Mechanisms to improve transparency can help lower perceptions of risk by reducing uncertainty. WTO membership itself, with the associated commitments on trade policies that are subject to binding dispute settlement, can also have this effect.

Safety Valves

A final principle embodied in the WTO is that, in specific circumstances, governments should be able to restrict trade. There are three types of provisions in this connection: (a) articles allowing for the use of trade measures to attain noneconomic objectives; (b) articles aimed at ensuring "fair competition"; and (c) provisions permitting intervention in trade for economic reasons. Category (a) includes provisions allowing for policies to protect public health or national security and to protect industries that are seriously injured by competition from imports. The underlying idea in the latter case is that governments should have the right to step in when competition becomes so vigorous as to injure domestic competitors. Although it is not explicitly mentioned in the relevant WTO agreement, the underlying rationale for intervention is that such competition causes political and social problems associated with the need for the industry to adjust to changed circumstances. Measures in category (b) include the right to impose countervailing duties on imports that have been subsidized and antidumping duties on imports that have been dumped (sold at a price below that charged in the home market). Finally, under category (c) there are provisions allowing actions to be taken in case of serious balance of payments difficulties or if a government desires to support an infant industry.

P.S.N.R and Non-Intervention in Domestic Affairs

The principle of Permanent Sovereignty over Natural Resources recognizes the inalienable right of all States to freely dispose of their natural wealth and resources in accordance with their national interests, and on respect for the economic independence of States. It commenced as a 'political claim' of the states formerly designated as 'underdeveloped countries' and the new ex-colonial countries who demanded the recognition of their right to participate in the development of their natural resources and the benefits accruing from their exploitation.

Origin and Development

Before the Second World War the international investment law was overly protective of the interests of the foreign investors. The majority of these investors were from industrialized nations. After the Second World War, this situation compelled the developing countries and the newly de-colonized states into promoting the development of a new international principle which recognized and protected their rights over their natural resources and wealth in their own countries. The promotion of this PSNR was the natural manifestation of the fear of the developing countries, that the Western World would continue exploiting their natural resources without conceding them a just and equitable share, without taking into account the fact that those resources were located within their national boundaries. Therefore in the developing countries, this period was characterized by widespread nationalization so as to assert their economic independence and consequently strengthen their sovereignty. The new states were also anxious to achieve total political and economic freedom from their former colonizers through the recognition of their right to self-determination which included the 'Permanent Sovereignty over Natural Resources and wealth'.

During this period the UN adopted several resolutions in which the member States attempted to reach an agreement beneficial to all of them. Within these resolutions the scope of the resources and activities covered by the principle of Permanent Sovereignty was enhanced from terrestrial and marine natural resources to all wealth, natural resources and economic activities for the exploitation of such resources.

Soft Law Development

General Assembly Resolution 523 (VI), 1952 "Integrated Economic Development and Commercial Agreements" – This was the first instrument which recognized the right of the developing countries to independently manage their natural resources.

General Assembly Resolution 626 (VII), 1952 "Right to Explore Freely Natural Wealth and Resources" – This resolution was adopted after a draft proposed by Uruguay, which by that time had a very good reputation as a country.

General Assembly Resolution 1314 (XIII), 1958 "Recommendations Concerning International Respect for the Rights of Peoples and Nations to Self-determination" – This resolution stipulated, the Permanent Sovereignty over Natural Resources as a part of the right to Self-determination. This was a very important instrument, since it established the Commission on Permanent Sovereignty over Natural Resources which undertook preliminary studies and surveys of the position of the PNRS which culminated in the adoption of the General Assembly Resolution 1803 (XVII), 1962 "Declaration on Permanent Sovereignty over Natural Resources".

General Assembly Resolution 1803 (XVII), 1962 "Declaration on Permanent Sovereignty over Natural Resources" – This Resolution was adopted by a wide majority of the Member States. It has been considered also as the most important resolution that comprises a turning point for the PSNR.

This resolution took into consideration that it is desirable to promote international co-operation for the economic development of developing countries, and that economic and financial agreements between the developed and the developing countries must be based on the principles of equality and of the right of peoples and nations to self-determination.

It declared that the right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned.

It declared on the one hand the inviolable exercise of the right to PSNR and also the right to nationalize or expropriate on the grounds of “public utility, security or the national interest”. On the other hand it lays down the legal obligation for the payment of “appropriate compensation” according to International Law and in the event of conflict it established the possibility of agreement between the States for settlement through arbitration or international adjudication.

Violation of the rights of peoples and nations to sovereignty over their natural wealth and resources is contrary to the spirit and principles of the Charter of the United Nations and hinders the development of international co-operation and the maintenance of peace.

MFN: Its Origin and Application in GATT and WTO

Bilateral and regional investment/ trade agreements have proliferated in the last decade and new agreements are still being negotiated. Most-Favoured-Nation (MFN) clauses, through the WTO system, link investment agreements by ensuring that the parties to one treaty provide treatment no less favourable than the treatment they provide under other treaties in areas covered by the clause. MFN clauses have thus become a significant instrument of economic liberalisation in the investment area.

Moreover, by giving the investors of all the parties benefiting from a country’s MFN clause the right, in similar circumstances, to treatment no less favourable than a country’s closest or most influential partners can negotiate on the matters the clause covers, MFN avoids economic distortions that would occur through more selective country-by-country liberalisation. Such a treatment may result from the implementation of treaties, legislative or administrative acts of the country and also by mere practice.

The present article provides a factual survey of jurisprudence and related literature on MFN treaty clauses in investment agreements with a view to contributing a better understanding of the MFN interfaces between such agreements.

Meaning and Definition

Under the WTO agreements, countries cannot normally discriminate between their trading partners. Once a special favour (such as a lower customs duty rate for one of their products) is granted to one member-country, the same has to be granted to all other WTO members. This principle is known as most-favoured-nation (MFN) treatment. Article 5 of the ILC Draft Articles on Most Favoured Nation Clauses 1978 defines most favoured nation treatment as “treatment accorded by the granting State to the beneficiary State, or to persons or things in a determined relationship with that State, not less favourable than treatment extended by the granting State to a third State or to persons or things in the same relationship with that third State."

This principle is so important that it is the first article of the General Agreement on Tariffs and Trade (GATT), which governs trade in goods. MFN is also a priority in the General Agreement on Trade in Services (GATS) (Article 2) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) (Article 4), although in each agreement the principle is handled slightly differently. Together, those three agreements cover all three main areas of trade handled by the WTO.

Some exceptions are allowed. For example, countries can set up a free trade agreement that applies only to goods traded within the group — discriminating against goods from outside. Or they can give developing countries special access to their markets. Or a country can raise barriers against products that are considered to be traded unfairly from specific countries. And in services, countries are allowed, in limited circumstances, to discriminate. But the agreements only permit these exceptions under strict conditions. In general, MFN means that every time a country lowers a trade barrier or opens up a market, it has to do so for the same goods or services from all its trading partners — whether rich or poor, weak or strong.

History: Origin and Development

MFN treatment has been a central pillar of trade policy for centuries. It can be traced back to the twelfth century, although the phrase seems to have first appeared in the seventeenth century. MFN treaty clauses spread with the growth of commerce in the fifteenth and sixteenth centuries. The United States included an MFN clause in its first treaty, a 1778 treaty with France. In the 1800s and 1900s the MFN clause was included frequently in various treaties, particularly in the Friendship, Commerce, and Navigation treaties. MFN treatment was made one of the core obligations of commercial policy under the Havana Charter where Members were to undertake the obligation "to give due regard to the desirability of avoiding discrimination as between foreign investors". The inclusion of MFN clauses became a general practice in the numerous bilateral, regional and multilateral investment-related agreements which were concluded after the Charter failed to come into force in 1950.

Its importance for international economic relations is underscored by the fact that the MFN treatment provisions of the GATT (Article I *General Most-Favoured-Nation Treatment*) and the GATS (Article II *Most-Favoured-Nation Treatment*) provide that this obligation shall be accorded "immediately and unconditionally" (although in the case of the GATS, a member may maintain a measure inconsistent with this obligation provided that such measure is listed in, and meets the conditions of, the Annex on Article II Exemptions).

MFN Obligation in GATT

"Article I: General Most-Favoured-Nation Treatment

1. With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

2. The provisions of paragraph 1 of this Article shall not require the elimination of any preferences in respect of import duties or charges which do not exceed the levels provided for in paragraph 4 of this Article and which fall within the following descriptions:

    a) Preferences in force exclusively between two or more of the territories listed in Annex A, subject to the conditions set forth therein;
    b) Preferences in force exclusively between two or more territories which on July 1, 1939, were connected by common sovereignty or relations of protection or suzerainty and which are listed in Annexes B, C and D, subject to the conditions set forth therein;
    c) Preferences in force exclusively between the United States of America and the Republic of Cuba;
    d) Preferences in force exclusively between neighbouring countries listed in Annexes E and F.

3. The provisions of paragraph 1 shall not apply to preferences between the countries formerly a part of the Ottoman Empire and detached from it on July 24, 1923, provided such preferences are approved under paragraph 5(1), of Article XXV which shall be applied in this respect in the light of paragraph 1 of Article XXIX.

4. The margin of preference on any product in respect of which a preference is permitted under paragraph 2 of this Article but is not specifically set forth as a maximum margin of preference in the appropriate Schedule annexed to this Agreement shall not exceed:

    a) in respect of duties or charges on any product described in such Schedule, the difference between the most-favoured-nation and preferential rates provided for therein; if no preferential rate is provided for, the preferential rate shall for the purposes of this paragraph be taken to be that in force on April 10, 1947, and, if no most-favoured-nation rate is provided for, the margin shall not exceed the difference between the most-favoured-nation and preferential rates existing on April 10, 1947;

b) In respect of duties or charges on any product not described in the appropriate Schedule, the difference between the most-favoured-nation and preferential rates existing on April 10, 1947.

In the case of the contracting parties named in Annex G, the date of April 10, 1947, referred to in subparagraph (*a*) and (*b*) of this paragraph shall be replaced by the respective dates set forth in that Annex."

Article III: National Treatment on Internal Taxation and Regulation

2. "The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1.

4. The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product."

Paragraph 1 of Article III is the rule against protectionism.

1. "The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production."

Essential Requirements of Article I

Under Article I: 1 there are three questions that must be answered to determine whether there is a violation of the MFN treatment obligation of Article I: 1, namely:

i. Whether the measure at issue confers a trade “advantage” of the kind covered by ArticleI: 1?
ii. Whether the products concerned are “like products”?
iii. Whether the advantage at issue is granted “immediately and unconditionally” to all like products concerned?

Advantage

The MFN treatment obligation concerns “any advantage, favour, privilege or immunity” granted by any member to any product originating in, or destined for, any other country with respect to

i. custom duties;
ii. charges of any kind imposed on exportation or importation (e.g. import, surcharges or consular taxes);
iii. charges of any kind imposed in connection with importation or exportation (e.g. customs fees or quality inspection fees);
iv. charges imposed on the international transfer of payments for imports or exports;
v. the method of levying such duties or charges, such as the method of assessing the base value on which the duty or charge is levied;
vi. all rules and formalities in connection with importation and exportation;
vii. internal taxes or other internal charges;
viii. Laws, regulations and requirements affecting internal sale, offering for sale, purchase, transportation, distribution or use of any product.

Under Article I: 1, if advantages are granted to all other countries, including non-WTO members, then the member has to grant that advantages also to all WTO members. In other words, the MFN treatment obligation requires that any advantage granted by a member to any product from or for another country be granted to all like products from or for all other members. The Article I: 1 casts a very wide net and it is of very wide applicability.

Illustrative Cases

- In **US-MFN Footwear case**, also referred to as **US-Non Rubber Footwear case**, the Panel found: “the rules and formalities applicable to countervailing duties, including those applicable to the revocation of countervailing duty orders, are rules and formalities imposed in connection with importation, within the meaning of Article I:1”.

- The Panel in **US-Customer User Fee case** stated: “The merchandise processing fee was a “charge imposed on or in connection with importation” within the meaning of Article I: 1. Exemptions from the fee fell within the category of “advantage, favour, privilege or immunity” which Article I: 1 required to be extended unconditionally to all other contracting parties”.

- In **Canada-Autos case**, the Appellate Body usefully clarified the scope of Article I: 1 by ruling: "Article I: 1 requires that "any advantage, favour, privilege or immunity granted by any Member to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other members". The words of Article I:1 refer not to some advantages granted "with respect to" the subjects that fall within the defined scope of the Article, but to "any advantage"; not to some products, but to "any product"; and not to like products from some other Members, but to like products originating in or destined for "all other" Members."
- Similarly, in **EEC-Imports of Beef case**, the panel applied Article I: 1 to European Communities regulations making the suspension of an import levy conditional on the production of a certificate of authenticity.

Like Products

ArticleI: 1 concerns any product originating in or destined for any other country and requires that an advantage granted to such products shall be accorded to "like products" originating in or destined for the territories of all other members. It must be noted that it is only when the products are like, the MFN treatment obligation applies and that discrimination is prohibited. Products that are not like may be treated differently. The concept of like products is used in various Articles of GATT but it is nowhere defined in the GATT 1994. The dictionary meaning of "like products" suggests that like products are products that share a number of identical or similar characteristics. However, the Appellate Body noted in **Canada-Aircraft case** that the dictionary meanings leave many interpretative questions open. With regard to the concept of "like products", there are three questions of interpretation that need to be resolved:

i. Which characteristics or qualities are important in assessing "likeness"?
ii. To what degree or extent must products share qualities or characteristics in order to be "like products"?
iii. From whose perspective should "likeness" be judged?

The Panel and Appellate Body have accepted that the concept of "like products" has different meaning in the different contexts in which it is used. In **Japan-Alcoholic Beverages II case**, the Appellate Body illustrated the possible differences in the scope of the concept of "like products" between different provisions of the WTO Agreement by evoking the image of an accordion. The Appellate Body said: "The accordion of "likeness" stretches and squeezes in different places as different provisions of the WTO Agreement are applied. The width of the accordion in any one of those places must be determined by the particular provision in which the term "like" is encountered as well as by the context and the circumstances that prevail in any given case to which that provision may apply".

The meaning of the phrase 'like products' in Article I: 1 was addressed in a number of GATT working party and panel reports. In **Spain-Unroasted Coffee case**, the Panel had to decide whether various types of unroasted coffee ("Colombian mild", 'other mild", "unwashed Arabica", "Robusta" and "other") were "like products" within the meaning of Article I:1. Spain did not apply custom duties on "Columbia mild" and "other mild"; while it imposed a seven percent customs duty on the other three types of unroasted coffee. Brazil, which exported mainly "unwashed Arabica", claimed that the Spanish tariff regime was inconsistent with Article I: 1. in examining whether the various types of unroasted coffee were "like products" to which the MFN treatment obligation applied, the Panel considered:

- the characteristics of the products;
- their end-use and
- Tariff regime of other members.

The Panel examined all arguments that had been advanced during the proceedings for the justification of a different tariff treatment for various groups and types of unroasted coffee. It noted that these arguments mainly related to organoleptic differences resulting from geographical factors, cultivation methods, the processing of the bean, and the generic factor. The Panel did not consider that such differences were sufficient reason to allow for a different tariff treatment. It pointed out that it was not unusual in the case of agricultural products that the taste and aroma of the end product would differ because of one or several of the above mentioned factors. The Panel furthermore found relevant to its examination of the matter that unroasted coffee was mainly, if not exclusively, sold in the form of blends, combining various types of coffee, and that coffee in its end use, was universally regarded as a well-defined and single product intended for drinking. The Panel noted that no other contracting party applied its tariff regime in respect of unroasted, non-decaffeinated coffee in such a way that different types of coffee were subject to different tariff rates. In the light of the foregoing, the Panel concluded that unroasted, non-decaffeinated coffee beans listed in the Spanish Customs Tariff should be considered as "like products" within the meaning of Article I: 1. In addition to the three criteria used by the Panel in Spain-Unroasted coffee case, there is one more criteria that has assumed importance and that is consumers' tastes and habits.

Advantage Granted Immediately and Unconditionally

Article I: 1 requires that any advantage granted by a WTO member to imports from any country must be granted "immediately and unconditionally" to imports from all other WTO Members. Once a WTO Member has granted an advantage to imports from a country, it cannot make the granting of that advantage to imports of other WTO members conditional upon those other WTO Members. In a legal opinion of 1973 in the context of the accession of Hungary to the GATT, the GATT Secretariat noted that: "the prerequisite of having a cooperation contract in order to benefit from certain tariff treatment appeared to imply conditional most favoured nation treatment and would, therefore, not appear to be compatible with the General Agreement".

Illustrative Cases

- In **Indonesia-Autos case**, the Panel found with respect to the requirement under Article I:1 that advantages are granted "unconditionally and immediately", as follows: "under the February 1996 car programme the granting of customs duty benefits to parts and components is conditional to their being used in the assembly in Indonesia of a National Car. The granting of tax benefits is conditional and limited to the only pioneer company producing National Cars. And there is also a third condition for these benefits: the meaning of certain local content targets. Indeed under all these car programmes, custom duty and tax benefits are conditional on achieving a certain local content value for the finished car. The existence of these conditions is inconsistent with the provisions of Article I: 1 which provides that tax and custom duty advantages accorded to products of one Member (here on Korean products) be accorded to import like products from other Members "immediately and unconditionally"."

- In **Canada-Autos case**, the Appellate Body also discussed the concepts of "immediately and unconditionally", and found: "The measures maintained by Canada accords the import duty exemption to certain motor vehicles entering Canada from certain countries. These privileged motor vehicles are imported by a limited number of designated manufacturers who are required to meet certain performance conditions. In practice, this measure does not accord the same import duty exemption "immediately and unconditionally" to like motor vehicles of all other Members, as required under Article I: 1 of the GATT 1994. The advantage of the import duty exemption is accorded to like motor vehicles from all other Members. Accordingly, we find that this measure is not consistent with Canada's obligations under Article I: 1 of the GATT 1994".

- In the **Belgian–Family Allowances case**, a dispute of 1952 concerning a Belgian Law providing for an exemption from a levy on products purchased from countries which had a system of family allowances similar to that of Belgium, the Panel held that the Belgian law at issue introduced a discrimination between countries having a given system of family allowances and those which had a different system or no system at all, and made the granting of the exemption dependent on certain conditions. The panel concluded that the advantage the exemption from a levy-was not granted "unconditionally" and that the Belgian law was, therefore, inconsistent with the MFN treatment obligation of Article I: 1.

Exceptions to the MFN Rule under GATT

Annex Countries

Preferences with respect to import duties or charges between/ among countries mentioned in Annexes A to F is permissible subject to the conditions contained in the annexes and the provisions of Article I: 4. the annexes are as follows:

- Annex A: List of territories referred to in Paragraph 2(a) of Article I: United Kingdom and dependent territories
- Annex B: List of territories of the French Union referred to in Paragraph 2(b) of Article I
- Annex C: List of territories referred to in Paragraph 2(b) of Article I as respects the customs union of Belgium, Luxemburg and the Netherlands
- Annex D: List of territories referred to in Paragraph 2(b) of Article I as respects the United States of America
- Annex E: List of territories covered by preferential arrangements between Chile and neighbouring countries referred to in Paragraph 2(d) of Article I
- Annex F: List of territories covered by preferential arrangements between Lebanon and Syria and neighbouring countries referred to in Paragraph 2(d) of Article I

General Exceptions (GATT Article XX)

Article XX of the GATT provides that the Members of the WTO are free to enforce any measure:

a) necessary to protect public morals;
b) necessary to protect human, animal or plant life or health;
c) relating to the importations or exportations of gold or silver;
d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trademarks and copyrights, and the prevention of deceptive practices;
e) relating to the products of prison labour;
f) imposed for the protection of national treasures of artistic, historic or archaeological value;
g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;

h) undertaken in pursuance of obligations under any intergovernmental commodity agreement which conforms to criteria submitted to the CONTRACTING PARTIES and not disapproved by them or which is itself so submitted and not so disapproved;
i) involving restrictions on exports of domestic materials necessary to ensure essential quantities of such materials to a domestic processing industry during periods when the domestic price of such materials is held below the world price as part of a governmental stabilization plan; *Provided* that such restrictions shall not operate to increase the exports of or the protection afforded to such domestic industry, and shall not depart from the provisions of this Agreement relating to non-discrimination;
j) essential to the acquisition or distribution of products in general or local short supply; *Provided* that any such measures shall be consistent with the principle that all contracting parties are entitled to an equitable share of the international supply of such products, and that any such measures, which are inconsistent with the other provisions of the Agreement shall be discontinued as soon as the conditions giving rise to them have ceased to exist.

The measures, however, should not "constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade."

Security Exceptions (GATT Article XXI)

Nothing in the Agreement shall be construed

a) To require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or
b) To prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests
    i. Relating to fissionable materials or the materials from which they are derived;
    ii. Relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;
    iii. Taken in time of war or other emergency in international relations; or
c) To prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

Regional Integration (GATT Article XXIV)

Regional integration has a vast impact on the world economy today and is the subject of frequent debate in a variety of forums, including the WTO Committee on Regional Trade Agreements. Regional integration liberalizes trade among countries within the region, while allowing trade barriers with countries outside the region. Regional integration therefore may lead to results that are contrary to the Most-Favoured-Nation principle because countries inside and outside the region are treated differently. This may have a negative effect on countries outside the region, and thus lead to results contrary to the liberalization of trade. Therefore, GATT Article XXIV provides that regional integration may be allowed as an exception to the Most-Favoured-Nation rule only if the following conditions are met:

i. First, tariffs and other barriers to trade must be eliminated with respect to substantially all trade within the region.
ii. Second, the tariffs and other barriers to trade applied to outside countries must not be higher or more restrictive than they were prior to establishment of regional integration.

Generalized System of Preferences

The Generalized System of Preferences or "GSP" is a system that grants products originating in developing countries lower tariff rates than those normally enjoyed under Most-Favoured-Nation status as a special measure granted to developing countries in order to increase their export earnings and promote their development.

The GSP is defined in the Decision on "Generalized System of Preferences" of June 1971, and is a measure taken based on the Decision on "Differential and More Favourable Treatment, Reciprocity, and Fuller Participation of Developing Countries" or the "Enabling Clause." The GSP has the following characteristics:

i. First, preferential tariffs may be applied not only to countries with special historical and political relationships (i.e. the British Commonwealth), but to developing countries more generally (thus the system is described as "generalized").
ii. Second, the beneficiaries are limited to developing countries.
iii. Third, it is a benefit unilaterally granted by developed countries to developing countries.

Non-Application of Multilateral Trade Agreements between Particular Member States (WTO Article XIII)

The Marrakesh Agreement Establishing the World Trade Organization (the "WTO Agreement") provides that "[t]his Agreement and the Multilateral Trade Agreement in Annexes 1 and 2 shall not apply as between any Member and any other Member," when either of the following conditions are met: (a) at the time the WTO went into force, Article XXXV of GATT 1947 had been invoked earlier and was effective as between original Members of the WTO which were contracting parties to GATT 1947 or; (b) between a Member and another Member which has acceded under Article XII only if the Member not consenting to the application has so notified the Ministerial Conference before the approval of the agreement on the terms of accession by the Ministerial Conference.

In the case of non-application, benefits enjoyed by other Members are not provided to the country of non-application, which leads to results that are contrary to the most-favoured-nation principle.

These Article XIII provisions were created to deal with problems arising from accessions. Ideally, the most-favoured-nation rule would be applied stringently so that when country B accedes to the Agreement, it is required to confer most-favoured-nation status on all other Members, and they, in turn, are required to confer most-favoured-nation status on country B. However, country A, which is already a Member of the WTO, may have reasons for not wanting to confer the rights and obligations of the WTO on new Member B. The WTO only requires the consent of two-thirds of the existing membership for accession, so it is conceivable that country A might, against its will, be forced to give most-favoured-nation status to country B. WTO Article XIII is a way to respect country A's wishes by preventing a WTO relationship from taking effect between countries A & B.

On the other hand, WTO Article XIII provides a way for the accession of country B, even if more than a third of the membership, like country A, has reasons for not wanting a WTO relationship with country B (in which case they will object to the accession itself) by allowing for non-application. In January 1995, the United States notified the General Council that it would not apply the Agreement and the Multilateral Trade Agreements in Annexes 1 and 2 to Romania, yet, in February 1997, the United States withdrew its invocation. In addition, the United States also notified that it would not apply the above-mentioned agreements to two other new Members: Mongolia and Kyrgyz Republic.

Other Exceptions

Other exceptions peculiar to the Most-Favoured-Nation principle include *Article XXIV: 3 regarding frontier traffic with adjacent countries*, and *Article I: 2 regarding historical preferences* which were in force at the signing of the GATT, such as the British Commonwealth.

It is also possible to obtain a *waiver* to constitute an exception to the Most-Favoured-Nation principle. Under WTO Article IX: 3, countries may, with the agreement of other contracting parties, waive their obligations under the agreement. New waivers, however, can only be obtained for exceptional circumstances, and require the consent of three-quarters of the contracting parties It is stipulated that the exceptional circumstances, the terms and conditions governing the application of the waiver, and the date on which the waiver will be terminated shall be clearly stated, and that waivers are subject to annual review (Article IX: 4).

MFN Obligation in GATS

"Article II: Most-Favoured-Nation Treatment

1. With respect to any measure covered by this Agreement, each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country.

2. A Member may maintain a measure inconsistent with paragraph 1 provided that such a measure is listed in, and meets the conditions of, the Annex on Article II Exemptions.

3. The provisions of this Agreement shall not be so construed as to prevent any Member from conferring or according advantages to adjacent countries in order to facilitate exchanges limited to contiguous frontier zones of services that are both locally produced and consumed."

Article II of the GATS constitutes a general obligation which is, in principle, applicable across the board by all Members to all services sectors.

Essential Features of Article II

Any measure covered by this Agreement

The scope of the GATS is defined in Article I: 1 of the Agreement to encompass "measures by Members affecting trade in services". A closer look at the elements of this definition reveals the wide domain of the Agreement. First of all, the Agreement takes a view of "trade in services" that includes not only cross border supply, but also the supply of a service through consumption abroad, commercial presence and presence of natural persons. Hence, while the MFN obligation under GATT 1994 is concerned with measures affecting products *per se*, the domain of this obligation in the GATS includes also measures affecting service *suppliers*. Secondly, "measures by Members" are defined broadly to include measures taken by central, regional or local governments, as well as non-governmental bodies in the exercise of powers delegated by the government - even though the GATS only requires Members to take "such reasonable measures as may be available to it" to ensure compliance by sub-central entities. Finally, the Bananas Case confirmed a broad interpretation of the term "affecting", i.e. measures concerned need not affect trade in services as such but could also be measures taken in other areas with repercussions on services - such as measures in respect of the purchase of goods.

Treatment no less favourable

The key issue here is whether this should be interpreted to mean only *de jure*, or formal, discrimination or whether it also pertains to *de facto* discrimination. The Appellate Body in the Bananas Dispute upheld the Panel's conclusion that the provision prohibits both forms of discrimination, but differed on the basis for this conclusion.

The Panel argued that the basic requirement to accord "treatment no less favourable" was the same in GATS Article II: 1 and GATS Article XVII: 1, the national treatment provision. The standard of "no less favourable treatment" in paragraph 1 of Article XVII was meant to provide for no less favourable conditions of competition regardless of whether this was achieved through the application of formally identical or formally different measures. Paragraphs 2 and 3 of Article XVII served the purpose of codifying this interpretation, established in previous jurisprudence pertaining to the GATT national treatment provision, and did not impose new obligations on Members additional to those contained in paragraph 1. The absence of similar elaboration in Article II was not a justification for giving a different ordinary meaning to the words "treatment no less favourable", which were identical in both Articles II:1 and XVII:1. It could be legitimately inferred, therefore, that Article II, also proscribed both forms of discrimination - notwithstanding the absence of clarifying elaboration.

The Appellate Body found the Panel's reasoning on this issue to be "less than fully satisfactory". It argued that the MFN obligation in GATS Article II should be interpreted, not in the light of the national treatment obligations in GATS Article XVII or GATT Article III, but in the light of the MFN obligation in GATT Article I. Article I of GATT 1994 had also been applied, in past practice, to measures involving *de facto* discrimination. Significantly, the Appellate Body agreed with the Panel that if Article II were to be interpreted to require only formally identical treatment, "it would not be difficult - and, indeed, it would be a good deal easier in the case of trade in services, than in the case of trade in goods - to devise discriminatory measures aimed at circumventing the basic purpose of that Article" which was to ensure equality of competitive opportunities. For these reasons, it concluded that "treatment no less favourable" in Article II: 1 of the GATS should be interpreted to include *de facto*, as well as *de jure*, discrimination. The Appellate Body went further than the Panel in clearly stating that its conclusion was not limited to the case under consideration.

Like services and service suppliers

In the Bananas Case, the question of how likeness of services and service suppliers should be established needed to be addressed to only a limited extent. First, and relatively straightforward, the Panel found that wholesale services of bananas are like, irrespective of the origin of the bananas supplied. Secondly, in the Panel's view, "to the extent that entities provide these like services, they are like service suppliers".

It is relatively straightforward to apply the MFN provision to measures taken by governments that are overtly discriminatory, i.e., those that discriminate on the basis of the provenance of the good. The problem arises in relation to what might be termed as apparently origin-neutral (AON) measures; namely, those where the basis for applying a measure is not the provenance of the service or service supplier but some other characteristic or set of characteristics, such as the place of training. In such cases, a determination under Article II hinges on determining whether the imported products are "like" each other. The wider the definition of "likeness," the greater will be the set of measures that are inconsistent with Article II. If a doctor is a doctor, a regulation which imposed greater qualification requirements on a doctor trained in Country A than on a doctor trained in Country B would violate Article II. On the other hand, the narrower the definition of "likeness" the more measures will conform to Article II. If a doctor trained in one country is not "like" a doctor trained in another country, then the treatment of the doctor trained in country A would have to be compared with the treatment of a doctor trained in a country with similar training standards, and the additional qualification requirement could then be found consistent with Article II. Similar questions also arise in establishing likeness of service suppliers.

Exceptions to the MFN Rule under GATS

Article II: 2 of the GATS: MFN Exceptions

Certain sectoral sensitivities that emerged in the Uruguay Round raised the spectre of wholesale sectoral exclusions from GATS as a means of avoiding the MFN rule. In order to prevent this, it was agreed to permit limited exemptions to MFN under GATS. Such exemptions, however, had to be taken at the time the negotiations were concluded. Any exception to this general obligation would have to be provided for explicitly in accordance with the terms of the GATS. Article II: 2 states:

"A Member may maintain a measure inconsistent with paragraph 1 provided that such a measure is listed in, and meets the conditions of, the Annex on Article II Exemptions".

The annex makes it clear that no new exemptions can be granted, at least by this route: any future requests to give non-MFN treatment can only be met through the WTO waiver procedures. Some listed exemptions are subject to a stated time limit. For those that are not, the annex provides that *in principle* they should not last longer than ten years (that is, not beyond 2004), and that in any case they are subject to negotiation in future trade-liberalizing rounds. Meanwhile, all remaining exemptions will be reviewed in the Council for Trade in Services before the end of 1999 to see whether they are still needed.

A limited exception to the rule that no new exemptions could be listed after the entry into force of the WTO applied to financial services, maritime transport and basic telecommunications: GATS annexes providing for continuing negotiations on these subjects, allowed exemptions to be listed only at the end of the negotiations. Now that negotiations in basic telecommunications and financial services have been concluded, it is only in maritime transport services that it is still possible to take an MFN exemption.

General Exceptions (Article XIV)

The GATS provisions on general and security exceptions resemble their GATT equivalents. The general exceptions are, as in the GATT, preceded by a head-note that makes the right of a member to adopt or enforce measures necessary for the purposes listed subject to the condition that they not be applied as a means of "arbitrary or unjustifiable discrimination between countries where like conditions prevail, or as a disguised restriction on trade in services". The list of purposes that follows includes the protection of public morals and maintenance of public order; protection of human, animal or plant life or health; securing compliance with laws or regulations which are not inconsistent with the provisions of GATS including those relating to the prevention of deceptive and fraudulent practices, the protection of individual privacy in the handling of personal data, and safety; ensuring equitable and effective taxation and the avoidance of double taxation. A footnote spells out a number of ways in which a country's taxation practices may treat foreigners differently from its own nationals.

Security Exceptions (Article XIV bis)

The security exceptions are virtually identical with those in GATT 1994.

Sectoral Annexes and Decisions

The Annex on Air Transport specifically excludes the complex network of bilateral agreements on air traffic rights from GATS rules. In consequence, the GATS applies at present only to aircraft repair and maintenance services, the selling and marketing of air transport services (a function defined as not including the pricing or conditions of transport services), and computer reservation systems.

In the maritime transport sector, the failure to conclude negotiations successfully led to the June 1996 Decision to suspend the application of the MFN obligation to the sector until the end of the next round of comprehensive services negotiations. The suspension was prompted by the difficulty in eliminating MFN-inconsistent measures in the maritime sector. Even though Members could have listed exemptions from the MFN obligations, the dominant view was that the continued suspension of the MFN obligation would avert the need for many countries to take MFN exemptions which may be more difficult to negotiate away once explicitly listed.

Regional Integration

Apart from services specified in individual MFN exemption lists, the only permitted departure from most-favoured-nation treatment under the GATS covers preferential treatment among countries that are members of regional trading arrangements. The GATS rules on "Economic Integration", in Article V, are modelled on those in Article XXIV of the GATT. Article V: 1 permits any WTO member to enter into an agreement to further liberalize trade in services with the other countries that are parties to the agreement, provided the agreement has "substantial sectoral coverage", eliminates measures that discriminate against service suppliers of other countries in the group, and prohibits new or more discriminatory measures. Recognizing that action to open up services markets may well form part of a wider process of economic integration, Article V: 2 allow the liberalization achieved to be judged in this light.

The drafting of these rules improves on their GATT equivalents in some respects: for instance, "substantial sectoral coverage" is more carefully defined, since it disqualifies agreements that exclude any of the four modes of supply. Some other provisions are carried over from Article XXIV with little change. An approved agreement must be designed to help trade among its members, and must not result in an increase in the overall barriers faced by non-members in trading with the group within the respective sectors or sub-sectors (Article V: 4). If the establishment of the agreement, or its subsequent enlargement, leads to the withdrawal of commitments made to non-members, there must be negotiations to provide appropriate compensation (Article V: 5). No compensation, on the other hand, is due from non-members for any trade benefits they may gain from the agreement (Article V:8).

Article V: 7 create a transparency obligation, requiring Members who are party to regional agreements to notify promptly any such agreement and any enlargement or significant modification to it. The agreements which have been notified so far include the agreements establishing NAFTA, the European Communities and their Member States, as well as their agreements with the Slovak Republic, Hungary, Poland, the Czech Republic, Romania, Norway, Iceland, Liechtenstein and Bulgaria, and agreements between Canada and Chile and between Australia and New Zealand.

A related exception from the MFN rule, for the movement of natural persons, is permitted by Article V *bis* of the GATS. This allows countries to take part in agreements which establish full integration of labour markets. The only such agreement notified so far is the one involving Denmark, Finland, Iceland, Norway and Sweden.

Monopolies and exclusive service suppliers

Article VIII requires each Member to ensure that any monopoly supplier of a service does not "in the supply of the monopoly service in the relevant market" act in a manner inconsistent with the MFN obligation and the Member's specific commitments. A monopoly supplier of a service is defined in the GATS as any person, public or private, which in the relevant market of the territory of a Member is authorized or established formally or in effect by that Member as the sole supplier of that service (Article XXVIII (h)).

Government Procurement

Article XIII of the GATS exempts government purchase of services for its own use from the MFN obligation (as well as from the market access and national treatment rules). However, the same provision mandates negotiations on government procurement in services which may lead to commitments to open up some government purchases to Foreign Service suppliers.

MFN Obligations in TRIPS

"Article IV: Most-Favoured-Nation Treatment

With regard to the protection of intellectual property, any advantage, favour, privilege or immunity granted by a Member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other Members. Exempted from this obligation is any advantage, favour, privilege or immunity accorded by a Member:

(a) deriving from international agreements on judicial assistance or law enforcement of a general nature and not particularly confined to the protection of intellectual property;
(b) granted in accordance with the provisions of the Berne Convention (1971) or the Rome Convention authorizing that the treatment accorded be a function not of national treatment but of the treatment accorded in another country;
(c) in respect of the rights of performers, producers of phonograms and broadcasting organizations not provided under this Agreement;
(d) deriving from international agreements related to the protection of intellectual property which entered into force prior to the entry into force of the WTO Agreement, provided that such agreements are notified to the Council for TRIPS and do not constitute an arbitrary or unjustifiable discrimination against nationals of other Members."

The MFN principle requires each Member to treat nationals of all other Members on an equivalent basis in relation to intellectual property protection. The MFN principle was not traditionally incorporated in the WIPO Conventions. It was assumed that WIPO members would not grant intellectual property rights protection to foreign nationals more extensive than the protection granted to local nationals. In this setting, a national treatment obligation would place all foreigners on the same plane. As bilateral pressures mounted in the late 1980s to increase IPR protection, Uruguay Round negotiators became concerned that some countries were indeed granting IPR privileges to foreign nationals more extensive than the rights granted to their own nationals. This focused attention on incorporating an MFN principle in TRIPS, so that all Members would obtain an equivalent level of protection when more extensive protection was granted to foreigners.

The MFN principle in TRIPS is particularly important because of its relationship to regional integration arrangements. Article 4 was drafted in a manner that was intended to accommodate the interests of certain pre-existing regional arrangements. However, the legal formula used in Article 4 (d) to establish that accommodation is oddly suited to such a purpose. The regional arrangements affected by it have notified the Council for TRIPS of potentially broad claims of exemption, though the effect of these claims in practice remains to be determined. Articles 3, 4 and 5 were not subject to the transition arrangements in favour of developing country and least developed country Members, and so became applicable to them on January 1, 1996.

Exceptions to the MFN Rule under TRIPS

Article IV provides for four exceptions to the MFN treatment under the TRIPS Agreement. The TRIPS, unlike GATT or GATS, does not contain any other provision on exemptions. This absence leads to particularly uncertain legal context with respect to the status of advantages that me exchanged between countries through bilateral trade agreements.

Judicial Assistance or Law Enforcement

Article IV (a) exempts any advantage, favour, privilege or immunity deriving from international agreements on judicial assistance or law enforcement of a general nature and not particularly confined to the protection of intellectual property.

Berne and Rome Convention

The second exception relates to any advantage, favour, privilege or immunity granted under the Berne Convention or Rome Convention.

Performers' Rights

Advantage, favour, privilege or immunity in respect of the rights of performers, producers of phonograms and broadcasting organizations not provided under TRIPS Agreement are also exempted from the MFN obligation.

International Arrangements

Article 4 (d) is with regard to the international agreements related to the protection of intellectual property. According to the exception given in Article 4 (d) countries are not required to extend the same advantage, favour, privilege or immunity to all member counties of the WTO in relation to intellectual property protection if these advantages, favours, privileges or immunities are derived from international agreements related to protection of intellectual property right. However, this is subject to four conditions.

i. First, the relevant international agreement should have entered into force prior to the entry into force of the WTO agreement.
ii. Second, the international agreement should be related to the protection of intellectual property.

iii. Third, such agreements should have been notified to the TRIPS council.
iv. Fourth, such agreements should not constitute arbitrary or unjustifiable discrimination against nationals of other countries.

In other words, this provision exempts those agreements related to the protection of intellectual property from the application of the MFN provision that were in existence when the WTO was formed.

National Treatment: Its Origin and Application in GATT and WTO

National treatment (GATT Article III) stands alongside MFN treatment as one of the central principles of the WTO Agreement. Under the national treatment rule, Members must not accord discriminatory treatment between imports and "like" domestic products (with the exception of the imposition of tariffs, which is a border measure). The GATS and the TRIPS Agreement have similar provisions. This rule prevents countries from taking discriminatory measures on imports and from offsetting the effects of tariffs through non-tariff measures. An example of the latter could be a case in which Member A reduces the import tariff on product X from ten percent to five percent, only to impose a five percent domestic consumption tax only on imported product X, effectively offsetting the five percentage point tariff cut. The purpose of the national treatment rule is to eliminate "hidden" domestic barriers to trade by WTO Members by according imported products treatment no less favorable than that accorded to products of national origin. Adherence to this principle is important in order to maintain a balance of rights and obligations, and is essential for the maintenance of the multilateral trading system.

Legal Framework

GATT Article III

GATT Article III requires that WTO Members provide national treatment to all other Members. Article III: 1 stipulates the general principle that Members must not apply internal taxes or other internal charges, laws, regulations, and requirements affecting imported or domestic products so as to afford protection to domestic production.

In relation to internal taxes or other internal charges, Article III:2 stipulates that WTO Members shall not apply standards higher than those imposed on domestic products between imported goods and "like" domestic goods, or between imported goods and "a directly competitive or substitutable product." With regard to internal regulations and laws, Article III: 4 provides that Members shall accord imported products treatment no less favourable than that accorded to "like products" of national origin.

In determining the similarity of "like products," GATT panel reports have relied on a number of criteria including tariff classifications, the product's end uses in a given market, consumer tastes and habits, and the product's properties, nature, and quality. WTO panels and the Appellate Body reports utilize the same criteria.

Exceptions to GATT Article III (National Treatment Rule)

Although national treatment is a basic principle under the GATT, the GATT provides for certain exceptions, outlined below

Government Procurement

GATT Article III: 8(a) permits governments to purchase domestic products preferentially, making government procurement one exception to the national treatment rule. This exception is permitted because WTO Members recognize the role of government procurement in national policy. For example, there may be a security need to develop and purchase products domestically, or government procurement may, as is often the case, be used as a policy tool to promote smaller business, local industry, or advanced technologies.

While the GATT made government procurement an exception to the national treatment rule, the Agreement on Government Procurement resulting from the Uruguay Round mandates signatories offer national treatment in their government procurement. However, WTO Members are under no obligation to join the Agreement on Government Procurement. In fact, it has mostly been developed countries that have joined the Agreement. Therefore, in the context of government procurement, the national treatment rule applies only between those who have acceded to the Agreement on Government Procurement. For others, the traditional exception is still in force.

Domestic Subsidies

GATT Article III: 8(b) allows for the payment of subsidies exclusively to domestic producers as an exception to the national treatment rule, under the condition that it is not in violation of other provisions in Article III and the Agreement on Subsidies and Countervailing Measures. The reason for this exception is that subsidies are recognized to be an effective policy tool, and are recognized to be basically within the latitude of domestic policy authorities. However, because subsidies may have a negative effect on trade, the Agreement on Subsidies and Countervailing Measures imposes strict disciplines on their use.

GATT Article XVIII: C

Members in the early stages of development can raise their standard of living by promoting the establishment of infant industries, but this may require government support, and the goal may not be realistically attainable with measures that conform to the GATT. In such cases, countries can use the provisions of GATT Article XVIII: C to notify WTO Members and to initiate consultations. After consultations are completed and under certain restrictions, these countries are then allowed to take measures that are inconsistent with GATT provisions, excluding Articles I, II and XIII. Unlike the trade restrictions for balance of payment reasons in GATT Article XVIII: B, the Article XVIII: C procedure allows both broader measures and violations of the national treatment obligations in order to promote domestic infant industries. In the case concerning Malaysia's import permit system of petrochemical products, Malaysia resorted to GATT Article XVIII: C as a reason to enforce import restrictions on polyethylene. Although Singapore filed a WTO case against this Malaysian practice, Singapore later withdrew its complaint. Thus, neither a panel nor the Appellant Body had an opportunity to rule on the case.[1]

Other Exceptions to National Treatment

Exceptions peculiar to national treatment include the exception on screen quotas of cinematographic films under Article III: 10 and Article IV. The provisions of GATT Article XX on general exceptions, Article XXI on security exceptions and WTO Article IX on waivers also apply to the national treatment rule. For further details, see the relevant sections of Chapter 1 (MFN Principle).

National Treatment Rules Outside of GATT Article III

With the entry into force of the WTO Agreement, the principle of national treatment has been extended, although in a limited fashion, to agreements on goods, services, and intellectual property. For instance, among the agreements on goods, Article 5.1.1 of the TBT Agreement also addresses national treatment. GATS Article XVII provides national treatment for services and service providers and Article 3 of the TRIPS Agreement provides national treatment for the protection of intellectual property rights. The plurilateral Agreement on Government Procurement also contains a national treatment clause. (See the relevant chapters for more information on Trade in Services, Intellectual Property Rights, and Government Procurement.)

Economic Implications

There is a tendency for importing countries to try to use discriminatory application of domestic taxes and regulations to protect national production, often as the result of protectionist pressures from domestic producers. This distorts the conditions of competition between domestic and imported goods and leads to a reduction in economic welfare.

The national treatment rule does not in principle permit these sorts of policies designed to protect domestic products. GATT Article II does permit the use of tariffs as a means of protecting domestic industry, but this is because tariffs have high degrees of transparency and predictability since they are published and committed to in tariff schedules. On the other

[1] Malaysia – Prohibition of Imports of Polyethylene and Polypropylene (WT/DS1). This complaint had the distinction of being the first dispute under the new WTO dispute settlement system.

hand, domestic taxes and regulations are "hidden barriers to trade" that lack both transparency and predictability. Thus, they can have a large trade-distortive impact. The existence of GATT Article III generally impedes the adoption of policies and measures aimed at domestic protection, and thus promote trade liberalization.

In addition, regarding tariff concessions, GATT Article II recognizes tariffs have been used as tools for domestic industrial protection. Consequently, it sets a course for the achievement of liberalization through gradual reductions. Even if tariff reductions were made as a result of trade negotiations, if domestic taxes and regulations were to be applied in a discriminatory fashion to protect domestic industry simultaneously, then effective internal trade barriers would remain. The national treatment rule prohibits countries from using domestic taxes and regulations to offset the value of tariff concessions and is, therefore, a significant tool in promoting trade liberalization.

Main Cases

The Tuna Dolphin Controversy

Overview

The killing of dolphins has been the by-product of catching tuna for a long time in the Eastern Tropical Pacific (ETP). Here, schools of tuna swim below dolphins. Fisherman began to really take advantage of this in the 1950's, using dolphins as a means of tracking down tuna. This is also when the purse-seine net fishing method was developed, which entrapped both tuna and dolphins in its nets.

As the dolphin mortality rate began to rise, US fishermen realized that their fishing methods would only work if there were still living dolphins in the ETP. As a consequence, they began to develop methods that were dolphin-safe.

Dolphin mortality rates remained high though, and in 1972 Congress enacted the Marine Mammal Protection Act (MMPA). This act required that fishermen use dolphin-safe techniques, and established a permit system with a fixed ceiling on dolphin mortalities, thus limiting the taking rate.

The number of dolphins dying due to tuna fishing did not decline though, because the composition of ships fishing in the EPC changed. There were less US ships and more Mexican ships (along with a good number from Venezuela).

The killing of dolphins rest almost completely on foreign fishing techniques, so Congress added the Direct Embargo Provision to the MMPA. This provision prohibited the importation of tuna from countries that did not have mortality rates and regulatory programs comparable to those of the US. If countries did not prove that these two requirements were met, they would be faced with a direct tuna embargo.

To ensure compliance, Congress introduced three other measures into the MMPA:

- The Intermediary Nation Provision: stated that intermediary countries that exported tuna to the US, but were not involved in the catching of the tuna, must prove that they have prohibited tuna from countries banned by the US.
- The Pelly Amendment: stipulated that after a ban had been in place for six months, the President of the US was to be notified. This gave the President discretionary power to impose a ban of fish products for a period determined by the President.
- The Dolphin Protection Consumer Information Act: dictated that only tuna products caught through dolphin-safe methods could include a "dolphin safe" label.

During 1990-91, the US implemented embargos on Mexico, Venezuela, Panama, and Vanuatu (since then, Ecuador and Panama have complied with US standards). Mexico resisted conforming to US policies on the fishing of tuna, and continued to contribute greatly to dolphin deaths

GATT Articles

Article I Most favored nation treatment provision: prohibits contracting parties from discriminating between like products based on national origin

Article III National treatment provision: countries must apply tariffs equally to similar products of all other contracting parties.

Article XI Quantitative restriction provision: only permits countries to impose tariffs as trade restrictions and prohibits the use of such non-tariff restrictions as quotas and import or export licenses

Article XX Allowance of trade restrictions when deemed "necessary to protect human, animal or plant life or health" or "relating to the conservation of exhaustible natural resources."

Tuna-Dolphin I (1990)

- Mexico brings complaint MMPA inconsistent with GATT principles
- Violates articles III, XI, and does not meet exceptions of XX.

III. Product vs. Process

XI. Embargoes vs. Tariffs.

XX. Couldn't be applied outside the jurisdiction of the US

Outcome: Mexico won the challenge, but the findings weren't formally adopted due to political pressures of upcoming NAFTA negotiations: not legally binding

Tuna - Dolphin II (1992)

- Brought by European Economic Community
- MMPA did not have right to place embargoes on intermediary nations
- Violated article XI mostly, but also III and XX
- GATT ruled against US on basis of Articles XI and III
- Went against the original ruling and found that it did qualify under exceptions in Article XX in the fact that those resources could be outside of the US, but…
- It still didn't qualify since the embargo wasn't primarily aimed at conservation
- Ruling vetoed by US thanks to procedure that predated the WTO

The Future: another attempt at embargo?

Shrimp-Turtle dispute

- very similar situation
- contradictory ruling to that of Tuna-Dolphin, helps the case would need to satisfy things that the Shrimp-Turtle case did not:
    1. State must be flexible in implementation of regulatory program
    2. Limit breadth of embargo
    3. Multilateral approach
    4. Treat all offending countries equally
    5. Lack of due process

Conclusion

- Difficult to convince WTO / GATT to rule for environmental protection measures against free trade.
- Bear the burden of proving that these are permissible reasons to bar trade
- Use appropriate barriers to trade
- Turtle Shrimp ban sheds light on appropriate actions to take

The Case of the Mexican Cross-Border Trucking Services

In 1995 Mexico complained about the lack of access to the U.S.-market with regard to Trucking Services after the U.S. had put in place a moratorium on the processing of applications by Mexican since 1982 as well as a prohibition barring Mexican investment in U.S. companies providing transport of international cargo.

The legal basis for these measures was the 1982 U.S. Bus Regulatory Reform Act which started a (initially) two-year moratorium on the issuance of new motor carrier operating authority to foreign carriers. While the ban against Canada was lifted very soon, it remained in place with regard to Mexico. Consequently Mexican trucking companies were unable to provide services in the U.S. and Mexican nationals were not allowed to invest in U.S. trucking companies. The only exceptions allowed for were Mexican trucks headed to the commercial zones of U.S. border cities. From the commercial zone the Mexican truck is to return to Mexico while the cargo will be picked up by a U.S. truck for further transport.

According to NAFTA, which was signed on 18 December 1992 and entered into force on 1 January 1994, Mexican nationals are permitted to carry cargo throughout the U.S. since 1 January 2000. Two years later, none of these deadlines had been met by the U.S.

The case is the first NAFTA Chapter 20 panel report to cover trade in services. The panel came to the conclusion that the U.S. violated Articles 1202(National Treatment) and 1203 NAFTA (Most Favoured Nation Treatment) "by failing to lift its moratorium on the processing of applications for Mexican trucking firms to operate in the U.S." Mexican trucking companies must not be treated less favourably than U.S. or Canadian companies.

It has been argued by the U.S. the limitations put in place against Mexico were justified under Art. 2101of the NAFTA. Art. 2101 of the NAFTA allows for exceptions which are "necessary to secure compliance with law or regulations that are not inconsistent with the provisions of [NAFTA], including those relating to health and safety consumer protection." The panel noted correctly that Art. 2101 NAFTA only refer to the least trade-restrictive measure- which the U.S. moratorium clearly is not. Moreover did the U.S. not prove that the moratorium was in fact necessary within the meaning of Art. 2101 NAFTA and finally did the panel not accept the claim already brought forward by the U.S. in the *Shrimp / Turtle* and *Yellowfin Tuna*cases that the moratorium was justified as long as Mexico did not adopt internal rules which are fully compatible with the U.S. rules, especially since it "is unclear when, if ever, the United States will be satisfied that the Mexican regulatory system is adequate to lift the moratorium with respect to all Mexican providers of trucking services." Interestingly enough, the U.S. did not attempt to prove its point regarding the alleged safety concerns but rather "argued that Mexico had failed to prove a prima facie violation of [NAFTA] Chapter 11", which was rejected by the panel to the effect that a violation of Art. 1102 NAFTA was found as well as was with regard to all other Mexican claims. Consequently the panel recommended that the U.S. bring into compliance with NAFTA its policies regarding cross-border trucking services.

Common Techniques of International Trade Law

Free trade between countries is important. It allows companies and workers to specialize in what they do best. Competition forces companies to be more productive. Costs are kept lower. Consumers have the options of buying cheaper and better goods and services. Free trade helps create jobs, both in the domestic country where goods are made and in the foreign country where the goods are imported.

Trade Restrictions

In spite of the many advantages of free trade, many nations put limits on trade for a variety of reasons and this practice is known as Protectionism. The main types of trade restrictions are tariffs, subsidies, quotas, embargoes, licensing requirements, and standards.

Tariff

A tariff is a tax on goods imported from a foreign country. So this is imposed upon the good at the time of entry inside the boundary of the country. Tariffs raise the price of the imported goods. This makes the price of the imported goods equal to or higher than the price of the domestic goods. The government of the country that is importing the goods collects the money from the tariff. Remember that a tariff on tea led to the American Revolution.

Subsidy

Subsidies are like tariffs in reverse. A government will give money to domestic producers of certain goods. This allows the producers to charge less than foreign producers to keep prices low. Tariffs are paid for by the consumers of the goods. But subsidies are paid for by the government (which gets its money from taxpayers). Taxpayers may or may not use the goods that are subsidized, so they may be paying for the cost of a product they do not even use. Some things that are commonly subsidized in the United States are gasoline, utilities, farm crops, and some student loans.

Quota

A quota is a limit on the amount of goods that can be imported. Putting a quota on a good creates a shortage, which causes the price of the good to rise. That allows domestic producers to raise their prices and to expand their production. A quota on cars, for example, might limit foreign-made cars to one million a year. If Americans buy twenty million new cars each year, this would leave most of the market to American producers. A quota benefits domestic producers, but it does not benefit the government.

Embargo

An embargo stops exports or imports of a product or group of products to or from another country. Sometimes all trade with a country is stopped. This is usually for political reasons. Because the U.S. doesn't want to support countries that may support terrorism, it has used embargos against Iran, Iraq, and Syria.

License

Some countries require a producer to get a license to import or export goods. In this way, the government can limit the number of imports by limiting the number of licenses issued. Export licenses can be used to keep domestic prices on agricultural products from rising. If too much wheat, for example, were exported, it would cause the domestic price of wheat to rise. Sometimes export licenses have been used to restrict trade with certain countries for political reasons. The government collects money from the sale of licenses.

Health and Safety Standards

Health and safety standards are set for imported goods. These are sometimes used to restrict imports by many countries. Because the standards are set by the importing country's government, the standards are sometimes much higher than those for domestic goods. Standards have become a major form of trade restriction.

Voluntary Export Restraint

A voluntary export restraint (VER) or voluntary export restriction is a government imposed limit on the quantity of goods that can be exported out of a country during a specified period of time. Also, VER is typically implemented on a bilateral basis, that is, on exports from one exporter to one importing country.

Dumping

The definition of dumping is the act of charging a lower price for a good in a foreign market than the price charged for the same good in the domestic market. This is often referred to as selling at less than "fair value". Under the World Trade Organization (WTO) Agreement, dumping is condemned (but is not prohibited) if it causes or threatens to cause material injury to a domestic industry in the importing country. Usually, nations resort to this practice to gain entry and market share in foreign markets, but it can also be used to sell off surplus or obsolete goods. Dumping creates unfair competition for domestic industries, and governments are justifiably concerned when they suspect foreign countries of dumping products on their markets. They often retaliate by imposing punitive tariffs that drive up the price of the imported goods.

Implications

All of these trade restrictions limit world trade. This has the effect of limiting total production of goods. It shifts production away from the most efficient producers to less efficient ones. It reduces employment and/or wages, and it causes an increase in prices.

Reasons for Use of Restrictive Measures

If trade restrictions are bad, why do countries use them? They want to protect their own businesses and workers. Some beginning businesses that are just getting started need extra help to become successful. Governments also want to protect certain industries. Agriculture is one area where tariffs and subsidies are commonly used to help domestic farmers earn enough from farming to keep raising food. Political reasons are also a major reason for trade restrictions.

INTERNATIONAL TRADE LAW AND FINANCIAL INSTITUTIONS: IMF & IBRD

The Nature and Characteristics of International Institutions

Over the years, international institutions of various types - treaties, organizations, regimes, conventions, and so on have grown greatly in numbers and importance. Paralleling this growth, the scholarly literature on international relations has seen successive waves of efforts to describe and explain institutional phenomena. Indeed, international institutions have frequently been at the center of leading theoretical debates in the field.

In contemporary global politics, international institutions play an enormous role. To most of the world, they symbolize the hope for international peace and security through global cooperation and mutual economic development. Examples of international institutions include the International Monitory Fund (IMF), International Bank for Reconstruction and Development (IBRD), the United Nations (UN), The General Agreement on Trade and Tariffs, *etc.*. Most international institutions operate as part of one or more international regimes. An international regime is a set of rules, standards, and procedures that govern national behaviour in a particular area. Examples of international regimes include arms control, foreign trade, and Antarctic exploration. International institutions are often central to the functioning of an international regime, giving structure and procedures to the “rules of the game” by which nations must play.

Following are the essentials of international institution:

I. Its origin is based on multilateral international agreement.
II. The institution has a personality of its own, which is distinct from that of its individual members
III. It has permanent organs which carry out common aims.

The System of Bretton Woods

In times of globalisation the economic environment changes rapidly. Capital movements become larger and at the same time less controllable. Therefore, the need for a stabilising system becomes more and more apparent. In the past such a system has been established at the conference of Bretton Woods. Already in 1944 the British economist John Maynard Keynes emphasised “the importance of rule-based regimes to stabilise business expectations something he accepted in the Bretton Woods system of fixed exchanged rates.” Recently leading industrial nations have been calling for a renewal of the purpose and the spirit of this system in order to cope with the growing size of international trade and capital flows. This essay gives a short overview of the system’s development from 1944 until today and stresses especially problems and obstacles. It identifies mistakes that have been made and points out aspects that have to be taken into account when implementing a "new system of Bretton Woods".

Development of the system

The international economic situation

After World War I most countries wanted to return to the old financial security and stable situation of pre-war times as soon as possible. Discussions about a return to the gold standard began and by 1926 all leading economies had re-established the system, according to which every nation's circulating money had to be backed by reserves of gold and foreign currencies to a certain extent. But several mistakes in implementing the gold standard (mainly that a weakened Great Britain had to take the leading part and that a number of main currencies where over- or undervalued) led to a collapse of the economic and financial relations, peaking in the Great Depression in 1929. Every single country tried to increase the competitiveness of its export products in order to reduce its payment balance deficit by deflating its currency. This strategy only led to success as long as a country was deflating faster and more strongly than all other nations. This fact resulted in an international deflation competition that caused mass unemployment, bankruptcy of enterprises, the failing of credit institutions, as well as hyper inflations in the countries concerned.

In the 1930s several conferences dealing with the world monetary problems caused by the Great Depression had ended in failure. But after World War II the need for a stabilizing system that avoided the mistakes, which had been made earlier, became evident. Plans were made for an innovative monetary system and a supervising institution to monitor all actions. First negotiations took place under wartime conditions

The conference of Bretton Woods

In 1944 an international conference took place in Bretton Woods, New Hampshire (USA). 44 countries attended this conference in order to restructure international finance and currency relationships. The participants of this conference created the International Monetary Fund (IMF) and the International Bank for Reconstruction and Development (IBRD/World Bank). Additionally, they agreed on implementing a system of fixed exchange rates with the U.S. dollar as the key currency.

The plans for the system of Bretton Woods were developed by two important economists of these days, the American minister of state in the U.S. treasury, Harry Dexter White, and the British economist John Maynard Keynes who stated: " We, the delegates of this Conference, Mr President, have been trying to accomplish something very difficult to accomplish.[...] It has been our task to find a common measure, a common standard, a common rule acceptable to each and not irksome to any." This statement outlines the difficulty of creating a system that every nation could accept. The ideas of John Maynard Keynes and Harry Dexter White have been described as very different from each other on several occasions but in fact there are extraordinary similarities. According to the White plan, a Bank for Reconstruction (today the World Bank) and an International Stabilisation Fund should be established. The Keynes plan called for the same. The only difference was that Keynes wanted to vest the IMF with possibilities to create money (a fact that can easily be understood in the background of Great Britain's suffering from the deflation policies in the Inter-War period) and with the authority to take actions on a much larger scale. In case of balance of payments imbalances John Maynard Keynes recommended that both sides, debtors and creditors, should change their policies. Countries with payment surpluses should increase their imports from the deficit countries and thereby create a foreign trade equilibrium. Harry Dexter White, on the other hand, saw an imbalance as a problem only of the deficit country. Economists today agree that White was mistaken and Keynes was more farsighted. However, Keynes' plan was never discussed seriously at Bretton Woods and the participants agreed on the White plan. The United States defined the value of its dollar in terms of gold, so that one ounce of gold was equal to $ 35. All other members had to define the value of their money according to what was called the "par value system" in terms of U.S. dollars or gold.

The International Monetary Fund

Purpose

The IMF was officially established on December 27, 1945, when the 29 participating countries at the conference of Bretton Woods signed its Articles of Agreement. It commenced its financial operations on March 1, 1947. The IMF is an international organisation, which today consists of 183 member countries. The purposes of the IMF are to promote international monetary cooperation by establishing a global monitoring agency that supervises, consults, and collaborates on monetary problems. It facilitates world trade expansion and thereby contributes to the promotion and maintenance of high levels of employment and real income. Furthermore, the IMF ensures exchange rate stability to avoid competitive exchange depreciation. It eliminates foreign exchange restrictions and assists in creating systems of payment for multilateral trade. Moreover, member countries with disequilibriums in their balance of payments are provided with the opportunity to correct their problems by making the financial resources of the IMF available for them.

Operations

When joining the IMF, each country must contribute a certain sum of money, which is called a quota subscription and is a sort of credit deposit. These quotas form the largest source of money at the IMF's disposal and the IMF uses this money to grant loans to member countries with financial difficulties. Each nation that has joined the system can immediately withdraw 25 per cent of its quota in case of payment problems and it may request more if this sum is insufficient. The debts have to be paid back as soon as possible. Additionally, the country must demonstrate how the payment difficulties will be solved. The higher a country's contribution is, the higher is the sum of money it can borrow from the IMF. Furthermore, the quotas determine the voting power of each member.

The money, which the IMF lends, should not be compared to a loan of a conventional credit institution. For the country that files an application it is rather an opportunity to buy a foreign currency and paying with gold or the national currency. Within three to five years the country has to pay back its debts. According to the IMF in the course of a typical year circa 20 currencies are borrowed and "most potential borrowers want only the major convertible currencies: the U.S. dollar, the Japanese yen, the deutsche mark, the pound sterling, and the French Franc." Therefore, although quotas are worth about $193 billion in theory, the sum at the IMF's disposal is deceptively large.

Organisation

The IMF has no control over national economic policies of its members. On the contrary, the chain of command runs from the governments of the member countries to the IMF. The highest authority is the Board of Governors, which consists of one Governor (usually the minister of finance or the head of the central bank) of each member country. Additionally, there is an equal number of Alternates (representative Governors). The Board of Governors gathers only on the occasion of annual meetings.

The IMF's day-to-day work is managed by the Executive Board, which is formed of 24 Executive Directors who meet at least three times a week to supervise the implementation of the IMF's policies. The member countries with the highest quotas send one Executive Director to the Board, who has as many votes as the quota regulation assigns to his country.

The remaining Directors are elected by the rest of the countries and they only have as many votes as they had in the election. This point illustrates the dominance of the USA in the System of Bretton Woods as the "United States, with the world's largest economy, contributes most to the IMF, providing about 18 percent of total quotas (about $35 billion)". Thus the USA have most votes, by now more than 265.000.

International Bank for Reconstruction and Development (IBRD)

The International Bank for Reconstruction and Development (IBRD) is one of five institutions that comprise the World Bank Group. The IBRD is an international organization whose original mission was to finance the reconstruction of nations devastated by World War II. Now, its mission has expanded to fight poverty by means of financing states. Its operation is maintained through payments as regulated by member states. It came into existence on December 27, 1945 following international ratification of the agreements reached at the

United Nations Monetary and Financial Conference of July 1 to July 22, 1944 in Bretton Woods, New Hampshire.

The IBRD provides loans to governments, and public enterprises, always with a government (or "sovereign") guarantee of repayment subject to general conditions. The funds for this lending come primarily from the issuing of World Bank bonds on the global capital markets—typically $12–15 billion per year. These bonds are rated AAA (the highest possible) because they are backed by member states' share capital, as well as by borrowers' sovereign guarantees. (In addition, loans that are repaid are recycled, or relent.) Because of the IBRD's credit rating, it is able to borrow at relatively low interest rates. As most developing countries have considerably lower credit ratings, the IBRD can lend to countries at interest rates that are usually quite attractive to them, even after adding a small margin (about 1%) to cover administrative overheads.

History

Commencing operations on June 25, 1946, it approved its first loan on May 9, 1947 ($250m to France for postwar reconstruction, in real terms the largest loan issued by the Bank to date).

The IBRD was established mainly as a vehicle for reconstruction of Europe and Japan after World War II, with an additional mandate to foster economic growth in developing countries in Africa, Asia and Latin America. Originally the bank focused mainly on large-scale infrastructure projects, building highways, airports, and power plants. As Japan and its European client countries "graduated" (achieved certain levels of income per capita), the IBRD became focused entirely on developing countries. Since the early 1990s the IBRD has also provided financing to the post-Socialist states of Eastern Europe and the republics of the former Soviet Union.

Establishment and downfall of Bretton Woods system:

The Bretton Woods system of monetary management established the rules for commercial and financial relations among the world's major industrial states in the mid 20th century. The Bretton Woods system was the first example of a fully negotiated monetary order intended to govern monetary relations among independent nation-states.

Preparing to rebuild the international economic system as World War II was still raging, 730 delegates from all 44 Allied nations gathered at the Mount Washington Hotel in Bretton Woods, New Hampshire, United States, for the United Nations Monetary and Financial Conference. The delegates deliberated upon and signed the Bretton Woods Agreements during the first three weeks of July 1944.

Setting up a system of rules, institutions, and procedures to regulate the international monetary system, the planners at Bretton Woods established the International Bank for Reconstruction and Development (IBRD) (now one of five institutions in the World Bank Group) and the International Monetary Fund (IMF). These organizations became operational in 1945 after a sufficient number of countries had ratified the agreement.

The chief features of the Bretton Woods system were an obligation for each country to adopt a monetary policy that maintained the exchange rate of its currency within a fixed value—plus or minus one percent—in terms of gold and the ability of the IMF to bridge temporary imbalances of payments. In the face of increasing strain, the system collapsed in 1971, following the United States' suspension of convertibility from dollars to gold. This created the unique situation whereby the United States dollar became the "reserve currency" for the states which had signed the agreement.

The year was 1944. For the first time in modern history, an international agreement was reached to govern monetary policy among nations. It was, significantly, a chance to create a stabilizing international currency and ensure monetary stability once and for all. In total, 730 delegates from 44 nations met for three weeks in July that year at a hotel resort in Bretton Woods, New Hampshire.

It was a significant opportunity. But it fell short of what could have been achieved. It was a turning point in monetary history, however. The result of this international meeting, the Bretton Woods Agreement, had the original purpose of rebuilding after World War II through a series of currency stabilization programs and infrastructure loans to war-ravaged nations. By 1946, the system was in full operation through the newly established International Bank for Reconstruction and Development (IBRD, the World Bank) and the International Monetary Fund (IMF).

What makes the Bretton Woods Agreement so interesting to us today is the fact that the whole plan for international monetary policy was based on nations agreeing to adhere to a global gold standard. Each country signing the agreement promised to maintain its currency at values within a narrow margin to the value of gold. The IMF was established to facilitate payment imbalances on a temporary basis.

This system worked for 25 years. But it was flawed in its underlying assumptions. By pegging international currency to gold at $35 an ounce, it failed to take into effect the change in gold's actual value since 1934, when the $35 level had been set. The dollar had lost substantial purchasing power during and after World War II, and as European economies built back up, the ever-growing drain on U.S. gold reserves doomed the Bretton Woods Agreement as a permanent, working system.

This problem was described by a former senior vice president of the Federal Reserve Bank of New York:

"From the very beginning, gold was the vulnerable point of the Bretton Woods system. Yet the open-ended gold commitment assumed by the United States government under the Bretton Woods legislation is readily understandable in view of the extraordinary circumstances of the time. At the end of the war, our gold stock amounted to $20 billion, roughly 60 percent of the total of official gold reserves. As late as 1957, United States gold reserves exceeded by a ratio of three to one the total dollar reserves of all the foreign central banks. The dollar bestrode the exchange markets like a colossus."

In 1971, experiencing accelerating depletion of its gold reserves, the United States removed its currency from the gold standard, and the Bretton Woods Agreement was no longer workable.

In some respects, the ideas behind Bretton Woods were much like an economic United Nations. The combination of the worldwide depression of the 1930s and the Second World War was central in leading so many nations to an economic summit of such magnitude. The opinion of the day was that trade barriers and high costs had caused the worldwide depression, at least in part. Also, during that time it was common practice to use currency devaluation as a means for affecting neighboring countries' imports and reducing payment deficits. Unfortunately, the practice led to chronic deflation, unemployment, and a reduction in international trade. The lessons learned in the 1930s (but subsequently forgotten by many nations) included a realization that the use of currency as a tactical economic tool invariably causes more problems than it solves.

The situation was summed up well by Cordell Hull, U.S. secretary of state from 1933 through 1944, who wrote:

"Unhampered trade dovetailed with peace; high tariffs, trade barriers, and unfair economic competition, with war... If we could get a freer flow of trade ... so that one country would not be deadly jealous of another and the living standards of all countries might rise, thereby eliminating the economic dissatisfaction that breeds war, we might have a reasonable chance of lasting peace."

Hull's suggestion that war often has an economic root is reasonable given the position of both Germany and Japan in the 1930s. The trade embargo imposed by the United States against Japan, specifically intended to curtail Japanese expansion, may have been a leading cause for Japan's militaristic stance.

Another observer agreed, saying that poor economic relations among nations "inevitably result in economic warfare that will be but a prelude and instigator of military warfare on an even vaster scale." Bretton Woods had the original intention of smoothing out economic conflict, in recognition of the problems that economic disparity causes. The nations at the meeting knew that these economic problems were at least partly to blame for the war itself, and that economic reform would help to prevent future wars. At that time, the United States was without any doubt the most powerful nation in the world, both militarily and economically. Because the fighting did not take place on U.S. soil, the country built up its industrial might during the war, selling weapons to its allies while developing its own economic strength. Manufacturing by 1945 was twice the annual rate of 1935-1939.

Due to its economic dominance, the United States held the leadership role at Bretton Woods. It is also important to note that the United States owned 80 percent of the world's gold reserves at the time. So the United States had every motive to agree to the use of the gold standard to organize world currencies and to create and encourage free trade. The gold standard evolved over a period of hundreds of years, planned by a central bank, government, or committee of business leaders.

Throughout most of the nineteenth century, the gold standard dominated currency exchange. Gold created a fixed exchange rate between nations. Money supply was limited to gold reserves, so nations lacking gold were required to borrow money to finance their production and investment.

When the gold standard was in force, it was true that the net sum of trade surplus and deficit came out to zero overall, because accounts were eventually settled in gold - and credit was limited as well. In comparison, in today's fiat money system, it is not gold but credit that determines how much money a country can spend. So instead of economic might being dictated by gold reserves, it is dictated by a country's borrowing power. The trade deficit and the trade surplus are only "in balance" in theory, because the disparity between the two sides is funded with debt. The pegged rates - the value of currency to the value of gold - maintained sensible economic policy based on a nation's productivity and gold reserves. Following Bretton Woods, the pegged rate was formalized by agreement among the leading economic powers of the world.

The concept was a good one. However, in practice the international currency naturally became the U.S. dollar and other nations pegged their currencies to the dollar rather than to the value of gold. The actual outcome of the Bretton Woods Agreement was to replace the gold standard with the dollar standard. Once the United States linked the dollar to gold at a value of $35 per ounce, the whole system fell into place, at least for a while. Since the dollar was convertible to gold and other nations pegged their currencies to the dollar, it created a pseudo-gold standard.

The British economist John Maynard Keynes represented Great Britain at Bretton Woods. Keynes preferred establishing a system that would have encouraged economic growth rather than a gold-pegged system. He favored creation of an international central bank and possibly even a world currency. He proposed that the goal of the conference was "to find a common measure, a common standard, a common rule acceptable to each and not irksome to any."

Keynes' ideas were not accepted. The United States, in its leading economic position, preferred the plan offered by its representative, Harry Dexter White. The U.S. position was intended to create and maintain price stability rather than outright economic growth. As a consequence, Third World progress would be achieved through lending and infrastructure investment through the IMF, which was charged with managing trade deficits to avoid currency devaluation.

In joining the IMF, each country was assigned a trade quota to fund the international effort, budgeted originally at $8.8 billion. Disparity among countries was to be managed through a series of borrowings. A country could borrow from the IMF, which would be acting in fact like a central bank. The Bretton Woods Agreement did not include any provisions for creation of reserves. The presumption was that gold production would be sufficient to continue funding growth and that any short term problems could be resolved through the borrowing regimens.

Anticipating a high volume of demand for such lending in reconstruction efforts after World War II, the Bretton Woods attendees formed the IBRD, providing an additional $10 billion to be paid by member nations. As well-intended an idea as it was, the agreements and institutions that grew from Bretton Woods were not adequate for the economic problems of postwar Europe. The United States was experiencing huge trade surplus years while carrying European war debt. U.S. reserves were huge and growing each year.

By 1947, it became clear that the IMF and IBRD were not going to fix the problems of European postwar economic woes. To help address the issue, the United States set up a system to help finance recovery among European countries. The European Recovery Program (better known as the Marshall Plan) was organized to give grants to countries to rebuild. The problems of European nations, according to Secretary of State George Marshall, "are so much greater than her present ability to pay that she must have substantial help or face economic, social, and political deterioration of a very grave character."

Between 1948 and 1954, the United States gave 16 Western European nations $17 billion in grants. Believing that former enemies Japan and Germany would provide markets for future U.S. exports, policies were enacted to encourage economic growth. During this period, the Cold War became increasingly worse as the arms race continued. The USSR had signed the Bretton Woods Agreement, but it refused to join or participate in the IMF. Thus, the proposed economic reforms turned into part of the struggle between capitalism and Communism on the world stage.

It became increasingly difficult to maintain the peg of the U.S. dollar to $35-per-ounce gold. An open market in gold continued in London, and crises affected the going value of gold. The conflict between the fixed price of gold between central banks at $35 per ounce and open market value depended on the moment. During the Cuban missile crisis, for example, the open market value of gold was $40 per ounce. The mood among U.S. leaders began moving away from belief in the gold standard.

President Lyndon B. Johnson argued in 1967 that:

"The world supply of gold is insufficient to make the present system workable - particularly as the use of the dollar as a reserve currency is essential to create the required international liquidity to sustain world trade and growth."

By 1968, Johnson had enacted a series of measures designed to curtail the outflow of U.S. gold. Even so, on March 17, 1968, a run on gold closed the London Gold Pool permanently. By this time, it had become clear that maintaining the gold standard under the Bretton Woods configuration was no longer practical. Either the monetary system had to change or the gold standard itself would need to be revised.

During this period, the IMF set up Special Drawing Rights (SDRs) for use as trade between countries. The intention was to create a type of paper gold system, while taking pressure off the United States to continue serving as central banker to the world. However, this did not solve the problem; the depletion of U.S. gold reserves continued until 1971. By that time, the U.S. dollar was overvalued in relation to gold reserves. The United States held only 22 percent gold coverage of foreign reserves by that year. SDRs acted as a basket of key national currencies to facilitate the inevitable trade imbalances.

However, the Bretton Woods Agreement lacked any effective mechanism for checking reserve growth. Only gold and the U.S. asset were considered seriously as reserves, but gold production was lagging. Accordingly, dollar reserves had to expand to make up the difference in lagging gold availability, causing a growing U.S. current account deficit. The solution, it was hoped, would be the SDR.

While these instruments continue to exist, this long-term effectiveness can only be the subject of speculation. Today SDRs make up about 1 percent of IMF members' non-gold reserves, and when in 1971 the United States went off the gold standard, Bretton Woods ceased to function as an effective centralized monetary body. In theory, SDRs - used today on a very limited scale of transactions between the IMF and its members - could function as the beginnings of an international currency. But given the widespread use of the U.S. dollar as the peg for so many currencies worldwide, it is unlikely that such a shift to a new direction will occur before circumstances make it the only choice.

The Bretton Woods system collapsed, partially due to economic expansion in excess of the gold standard's funding abilities on the part of the United States and other member nations. However, the problems of currency systems not pegged to gold lead to economic problems far worse. No provision was made for international creation of reserves. New gold production was assumed to be sufficient. In the event of structural disequilibria, it was expected that there would be national solutions—a change in the value of the currency or an improvement by other means of a country's competitive position. Few means were given to the IMF, however, to encourage such national solutions.

It had been recognized in 1944 that the new system could come into being only after a return to normalcy following the disruption of World War II. It was expected that after a brief transition period—expected to be no more than five years—the international economy would recover and the system would enter into operation.

To promote the growth of world trade and to finance the postwar reconstruction of Europe, the planners at Bretton Woods created another institution, the International Bank for Reconstruction and Development (IBRD)—now the most important agency of the World Bank Group. The IBRD had an authorized capitalization of $10 billion and was expected to make loans of its own funds to underwrite private loans and to issue securities to raise new funds to make possible a speedy postwar recovery. The IBRD was to be a specialized agency of the United Nations charged with making loans for economic development purposes.

The World Bank Group: Present

WBG has been catalytic in leveraging financing from private markets with its risk mitigation instruments. Its guarantees can open new financing sources, reduce costs of capital, and extend maturities by providing coverage for risks that the market is unable or unwilling to bear. WBG's participation as guarantor can support transparency and improve market confidence, but cannot make fundamentally unviable projects, viable.

The World Bank Group (WBG) is a family of five international organizations responsible for providing finance and advice to countries for the purposes of economic development and eliminating poverty. The Bank came into formal existence on 27 December 1945 following international ratification of the Bretton Woods agreements, which emerged from the United Nations Monetary and Financial Conference (1 July – 22 July1944). It also provided the foundation of the Osiander-Committee in 1951, responsible for the preparation and evaluation of the World Development Report. Commencing operations on 25 June 1946, it approved its first loan on 9 May 1947 ($250M to France for postwar reconstruction, in real terms the largest loan issued by the Bank to date). Its five agencies are:

- International Bank for Reconstruction and Development (IBRD)
- International Development Association (IDA)
- International Finance Corporation (IFC)
- Multilateral Investment Guarantee Agency (MIGA)
- International Centre for Settlement of Investment Disputes (ICSID)

MODULE-III

WTO, GATS and International Trade

THE UNITED NATIONS AND TRADE LAW

The Declaration of the High-level Meeting on the Rule of Law recognizes the importance of fair, stable and predictable legal frameworks for generating inclusive, sustainable and equitable development, economic growth and employment, generating investment and facilitating entrepreneurship. In that regard, it commended the work of the United Nations Commission on International Trade Law (UNCITRAL) in modernizing and harmonizing international trade law.

General Assembly has repeatedly reaffirmed its belief that the progressive modernization and harmonization of international trade law, and reducing or removing legal obstacles to the flow of international trade. This contributes significantly to universal economic cooperation among all States on a basis of equality, equity, common interest and respect for the rule of law, and to the elimination of discrimination in international trade. General Assembly has also emphasized that the implementation and effective use of modern private law standards in international trade are essential for advancing good governance, sustained economic development and the eradication of poverty and hunger (for example, in resolution 69/115, para. 12).

UNCITRAL instruments and tools are also relevant for creating an environment of sustainable economic activity conducive to post-conflict reconstruction and preventing societies from sliding back into conflict (resolution 66/94, paras. 15-17). The UNCITRAL secretariat, International Trade Law Division at the Office of Legal Affairs, provides assistance to States that seek to promote the rule of law in the area of international and domestic trade and investment by assisting them to identify needs for commercial law reforms and implement the reforms in compliance with internationally accepted commercial law standards.

It is widely accepted by developing and developed countries that trade creates wealth and is essential to the economic health of the world. But who works out the rules for international trade and decides how payments should be made and disputes are to be settled?

When world trade began to expand dramatically in the 1960s, national governments began to realize the need for a global set of standards and rules to harmonize and modernize the worldwide assortment of national and regional regulations, which until then, largely governed international trade. They turned to the United Nations, which in 1966 recognized the need for it to play a more active role in removing legal obstacles to the flow of international trade and established the United Nations Commission on International Trade Law (UNCITRAL). UNCITRAL has since become the core legal body of the United Nations system in the field of international trade law.

Much of the complex network of international legal rules and agreements that affects today's commercial arrangements has been reached through long and detailed consultations and negotiations organized by UNCITRAL. Its aim is to remove or reduce legal obstacles to the flow of international trade and progressively modernize and harmonize trade laws. It also seeks to coordinate the work of organizations active in this type of work and promote wider acceptance and use of the rules and legal texts it develops.

When world trade began to expand dramatically in the 1960s, national governments began to realize the need for a global set of standards and rules to harmonize national and regional regulations, which until then governed international trade.

THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW (UNCITRAL)

In the years since its establishment, UNCITRAL has been recognized as the core legal body of the United Nations system in the field of international trade law. A legal body with universal membership specializing in commercial law reform worldwide for over 50 years, UNCITRAL's business is the modernization and harmonization of rules on international business.

Trade means faster growth, higher living standards, and new opportunities through commerce. In order to increase these opportunities worldwide, UNCITRAL is formulating modern, fair, and harmonized rules on commercial transactions. These include:

- Conventions, model laws and rules which are acceptable worldwide
- Legal and legislative guides and recommendations of great practical value
- Updated information on case law and enactments of uniform commercial law
- Technical assistance in law reform projects
- Regional and national seminars on uniform commercial law

Membership

UNCITRAL’s original membership comprised 29 states, and was expanded to 36 in 1973, and again to 60 in 2002. Member states of UNCITRAL are representing different legal traditions and levels of economic development, as well as different geographic regions. States includes 14 African states, 14 Asian states, 8 Eastern European states, 10 Latin American and Caribbean states, and 14 Western European states. The Commission member States are elected by the General Assembly. Membership is structured so as to be representative of the world’s various geographic regions and its principal economic and legal systems. Members of the commission are elected for terms of six years, the terms of half the members expiring every three years.

The methods of work are organized at three levels. The first level is UNCITRAL itself (The Commission), which holds an annual plenary session. The second level is the intergovernmental working groups (which is developing the topics on UNCITRAL’s work program. Texts designed to simplify trade transactions and reduce associated costs are developed by working groups comprising all member States of UNCITRAL, which meet once or twice per year. Non-member States and interested international and regional organizations are also invited and can actively contribute to the work since decisions are taken by consensus, not by vote. Draft texts completed by these working groups are submitted to UNCITRAL for finalization and adoption at its annual session. The International Trade Law Division of the United Nations Office of Legal Affairs provides substantive secretariat services to UNCITRAL, such as conducting research and preparing studies and drafts. This is the third level, which assists the other two in the preparation and conduct of their work.

Secretariat

Located originally at United Nations Headquarters in New York, the UNCITRAL secretariat was transferred to the United Nations Office, Vienna in September 1979. With a staff of 21 (14 legal officers and seven support staff), the International Trade Law Division of the United Nations Office of Legal Affairs provides substantive secretariat services to UNCITRAL. The Director of the Division serves as the Secretary of UNCITRAL. To assist UNCITRAL in its work, the secretariat undertakes a variety of different tasks, including preparation of studies, reports and draft texts on topics under consideration for possible inclusion in the work programme; legal research, drafting and revision of working papers and legislative texts on topics already included on the work programme; reporting on Commission and working group meetings; provision of technical legislative assistance to States; preparation of UNCITRAL publications; as well as the provision of a range of administrative services to UNCITRAL and its working groups.

Work Methods

Texts designed to simplify trade transactions and reduce associated costs are developed by working groups comprising all member States of UNCITRAL, which meet once or twice per year. Non-member States and interested international and regional organizations are also invited and, since decisions are taken by consensus, not by vote, can actively contribute to the work. Draft texts completed by these working groups are submitted to UNCITRAL for finalization and adoption at its annual session.

Functions of UNCITRAL

- Coordinating the work of organizations active and encouraging cooperation among them.
- Promoting wider participation in existing international conventions and wider acceptance of existing model and uniform laws.
- Preparing or promoting the adoption of new international conventions, model laws and uniform laws and promoting the codification and wider acceptance of

international trade terms, provisions, customs and practice, in collaboration, where appropriate, with the organizations operating in this field.

- Promoting ways and means of ensuring a uniform interpretation and application of international conventions and uniform laws in the field of the law of international trade.
- Collecting and disseminating information on national legislation and modern legal developments, including case law, in the field of the law of international trade.
- Establishing and maintaining a close collaboration with the UN Conference on Trade and development.
- Maintaining liaison with other UN organs and specialized agencies concerned with international trade.

Conventions

The Convention is an agreement among participating states establishing obligations binding upon those States that ratify or accede to it. A convention is designed to unify law by establishing binding legal obligations To become a party to a convention, States are required formally to deposit a binding instrument of ratification or accession with the depositary. The entry into force of a convention is usually dependent upon the deposit of a minimum number of instruments of ratification.

UNCITRAL conventions:

- The Convention on the Limitation Period in the International Sale of Goods (1974) (text)
- The United Nations Convention on the Carriage of Goods by Sea (1978)
- The United Nations Convention on Contracts for the International Sale of Goods (1980)
- The United Nations Convention on International Bills of Exchange and International Promissory Notes (1988)
- The United Nations Convention on the Liability of Operators of Transport Terminals in International Trade (1991)
- The United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (1995)
- The United Nations Convention on the Assignment of Receivables in International Trade (2001)
- The United Nations Convention on the Use of Electronic Communications in International Contracts (2005)
- The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (2008)

Model laws

A model law is a legislative text that is recommended to States for enactment as part of their national law. Model laws are generally finalized and adapted by UNCITRAL, at its annual session, while conventions require the convening of a diplomatic conference.

- UNCITRAL Model Law on International Commercial Arbitration (1985)
- Model Law on International Credit Transfers (1992)
- UNCITRAL Model Law on Procurement of Goods, Construction and Services (1994)
- UNCITRAL Model Law on Electronic Commerce (1996)
- Model Law on Cross-border Insolvency (1997)
- UNCITRAL Model Law on Electronic Signatures (2001)
- UNCITRAL Model Law on International Commercial Conciliation (2002)
- Model Legislative Provisions on Privately Financed Infrastructure Projects (2003)

UNCITRAL also drafted the:

- UNCITRAL Arbitration Rules (1976) (text)—revised rules will be effective August 15, 2010; pre-released, July 12, 2010
- UNCITRAL Conciliation Rules (1980)
- UNCITRAL Arbitration Rules (1982)
- UNCITRAL Notes on Organizing Arbitral Proceedings (1996)

THE UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT (UNCTAD)

The United Nations Conference on Trade and Development (UNCTAD) was established in 1964 as a permanent intergovernmental body. UNCTAD is the part of the United Nations Secretariat dealing with trade, investment, and development issues. The organization's goals are to: "maximize the trade, investment and development opportunities of developing countries and assist them in their efforts to integrate into the world economy on an equitable basis. UNCTAD was established by the United Nations General Assembly in 1964 and it reports to the UN General Assembly and United Nations Economic and Social Council.

The primary objective of UNCTAD is to formulate policies relating to all aspects of development including trade, aid, transport, finance and technology. The conference ordinarily meets once in four years; the permanent secretariat is in Geneva. One of the principal achievements of UNCTAD (1964) has been to conceive and implement the Generalised System of Preferences (GSP). It was argued in UNCTAD that to promote exports of manufactured goods from developing countries, it would be necessary to offer special tariff concessions to such exports. Accepting this argument, the developed countries formulated the GSP scheme under which manufacturers' exports and import of some agricultural goods from the developing countries enter duty-free or at reduced rates in the developed countries. Since imports of such items from other developed countries are subject to the normal rates of duties, imports of the same items from developing countries would enjoy a competitive advantage.

The creation of UNCTAD in 1964 was based on concerns of developing countries over the international market, multi-national corporations, and great disparity between developed nations and developing nations. The United Nations Conference on Trade and Development was established to provide a forum where the developing countries could discuss the problems relating to their economic development. The organisation grew from the view that existing institutions like GATT (now replaced by the World Trade Organization, WTO), the International Monetary Fund (IMF), and World Bank were not properly organized to handle the particular problems of developing countries. Later, in the 1970s and 1980s, UNCTAD was closely associated with the idea of a New International Economic Order (NIEO).

The first UNCTAD conference took place in Geneva in 1964, the second in New Delhi in 1968, the third in Santiago in 1972, fourth in Nairobi in 1976, the fifth in Manila in 1979, the sixth in Belgrade in 1983, the seventh in Geneva in 1987, the eighth in Cartagena in 1992, the ninth at Johannesburg (South Africa) in 1996, the tenth in Bangkok (Thailand) in 2000, the eleventh in São Paulo (Brazil) in 2004, the twelfth in Accra in 2008, the thirteenth in Doha (Qatar) in 2012 and the fourteenth in Nairobi (Kenya) in 2016.

Currently, UNCTAD has 194 member states and is headquartered in Geneva, Switzerland. UNCTAD has 400 staff members and a bi-annual (2010–2011) regular budget of $138 million in core expenditures and $72 million in extra-budgetary technical assistance funds. It is a member of the United Nations Development Group. There are non-governmental organizations participating in the activities of UNCTAD.

History and Development

Foundation

- In the early 1960s, growing concerns about the place of developing countries in international trade led many of these countries to call for the convening of a full-fledged conference specifically devoted to tackling these problems and identifying appropriate international actions.
- The first United Nations Conference on Trade and Development (UNCTAD) was held in Geneva in 1964.
  Given the magnitude of the problems at stake and the need to address them, the conference was institutionalized to meet every four years, with intergovernmental bodies meeting between sessions and a permanent secretariat providing the necessary substantive and logistical support.

- Simultaneously, the developing countries established the Group of 77 to voice their concerns. (Today, the G77 has 131 members.)
- The prominent Argentinian economist Raúl Prebisch, who had headed the United Nations Economic Commission for Latin America and the Caribbean, became the organization's first Secretary-General.

Phase 1: The 1960s and 1970s

- In its early decades of operation, UNCTAD gained authoritative standing:
  - as an **intergovernmental forum for North-South dialogue and negotiations** on issues of interest to developing countries, including debates on the **"New International Economic Order"**.
  - for its **analytical research** and **policy advice** on development issues.
- Agreements launched by UNCTAD during this time include:
  - the **Generalized System of Preferences (1968)**, whereby developed economies grant improved market access to exports from developing countries.
  - a number of **International Commodities Agreements**, which aimed at stabilizing the prices of export products crucial for developing countries.
  - the Convention on a **Code of Conduct for Liner Conferences**, which strengthened the ability of developing countries to maintain national merchant fleets.
  - the adoption of a Set of Multilaterally Agreed Equitable Principles and Rules for the **Control of Restrictive Business Practices**. This work later evolved into what is today known as "Trade and Competition Policies".
- Furthermore, UNCTAD was a key contributor to:
  - the definition of the target of 0.7% of gross domestic product (GDP) to be given as official development aid by developed countries to the poorest countries, as adopted by the United Nations General Assembly in 1970.
  - the identification of the Group of Least Developed Countries (LDCs) as early as 1971, which drew attention to the particular needs of these poorest countries. UNCTAD became the focal point within the UN system for tackling LDC-related economic development issues.

Phase II: The 1980's

- In the 1980s, UNCTAD was faced with a changing economic and political environment:
  - There was a significant transformation in **economic thinking**. Development strategies became more market-oriented, focusing on trade liberalization and privatization of state enterprises.
  - A number of developing countries were plunged into severe **debt crises**. Despite structural adjustment programs by the World Bank and the International Monetary Fund, most developing countries affected were not able to recover quickly. In

many cases, they experienced negative growth and high rates of inflation. For this reason, the 1980s become known as the "lost decade", particularly in Latin America.
    - **Economic interdependence** in the world increased greatly.
- In the light of these developments, UNCTAD multiplied efforts aimed at:
    - strengthening the analytical content of its **intergovernmental debate**, particularly regarding **macroeconomic management** and international financial and monetary issues.
    - broadening the scope of its activities to assist developing countries in their efforts to integrate into the **world trading system**. In this context,
        - the **technical assistance** provided by UNCTAD to developing countries was particularly important in the Uruguay Round of trade negotiations, which had begun under the General Agreement on Tariffs and Trade (GATT) in 1986. UNCTAD played a key role in supporting the negotiations for the General Agreement on Trade in Services (GATS).
        - UNCTAD's work on **trade efficiency** (customs facilitation, multimodal transport) made an important contribution to enabling developing economies to reap greater gains from trade.
        - UNCTAD assisted developing countries in the **rescheduling of official debt** in the Paris Club negotiations.
    - promoting **South-South cooperation**. In 1989, the Agreement on the **Global System of Trade Preferences among Developing Countries** (GSTP) came into force. It provided for the granting of tariff as well as non-tariff preferences among its members. To date, the Agreement has been ratified by 44 countries.
    - addressing the concerns of the poorest nations by organizing the **first UN Conference on Least Developed Countries in 1981**. Since then, two other international conferences have been held at 10-year intervals.

Phase III: From 1990's till Today

- Key developments in the international context:
    - The conclusion of the **Uruguay Round** of trade negotiations under the GATT resulted in the establishment of the World Trade Organizationin 1995, which led to a strengthening of the legal framework governing international trade.
    - A spectacular increase in international **financial flows** led to increasing financial instability and volatility.
    - Against this background, UNCTAD's analysis gave early warning concerning the risks and the destructive impact of **financial crises** on development. Consequently, UNCTAD emphasized the need for a more development-oriented "international financial architecture".
    - Foreign direct investment flows became a major component of globalization.

- UNCTAD highlighted the need for a differentiated approach to the problems of developing countries. Its tenth conference, held in Bangkok in February 2000, adopted a political declaration – "**The Spirit of Bangkok**" – as a strategy to address the development agenda in a globalizing world.

- In recent years, UNCTAD has
    - further focused its **analytical research** on the linkages between trade, investment, technology and enterprise development.
    - put forward a "**positive agenda**" for developing countries in international trade negotiations, designed to assist developing countries in better understanding the complexity of the multilateral trade negotiations and in formulating their positions.
    - Expanded work on **international investment issues**, following the merger into UNCTAD of the New York–based United Nations Centre on Transnational Corporations in 1993.
    - **expanded and diversified its technical assistance**, which today covers a wide range of areas, including training trade negotiators and addressing trade-related issues; debt management, investment policy reviews and the promotion of entrepreneurship; commodities; competition law and policy; and trade and environment.

INTERNATIONAL TRADE AND THE GENERAL AGREEMENT ON TRADES AND TARIFFS (GATT)

General Agreement on Trades and Tariffs (GATT) was formed in 1947 as part of the Bretton Woods Agreement. GATT set up a series of negotiating rounds, which were primarily intended to reduce and gradually eliminate quotas, duties, and tariffs in respect of trade in goods. The basic objective of the GATT was to progressively reduce national barriers to international trade, (a) initially through across-the-board tariff reduction, (b) later the removal of non-tariff measures, and (c) eventually, the development of global standards for fair trade. The fundamental promise of the GATT in pursuing its objectives was to reduce trade barriers and to facilitate trade liberalization and expansion through multilateral consensus in a global forum bringing together all nations, developed and developing, rich and poor.

Origins of the GATT System: The Role of GATT -ITO Preparatory Work

The economy of pre-World War II was dominated by US and its major trading partners. This process took place in the form of bilateral agreements between them. The US in order to secure more open markets offered its own tariff cuts. Subsequent to World War II, diverse measures were adopted to liberalize trade between various nations to ensure close economic co-operation between them.

Hence, the wartime scenario made the groundwork for the concept of liberalization of international trade. This was by and large initiated by the United States of America. However, the major obstacle towards achieving this objective was the existence of multifarious trade barriers. This in turn called for a universal set of regulations, which would be applicable to all the nations. In order to necessitate an overall international progress in the economic order, it was necessary that a substantial improvement be achieved in three major domains i.e., investment, trade and exchange policy.

After several rounds of discussions between the United States of America, the United Kingdom and Canada in the Bretton Wood Conference, it was agreed that the world economy would be organized around three institutions':

- International Monetary Fund
- The International Bank for Reconstruction and Development or the World Bank
- International Trade Organization

International Monetary Fund was formulated to look after the short-term problems relating to international liquidity and International Bank for Reconstruction and Development to take care of international investments. Likewise International Trade Organization was to take care of the 'actual' trade relationship.

However, the International Trade Organization never came to see the light of the day. This was due to the non-ratification of the agreement relating to International Trade Organization or ITO, especially by United States, to which 53 states were signatories. Although the failure of establishing the ITO was a major setback to the international trade, its contribution to the movement on international trade regulation cannot be overlooked. The establishment of the ITO brought into existence the ITO Charter which laid down the foundations not only for GATT but also for the present WTO Agreement. The resultant impact of the ITO was that even after its failure to take off as an organization, the ITO Charter was used to formulate GATT. This started when some of the participants at the London Conference on Trade and Employment recommended that the tariff negotiation be initiated in the Charter at Geneva. Those regulations, which were required to protect the integrity of the trade and concessions, were included and those relating to employment investment etc. were disregarded.

As a result of these discussions, participated by 23 nations, the General Agreement on Tariffs and Trade (GATT) came into being in 1947. It came into force in 1948. The agreement was intended to provide a temporary international medium that encourages free trade between member states by regulating and reducing tariffs on traded goods and by providing a common mechanism for resolving trade disputes. However, GATT surpassed expectations. Despite an intention to make it a temporary Agreement, GATT 1947 became operational for almost fifty years providing the only international forum and framework (other than regional arrangements) for carrying forward the objectives of free and fair trade. Its popularity grew over the years and GATT membership finally was comprised of more than 125 countries.

GATT was thus established, on a temporary basis to break down trade barriers in the form of tariffs, quotas, preferential trade agreements between countries, etc., to make the flow of commodities and capital, less restricted by national government influence. It is for its temporary nature that a signatory to the agreement is known as a Contracting Party, since it is not an organization. Hence, the origin of GATT traces back to 1947, which governed most of the world's trade in goods for almost, half a century. It was the foremost step towards liberalization of global trade. Its importance may be highlighted as a multilateral agreement, which facilitated liberalization of trade by reducing tariffs, opening markets and framing rules for free and fair trade. The original signatories to GATT in 1947 were 23 nations. The GATT 1947 covered only trade in goods.

It is pertinent to note that GATT 1947, unlike GATT 1994, did not cover trade in Trade in Services, Agriculture, Textile and Apparel. This Agreement could also not justify the inclusion of intellectual property rights regime within its ambit and neither did it regulate the foreign investment that is incidental to the free movement of goods.

ITO and the Havana Charter

Four Preparatory conferences were held from 1946 – 1948 to draft the ITO-GATT Charter.

1. October – November 1946 at London the issues that were dealt in this conference were: quantitative restrictions, issues relating to LDCs, full employment, general commercial policies and restrictive trade practices.

2. New York (Jan-Feb 1947): Full draft of the GATT was developed. The GATT discussions at New York Conference focused on which articles of ITO were to be included in the GATT.

3. Geneva Conference (April 1947): Issues dealt with – preparatory draft of the ITO and tariff negotiations.

4. Havana Conference: Formally the UN Conference on Trade and Employment from November 1947 – March 1948. Major achievements of this conference were that the ITO Charter was considered and the first session of Contracting Parties of GATT also met at Havana. However divergent views were expressed between developed and developing countries. It also established an interim Commission for the ITO i.e., ICITO for preparing the administrative groundwork for the establishment of GATT.

The ITO (Havana) Charter 1948

The Charter consisted of 106 Articles divided into 11 Chapters.

Chapter I: Objectives and purposes included stability and wellbeing; peaceful and friendly relations; higher standards of living; full employment etc.

Chapter II focused on employment and economic activities which included provisions relating to unemployment and underemployment; removal of Balance of Payment (BoP); exchange of economic information; control of inflation and fair labour standards.

Chapter III focused on economic development and reconstruction including development of internal resources, cooperation in economic development, international investment for economic development, government assistance for economic development etc.

Chapter IV: Commercial policy issues which include

a) tariffs, preferences, internal taxation and regulations, national treatment on taxation, quantitative restrictions and related matters;
b) subsidies;
c) State trading and related matters
d) General commercial policy provisions

Chapter V: Restrictive business practices including general policy issues, consultation procedure and investigation procedures and subsidies.

Chapter VI: Inter-governmental commodity agreements including primary commodities, commodity conferences and commodity disputes.

Chapter VII: The ITO including the structure, functioning, membership and the relation with other international financial institutions.

Chapter VII: Settlement of disputes – this dealt with

- UN Charter procedure
- Consultation and arbitration and
- ICJ

Chapter IX: General provisions which include relation with non-members, amendment procedure (two-thirds); review of charter, withdraw and termination etc.

<u>Objectives, Structure and Functions of GATT 1947</u>

Objectives of GATT

The GATT 1947 was an international agreement, i.e., a document setting out the rules for conducting international trade, and an international organization created later to support the agreement. The primary objective of GATT was to liberalize and expand trade through negotiated reductions in trade barriers. It provided a forum in which countries could discuss and resolve trade problems and make available contractual rights and obligations for Contracting Parties to challenge formally other members' trade practices.

The important objectives of GATT as stated in preamble are:

- Raising the standard of living and the progressive development of the economies of the respective countries.
- Ensuring full employment and a large and steady growing volume of real income and effective demand.
- Better utilization of the resources of the world.
- Expansion of production and international trade.
- Recognizing that international trade as a means of achieving economic and social advancement.
- Equalizing and lowering trade barriers.

The GATT contains numerous Articles and Annexure. It is a cluster of various agreements, protocols etc. Some of these relate to the general principles whereas some relate to the revision of various tariff schedules. There are around 38 Articles dealing with commitments on tariffs. These depict the rules and obligations to prevent nations from pursuing trade policies, which would be self-defeating if emulated, by other nations. The unrevised text of GATT encompasses three parts. Later on a new chapter was added.

Structure of GATT

The prime body of GATT was the Session of Contracting parties that met annually. It was in this meeting that the major decisions were taken by way of a vote by the parties. But generally they did not go for a vote but preferred a consensus. In case a voting took place each Contracting Party had one vote and decisions were arrived at by simple majority. However, two-thirds majority was essential for any major decisions.

Other than the Session of contracting parties, the GATT Council was authorized to act on any routine and urgent matters. They had many different standing committees or councils like the Committee on Trade and Development, Textiles Committee that looked into matters like development of trade in developing countries. There also were ad hoc committees to look after any specific transitory questions. GATT Secretariat was the clearing house for the working of the Contracting Parties. It was situated at Geneva.

Constitutional Law of GATT

The GATT Agreement comprises the basic trade policy commitments of the contracting parties (CPs). GATT 1947 consists of 38 articles divided into Preamble and four parts.

The Preamble of the GATT consisting the objectives which include Raising the standard of living and the progressive development of the economies of the respective countries; Ensuring full employment and a large and steady growing volume of real income and effective demand; Better utilization of the resources of the world; Expansion of production and international trade; Recognizing that international trade as a means of achieving economic and social advancement; and Equalizing and lowering trade barriers.

Part I (Arts. 1 and 2): It deals with MFN and Binding Commitments.

Part II (Arts. 3 - 23): Contains substantive issues on commercial policy provisions which form the GATT's code of conduct for its CPs with regard to trade matters. Issues covered in this Part include National Treatment; Freedom of Transit, Anti-Dumping and Countervailing Duties, Valuation for Custom Procedures, Marks of Origin, Quantitative Restrictions, Balance of Payments, security exceptions, provisions relating to developing countries, consultation and nullification or impairment procedures etc.

Part III (Arts. 24-35): Contain miscellaneous and procedural provisions. Issues discussed in this Part include customs unions and free trade areas, joint actions by CPs, acceptance and entry into force, withdrawal of concessions, modifications of schedules, tariff negotiations amendments, withdrawal etc.

Part IV (Arts. 36-38): Deals with trade and development or issues concerning the developing countries. This Part was added in 1964 to combat trade-related problems of developing countries.

Core Principles of the GATT

The principles can be listed down as:

a) Non-discrimination (Article I)
b) Reciprocity
c) Prohibition of quantitative restrictions and Protection through tariff (Article XI)
d) Dispute Sottement (Article XXIII)

a) Non-discrimination

The principle of non-discrimination is an important aspect to the system of international trade. "Non-discrimination" denotes that the member country shall not discriminate between the members of GATT in the conduct of international trade. Once a member reduced a tariff on some commodity for any country, that reduction applies to all member countries. The whole concept of multilateral trading system is based on the principle of non-discrimination. It is also given that the nations should offer an equivalent exchange for the benefits they gain.

The principle has two components:

- Most favored nation (MFN) treatment (Article I)
- National treatment(Article III)

Most favored Nation Treatment: MFN treatment became an operational principle in the 19th century. MFN means that every time a member State extends or improves the benefits that it gives to one trading partner, it has to give the same "best" treatment to all other GATT Contracting Parties, so that they remain equal. Countries are to grant equal treatment – not more favorable or discriminatory – to goods and services from all Contracting Parties. Benefits tendered to one country have to be given in the same manner to other country, so that literally all of them remain 'most favored'. All are beneficiary to any moves towards lowering of trade barriers.

Hence, the MFN principle ensures that developing countries and others with little economic leverage are able to benefit freely from the best trading conditions whenever and wherever they are negotiated. Article I, II and IV of GATT says that a contracting party cannot treat a product/service of another country more favorably than the product/service of other GATT members.

Exceptions to MFN treatment:

- Article I paragraph 2 says that the contracting parties are permitted to continue with the receipt of any grant or preferences under any agreement/arrangement, which was entered into prior to the initiation of GATT.
- Article XXIV says that customs and free trade areas i.e., an association of nations with duty free treatment for imports from members and a common level of tariff for imports from members, are exempted from this treatment.
- Article XVII lays down provisions to the effect that if any special preferential arrangements for the benefit of developing country are entered into, such arrangements can be continued as such.

National Treatment: As maintained by this rule the Contracting parties/members must not accord discriminatory treatment between imports and similar type of domestic products (with the exception of the imposition of tariffs, which is a border measure). The vital intent behind this is to prevent countries from taking discriminatory measures on imports on the one hand, and to avert countries from offsetting the effects of tariffs through non-tariff measures. This also helps to maintain the balance of rights and obligations, and is an essential constituent for the maintenance of the multilateral trading system.

Under this principle the parties are not allowed to apply internal taxes or other internal charges, law regulations, affecting imported or domestic products so as to provide protection to domestic production. The standard shall not be higher than those imposed on domestic products between imported goods and similar type of domestic goods, or between imported goods and a directly competitive or substitutable product.

Exceptions to National treatment:

- Government Procurement allows governments to purchase domestic products preferentially. As a result, in the context of government procurement, the national treatment rule applies only between those who have consented to the Agreement on Government Procurement, and for others, the traditional exception is still in force.
- Domestic Subsidies allows for the payment of subsidies exclusively to domestic producers provided that it is not a violation of other related provisions.
- Members in the early stages of development can raise their standard of living by promoting the establishment of infant industries by taking measures that are inconsistent with GATT provisions after the required formality of consultation.

Tariff Concessions or Binding Commitments

What is a tariff? Tariff is a tax levied on imported goods which effectively raises the price of those goods. Tariffs reduce imports and increase domestic prices. The main object of GATT is the tariff concessions which are a commitment by a GATT CP to levy no more than a stated tariff on a particular item. This commitment is contained in a Schedule for that Party. The items in the Schedule are termed as 'Bound Items' and the individual commitment sometimes are termed as 'binding'.

The Schedules of GATT have resulted from various trade negotiations. These Schedules are incorporated by references into GATT under Article II. A tariff concession in GATT can be understood by two categories of GATT obligations:

1. Tariff concessions give rise to a specific series of obligations which are contained in Art. II of GATT.
2. A second category of GATT obligations are those that are general obligations which apply to trade in all products, not just the ones contained in Schedule.

Art. II of GATT is designed to protect the tariff bindings. Art. II.1 (a) of GATT embodies this objective by obligating WTO Members to accord tariff treatment no less favorable than that provided in their Schedules. Art. II.1 (b) provides that imported products shall be exempted from ordinary custom duties and all other duties and charges of any kind.

Tariff Modifications: GATT/WTO rules includes several provisions that allow members to modify their tariff Schedules through:

1. reopening negotiations after three years
2. negotiations in special circumstances
3. re-negotiations by developing countries

4. waiver
5. a new round of trade negotiations

Tariffs may also be modified upon the occurrence of any one of the following circumstances or events:-

1. Withdrawal of a WTO member
2. Compensatory modifications as a result of the formation or entry into a regional economic union
3. Invocation of the escape clause
4. Balance of payment difficulties
5. Sanctions

Prohibition of Quantitative Restrictions

Even though it is important for member countries to follow open and liberal trade policies, which permits them to protect domestic production from foreign competition, such protection is to be extended only through tariffs, which are to be kept at low levels. The principle of protection by tariffs is armored by provisions prohibiting member countries from using quantitative restrictions on imports. To this end, countries are prohibited from using quantitative restrictions, except in specified cases. Article XI of the GATT 1994 by and large prohibits the use of quantitative restrictions on the importation or the exportation of any product, by stating, “No prohibitions or restrictions other than duties, taxes or other charges shall be instituted or maintained by any Member...”

Quantitative restrictions is not defined anywhere. However, the Council for Trade in Goods, in a Decision of 1996 provides a list of quantitative restrictions. This list includes: prohibition, prohibition except under defined conditions, global quota, global quota allocated by country, bilateral quota (i.e., anything less than a global quota), automatic licensing, non-automatic licensing, quantitative restriction made effective through state-trading operations, mixing regulation, minimum price triggering a quantitative restriction, and “voluntary” export restraint.

Exceptions to Quantitative Restrictions: There are, however, certain exceptions to this. They are:

- Export prohibitions or restrictions temporarily applied to prevent or relieve critical shortages of foodstuffs essential to the exporting Members (Paragraph 2 (a));
- Import and export prohibitions or restrictions necessary to the application of standards or regulations for the classification, grading or marketing of commodities in international trade (Paragraph 2 (b));

- Import restrictions on any agricultural or fisheries product, necessary to the enforcement of governmental measures which operate to restrict production of the domestic product or for certain other purposes (Paragraph 2 (c));
- General exceptions for measures such as those necessary to protect public morals or protect human, animal or plant life or health;
- Exceptions for security reasons;
- Restrictions to safeguard the balance of payments;
- Quantitative restrictions necessary to the development of a particular industry by a WTO Member in the early stages of economic development or in certain other situations;
- Quantitative restrictions necessary to prevent sudden increases in imports from causing serious injury to domestic producers or to relieve producers who have suffered such injury (Article XIX);
- Quantitative restrictions imposed with the authorization of the Dispute Settlement Body as retaliatory measures in the event that the recommendations and rulings of a panel are not implemented within a reasonable period of time (Article XXIII:2); and
- Quantitative restrictions imposed pursuant to a specific waiver of obligations granted in exceptional circumstances by the Ministerial Conference.

Role of GATT in Promoting International Trade

The main role of GATT in the international trade was regulating the contracting parties to achieve the purpose of the agreement which were reducing tariffs and other barriers, and to achieve the liberalization in international trade. The role was reflected in following aspects:

Firstly, GATT established a set of standard to guide the contracting parties to participate in international trade practices. GATT stipulated several of basic principle to conduct the contracting parties in international business, such as General Most-Favored-Nation Treatment (Article II), Non-discriminatory Administration of Quantitative Restrictions (Article XIII), and General Elimination of Quantitative Regulations (Article XI) and so on in the "GATT 1947". Every contracting party should obey these basic principles when they were involved in trade relations, otherwise they would be condemned, even be taken revenge by other parties. Besides this, contracting parties reached quite a little of agreements, and made some rules during pervious multilateral trade negotiations. For instance, Kennedy Round which was started from May 1964 brought about the Anti-dumping Agreement. (WTO). These rules and agreements which were made in the multilateral rounds later become the basic principles which were accepted by all the parties, and stimulated the development of international trade.

Secondly, GATT reduced the tariff on the basis of mutual benefit, accelerate the trade liberalization after the World War II. GATT's major contribution was to reduce of tariffs by sponsoring "rounds" of multilateral negotiations. By sponsoring the multilateral negotiations, there was a significant reduce of the tariff. There were about 35% average tariff reductions in both Kennedy Round and Tokyo Round. Future more, in the Uruguay Round which was the most productive in the history of GATT multilateral negotiation, the contracting parties practiced the rules that kept cutting the tariff rate, there was an average tariff cut of 39% in this round of negotiation. By cutting the tariff rate, there is less trade barriers in doing international business which will mutual benefit the parties which participated, and promote trade liberalization.

Thirdly, GATT reduced the discrimination in tariff and trade which promoted to reduce other trade barriers. As stated in the Article II: schedule of concession in “GATT 1947", “Each contracting party shall accord to the commerce of the other contracting parties’ treatment no less favorable than that provided for in the appropriate Part of the appropriate Schedule annexed to this Agreement." According to this statement, GATT regulate the contracting parties cannot increase the levels of tariff as their wish, but some countries used other non-tariff barriers to promote their protectionism. Therefore, GATT claimed the contracting parties should not use other barriers to protect their own industries, it requested the reduction of the non-tariff barriers and quantitative restriction to make sure the benefit from the reduction of tariff not be erased by the non-tariff barriers. After Kennedy Round, the multilateral negotiation started to cover non-tariff barriers on goods. In 1968/1969, GATT compiled the “Inventory of Non-tariff Barriers" which listed more than 800 individual trade barriers in several volumes. Codes was one of the six agreements passed in the Tokyo Round, it established new rules on government procurement, technical barriers to trade, customs valuation, import licensing, antidumping, and subsidies and countervailing measures. The codes worked towards the goal which to eliminate the non-tariff barriers. Future more, the Uruguay Round also made the progress in decreasing and eliminating non-tariff barriers, especially in agriculture products. All these are good for eliminating the trade barriers, which towards the development of the international trade.

Fourthly, GATT protected the benefits of the developing countries to a certain extent to international trade. One of the basic objectives of GATT was that “raising of standards of living and the progressive development of the economies of all contracting parties, and considering that the attainment of these objectives is particularly urgent for less-developed contracting parties." (GATT 1947) In order to achieve this objective, GATT established some special measures for less-developed countries, such as provide tariff protect for specific industries, quotas which are with the purpose of balance of payment. With the increasing number of developing countries jointed the GATT, there were more concern in the trade position and benefit of less-developed countries, more over with the developing countries’ flight, so GATT established some measures for developing countries so that will benefit the less-developed countries in export-oriented trade. At the GATT ministerial meeting of 1963, it enabled the Contracting Parties to discharge the responsibilities towards the development objectives of the developing countries which led to add Part IV which entitled “ Trade and

Development" to the General Agreement. The new Part IV provided preferential treatment to the developing countries. In the Uruguay Round which was "an important milestone for developing countries in their integration into the global economy", the participants agreed a number of rules which would benefit the developing countries, for example, agricultural liberalization, manufacture trade liberalization. There was a significant reduction of non-tariff barriers (especially export subsidies) in agriculture, it converted virtually all agriculture nontariff barriers into tariff. In manufacture trade, the tariff levied on manufacture products which imported from developing countries was reduced by 40 percent on average. All these measurement reduced the burden on the economy of developing countries, and had positives in the development of trade for less developed countries.

Finally, GATT acted as the "court of international trade", by providing a platform for contracting parties to negotiation and talk to settle disputes in international trade. One of the objectives of GATT was to settle the disputes between two or more parties. When two or more parties are involved in the international trade, it is inevitable that without disputes. Some of the disputes may be solved by the two parties themselves, however, some disputes could not be solved by themselves, without the help of the third party, and the disputes may be remaining unresolved for years. So it needed GATT to solve those disputes which could not solve by parties themselves. Before it was replaced by WTO, in a certain period, GATT had become a legal mechanism to settle trade disputes among contracting parties, it provided a platform for contracting parties to settle disputes so that the trade conflicts and disputes can be solved immediately which would protect the benefit of both parties, and lay the foundation to achieve the main objective of GATT.

WTO - INTERNATIONAL TRADE NEGOTIATIONS AT A GLANCE

Round	**Year**	**Objective**
Geneva	1947	Inception of GATT
Annecy, France	1949	Tariff reduction
Torquay, England	1951	Tariff reduction
Geneva	1956	Tariff reductions and guidelines for addressing the trade and development needs of developing countries
Geneva, Dillon	1960-62	Negotiations relating to product-by-product basis and tariff concessions.
Geneva, Kennedy	1962-67	Multilateral trade negotiations

Tokyo	1973-79	Negotiations on non-tariff barriers like anti- dumping, customs valuation, government procurement and subsidies.
Uruguay	1986-94	*Establishment of WTO *Include Intellectual property *Include Services-trade

The sequence of negotiations of WTO is as follows:

- The Geneva Round, 1947 saw the formation of GATT. Negotiations relating to product-by-product, bilateral basis etc., were carried out.
- The Annecy Round, 1949 was primarily to extend the membership to other nations who were not a part of the Geneva conference.
- The Torguay Round, 1950-51 was a disappointment for the European nations as they felt that low-level tariff levels were disadvantageous to them.
- The Geneva Round, 1955-56 witnessed major tariff reductions and guidelines for addressing the trade and development needs of developing countries were addressed by way of Haberler report.
- The Dillon Round 1960-61 dealt mainly with negotiations relating to product-by-product basis and tariff concessions.
- The Kennedy Round, 1963-67 concentrated on multilateral trade negotiations. Negotiations on cutting were carried out fundamentally on an across the board basis.
- The Tokyo Round, 1973-79 saw for the first time negotiations on non-tariff barriers, which resulted in codes on anti-dumping, customs valuation, government procurement and subsidies.
- The Uruguay Round, 1986-93. The first six rounds concentrated mostly on reduction of tariffs. Tariff and non-tariff measures were dealt with in the Tokyo round. The most significant among them is the Uruguay round, which was initiated in September, 1986 and concluded on 15th September 1993. The Tokyo Round of trade negotiations contributed significantly to trade liberalization, it soon became evident that another round was needed to deal with areas not previously covered, including measures to adequately protect intellectual property rights (to combat trade in counterfeit products), distortions arising from trade-related investment measures (such as local-content and export-performance requirements), and trade in services (banking, insurance, tourism, etc., where national restrictions made it difficult for foreign service industries to operate in some countries and compete with national service providers), and to come to grips with rising protectionism and the closing of markets.

The Uruguay Round brought about the biggest reform of the world's trading system given that GATT was created at the end of the Second World War. It was relatively the largest trade negotiation ever, and most probably the largest negotiation of any kind in history. Most of the rounds dealt with tariff reduction. Later on focus was on anti-dumping, technical barriers, import-licensing procedures, government procurement etc. A most significant feature of the Uruguay Round was agreement by the world's key trading countries to completely eliminate tariff barriers in nine industrial sectors: paper, from pulp to all forms of made-up paper articles; steel; pharmaceuticals including finished medications of all forms; construction equipment; agricultural equipment; medical equipment; office furniture; toys; and whiskies, brandies and beer. In addition to the multilateral free-trade sectors, agreement was reached to harmonize tariff levels for chemicals and plastics. Participating countries will reduce their tariffs on products ranging from basic chemicals to cosmetics and photographic film to a common three-tier rate structure of free.

The post-Uruguay Round built-in agenda

Many of the Uruguay Round agreements set timetables for future work. Part of this "built-in agenda" started almost immediately. In some areas, it included new or further negotiations. In other areas, it included assessments or reviews of the situation at specified times. Some negotiations were quickly completed, notably in basic telecommunications, financial services. (Member governments also swiftly agreed a deal for freer trade in information technology products, an issue outside the "built-in agenda".) The agenda originally built into the Uruguay Round agreements has seen additions and modifications. A number of items are now part of the Doha Agenda, some of them updated.

There were well over 30 items in the original built-in agenda. This is a selection of highlights:

- 1996
  - Maritime services: market access negotiations to end (30 June 1996, suspended to 2000, now part of Doha Development Agenda)
  - Services and environment: deadline for working party report (ministerial conference, December 1996)
  - Government procurement of services: negotiations start
- 1997
  - Basic telecoms: negotiations end (15 February)
  - Financial services: negotiations end (30 December)
  - Intellectual property, creating a multilateral system of notification and registration of geographical indications for wines: negotiations start, now part of Doha Development Agenda
- 1998
  - Textiles and clothing: new phase begins 1 January

- Services (emergency safeguards): results of negotiations on emergency safeguards to take effect (by 1 January 1998, deadline now March 2004)
- Rules of origin: Work programme on harmonization of rules of origin to be completed (20 July 1998)
- Government procurement: further negotiations start, for improving rules and procedures (by end of 1998)
- Dispute settlement: full review of rules and procedures (to start by end of 1998)

- 1999
  - Intellectual property: certain exceptions to patentability and protection of plant varieties: review starts
- 2000
  - Agriculture: negotiations start, now part of Doha Development Agenda
  - Services: new round of negotiations start, now part of Doha Development Agenda
  - Tariff bindings: review of definition of "principle supplier" having negotiating rights under GATT Art 28 on modifying bindings
  - Intellectual property: first of two-yearly reviews of the implementation of the agreement
- 2002
  - Textiles and clothing: new phase begins 1 January
- 2005
  - Textiles and clothing: full integration into GATT and agreement expires 1 January

Principles and Objectives of WTO

The key objective of WTO is to facilitate and promote world trade among its member states. Objectives are set out in the preamble to the Marrakesh Agreement. These include:

- Raising standards of living;
- Ensuring full employment
- Ensuring large and steadily growing real incomes and demand; and
- Expanding the production of and trade in goods and services.

These objectives are to be achieved while allowing for the most advantageous use of the world's resources in accordance with the objective of achieving sustainable development, and while seeking to protect and preserve the environment. The preamble also specifically mentions the need to assist developing countries.

The WTO aims to achieve its objectives by reducing existing barriers to trade and by preventing new ones from developing. It seeks to ensure fair and equal competitive conditions for market access, and predictability of access to all traded goods and services by employing certain well-laid principles.

The basic principles of the WTO are:

- Trade without Discrimination
- No Most Favored Nation (MFN) Treatment - no special deals to trading partners, all members of WTO must be treated with the same status
- No National Special Treatment - locals and foreigners are treated equally
- Free Trade
- Predictability through Binding - promising not to raise tariffs is called binding a tariff and binding leads to greater certainty for businesses
- Promoting Fair Competition
- Encouraging Development and Economic Reform

These principles are the foundation of the multilateral trading system.

First level of the WTO structure:

The Ministerial Conference

It is composed of international trade ministers from all member countries. This constitutes the governing body of the WTO, responsible for setting the strategic direction of the organization and making all final decisions on agreements under its wings. The Ministerial Conference meets in any case once for every two years. Although voting can take place, decisions are generally taken by consensus, a process that can at times be difficult, particularly in a body composed of 136 very different members.

After the inception of the WTO there were four Ministerial Conferences.

First Ministerial Conference held at Singapore

The First WTO Ministerial Conference was held at Singapore between 9 and 13 December 1996. Ministers for Trade, Foreign, Finance and Agriculture from more than 120 World Trade Organization Member governments and from those in the process of acceding to the WTO participated in Conference. The Conference was the first since the WTO came into force on 1 January 1995. It included plenary meetings and various multilateral, plurilateral and bilateral business sessions. These examined issues related to

- Strengthening of WTO as a forum for negotiation
- Continuance of liberalization of trade within a rule based system
- Assessment of implementation of member's commitments under the WTO Agreements and decisions
- Review the ongoing negotiations and Work Programme;

- Examine developments in world trade; and
- Address the challenges of an evolving world economy.

The Implementation of the Uruguay Round Agreements

The following important decisions were taken regarding the tribulations of Least-Developed Countries and it was agreed to:

- A Plan of Action, including provision for taking positive measures, for example duty-free access, on an autonomous basis, aimed at improving their overall capacity to respond to the opportunities offered by the trading system;
- Seek to give operational content to the Plan of Action, for example, by enhancing conditions for investment and providing predictable and favorable market access conditions for LDCs'(less developed countries) products, to foster the expansion and diversification of their exports to the markets of all developed countries; and in the case of relevant developing countries in the context of the Global System of Trade Preferences; and
- Organize a meeting with UNCTAD and the International Trade Centre as soon as possible in 1997, with the participation of aid agencies, multilateral financial institutions and least-developed countries to foster an integrated approach to assisting these countries in enhancing their trading opportunities.

Agreements were arrived on at a number of provisions calling for future negotiations on Agriculture, Services and aspects of TRIPS, or reviews and other work on Anti-Dumping, Customs Valuation, Dispute Settlement Understanding, Import Licensing, Pre shipment Inspection, Rules of Origin, Sanitary and PhytoSanitary Measures, Safeguards, Subsidies and Countervailing Measures, Technical Barriers to Trade, Textiles and Clothing, Trade Policy Review Mechanism, Trade-Related Aspects of Intellectual Property Rights and Trade-Related Investment Measures.

Second Ministerial Conference held at Geneva

The Second WTO Ministerial Conference was held in Geneva, Switzerland between 18 and 20 May 1998. Consensus was arrived at on the basic telecommunications and financial services and the implementation of the Information Technology Agreement. The important decisions were arrived at on:

- A mechanism to ensure full and faithful implementation of existing multilateral agreements were to be set up
- Projectionist measures are to be rejected and open and transparent rule based trading system was to be accepted
- It was agreed that The General Council's work programme should encompass the following:

Recommendations concerning:

- The issues, including those brought forward by Members, relating to implementation of existing agreements and decisions;
- The negotiations already mandated at Marrakesh, to ensure that such negotiations begin on schedule;
- Future work already provided for under other existing agreements and decisions taken at Marrakesh
- Recommendations concerning other possible future work on the basis of the work programme initiated at Singapore;
- Recommendations on the follow-up to the High-Level Meeting on Least-Developed Countries;
- Recommendations arising from consideration of other matters proposed and agreed to by Members concerning their multilateral trade relations.

Third Ministerial conference held at Seattle

The Third WTO Ministerial Conference was held in Seattle and ended on December 1999. Major new negotiations were launched to further liberalize international trade and to review some current trade rules. Proposals regarding tariffs, anti-dumping, subsidies, safeguards, investment measures, trade facilitation, electronic commerce, competition policy, fisheries, transparency in government procurement, technical assistance, capacity-building and other development issues, intellectual property protection, and many other subjects, in addition to agriculture and services were discussed in the conference. A special deal to help least-developed countries gain easier access to richer countries' markets, and to develop further work on technical assistance to least-developed countries under an integrated framework which was set up by the WTO and a number of other organizations in 1997.

This conference turned out to be a failure since the developing nations jointly protested against the lack of transparency and imposition of the views of the rich on the poor countries in the negotiations. It was felt by the Asian, African and Latin American countries that their views were not cared for in the WTO. On the lighter side, it was even claimed by the demonstrators that WTO is no more "World Trade Organization" but "Wrong Trade Organization"

Fourth Ministerial Conference held at Doha, Qatar

The Fourth WTO Ministerial Conference was held in Doha, Qatar from 9 to 14 November 2001. This is a much talked about conference among all the WTO conferences. It was once again confirmed that the multilateral trading system embodied in the World Trade Organization has contributed significantly to economic growth, development and employment throughout the past fifty years. It was decided to with the light of the global economic slowdown as a backdrop, to maintain the process of reform and liberalization of trade policies, thus ensuring that the system plays its full part in promoting recovery, growth and development. This was a round especially for the developing countries.

This round successfully launched a new round of trade and investment liberalization negotiations—the “Doha Development Agenda”. For the past half-century the countries of the world have been able to achieve economic growth without resorting to the affluent countries as it was in the 1930s. This was possible due to the rising accomplishments of successive negotiation rounds. The launch of a new round with broad-based agendas and forward-looking efforts by Japan and other countries and regions is a significant achievement.

In Doha a move towards the resolution of implementation issues was made and some of the following concerns were addressed:

- Exclusion of labor
- Protection of interests in agriculture, services and industrial tariffs
- Postponement of negotiations on Singapore issue
- Safeguards in environmental negotiations
- TRIPS and public health
- Emphasis on developmental goals

The preamble of the Ministerial Declaration, speaks about the role trade plays in promoting economic development and the mitigation of poverty. It recognizes the particular problems of developing countries. It speaks of the need for more impartial sharing of the benefits accruing from trade liberalization. It promises to “seek to place their (developing countries) needs and interests at the heart of the Work Programme adopted in this Declaration.” It even goes to the extent of stating that the Ministers ought to “attach the utmost importance to the implementation-related issues and concerns raised by Members and are determined to find appropriate solutions to them.” The implementation issues are a set of problems within the WTO trade agreements that many countries of the South define as unfair to their interests and development needs and are seeking to change.

The major outcome or results of the Doha round could be summed up as

The decision to launch a new three-year round of WTO trade talks (the Doha agenda) with a joint focus on free trade and new forms of regulation, along with undertakings to substantially increase support for capacity-building in the developing countries and help them to apply existing WTO agreements.

The decision to interpret the agreement on trade-related intellectual property rights (TRIPS) in a way favorable to the rights of its signatories to take public health protection measures; i.e., to enable countries to break patent law when faced by public health emergencies such as the AIDS endemic.

Derogation from WTO rules to allow the preferential trade agreements provided for in the Cotonou Agreement between the EU and the ACP (African, Caribbean and Pacific) countries.

(Note: Cotonou Agreement laid down efforts to consolidate peace and prevent and settle conflicts as part of the partnership and stressed the importance of civil society's contribution to development in the ACP countries, through implementation of the Agreement).

EU's four main objectives are to a certain extend realized. They are namely:

- The vista of further trade liberalization to get off the ground, economic growth and restore business confidence at a critical moment in the development of the global economy; reinforcing the regulatory nature of the multilateral trade system - to be achieved by drafting under WTO auspices agreements on investment, competition, facilitating trade and public procurement;
- Introducing new rules to govern relations between WTO rules and international agreements on the environment;
- Meeting the concerns of the developing countries about implementation of the Marrakesh agreements and taking account of the development dimensions in all specific negotiations;
- Meeting the expectations of civil society about transparency, sustainable development and the environment.

The Doha ministerial declaration includes mandates to tackle the following issues, either through negotiations or work programs: implementation; agriculture; services; market access for non-agricultural products; TRIPs; trade and investment; trade and competition policy; transparency in government procurement; trade facilitation; WTO rules (including antidumping and subsidy rules); dispute settlement; trade and environment; electronic commerce; small economies; trade, debt, and finance; trade and transfer of technology; technical cooperation and capacity building; least-developed countries; and special and differential treatment for the WTO's poorer members.

Though this round was meant mainly for the developing countries, it turned out to be the opposite. More or less the whole of the Ministerial conference was devoted to issues in the interests of rich countries. The EU wanted to launch new free trade agreements on investment, government procurement, and competition policy and trade facilitation which in a way was harmful for the developing countries Though the Developing countries, bravely stood up to the bullying and threats of the rich countries in the end though they had no choice but to sign up.

The Fifth WTO Ministerial Conference to be held at Cancun, Mexico

The Fifth WTO Ministerial Conference will be held in Cancun, Mexico from 10 to 14 September 2003. The debate on concerns about transparency and procedures of negotiations will continue at Cancun, especially as it relates to the negotiations on agriculture and services, which began in early 2000. Liberalization of trade in services through the WTO General Agreement on Trade in Services (GATS) can be expected. The Cancun meeting is the deadline for member countries to decide on modalities for launching negotiations on the Singapore issues of investment, competition, transparency in government procurement, and trade facilitation.

Second Level Wings of WTO

Three bodies carry out the day-to-day work of Ministerial Conference, namely:

The General Council

The General Council is composed of senior representatives (usually ambassador level) of all members. It is responsible for overseeing the day-to-day business and management of the WTO, and is based at the WTO headquarters in Geneva. In reality, this is the key decision-making arm of the WTO for most issues. Several of the bodies described below report directly to the General Council.

The Trade Policy Review Body

The Trade Policy Review Body is composed of all the WTO members, and oversees the Trade Policy Review Mechanism, a product of the Uruguay Round. It periodically reviews the trade policies and practices of all member states. These reviews are intended to provide a general indication of how states are implementing their obligations and to contribute to improved adherence by the WTO parties to their obligations.

The Dispute Settlement Body

The Dispute Settlement Body constitutes all the WTO members. It oversees the implementation and effectiveness of the dispute resolution process for all WTO agreements, and the implementation of the decisions on WTO disputes. Disputes are heard and ruled on by dispute resolution panels chosen individually for each case, and the permanent Appellate Body that was established in 1994. Dispute resolution is mandatory and binding on all members. A final decision of the Appellate Body can only be reversed by a full consensus of the Dispute Settlement Body.

Third Level Wings of WTO-Councils

Third level has councils for each broad area of trade, services etc.

The Councils on Trade in Goods and Trade in Services operate under the mandate of the General Council and are composed of all members. They provide a mechanism to oversee the details of the general and specific agreements on trade in goods (such as those on textiles and agriculture) and trade in services.

There is also a Council for the Agreement on Trade-Related Aspects of Intellectual Property Rights, dealing with that agreement and that subject area.

Fourth Level Wings of WTO-Committees

Fourth level has 11 committees dealing with specific subjects (such as agriculture, market access, subsidies, anti-dumping measures and so on).

The Committee on Trade and Development and the Committee on Trade and Environment are two of the several committees continued or established under the Marrakesh Agreement in 1994. They have specific mandates to focus on these relationships, which are especially relevant to how the WTO deals with sustainable development issues. The Committee on Trade and Development was established in 1965. The forerunner to the Committee on Trade and Environment (the Group on Environmental Measures and International Trade) was established in 1971, but did not meet until 1992. Both Committees are now active as discussion grounds but do not actually negotiate trade rules.

The Secretariat and Director General

The Head Quarters of WTO is Geneva, Switzerland. It has around 550 staff and is headed by a Director-General. The Director General, who is elected by the members, heads the Secretariat its annual budget is roughly 143 million Swiss francs. It does not have branch offices outside Geneva. Since decisions are taken by the members themselves, the Secretariat does not have the decision-making role unlike the other international bureaucracies. The Secretariat's foremost duties are to supply technical support for the various councils and committees and the ministerial conferences, to provide technical assistance for developing countries, to analyze world trade, and to explain WTO affairs to the public and media. The Secretariat also provides legal assistance in the dispute settlement process and advises governments wishing to become members of the WTO.

Benefits to Member Countries of WTO

By being members of WTO, the member countries are eligible to get the following benefits.

- The system helps promote peace
- Disputes are handled constructively
- Rules make life easier for all
- Freer trade cuts the costs of living
- Provision of more choice of products and qualities

- Trade free from disputes raises incomes
- Trade stimulates economic growth
- The basic principles make life more efficient
- Governments are shielded from lobbying
- The system encourages good government
- The system helps to promote peace
- The system contributes to international peace.
- Peace is partially an outcome of two of the most fundamental principles of the trading system.

Agreement establishing the WTO:

The agreement that created the WTO lays down every aspect of WTO in detail like the scope of the WTO, explaining the "single undertaking approach" which means that all multilateral WTO agreements are binding on all members (the plurilateral agreements, however, are only binding on those countries that signed them).

Articles mentioned in the Agreement Establishing the World Trade Organization

Salient contents of agreements

Article I	Establishment of the Organization
Article II	Scope of the WTO
Article III	Functions of the WTO
Article IV	Structure of the WTO
Article V	Relations with Other Organizations
Article VI	The Secretariat
Article VII	Budget and Contributions
Article VIII	Status of the WTO (a legal personality)
Article IX	Decision-Making (by consensus)
Article X	Amendments (by laying down the proposal before the Ministerial conference)
Article XI	Original Membership
Article XII	Accession

Article XIII	Non-Application of Multilateral Trade Agreements between Particular Members
Article XIV	Acceptance, Entry into Force and Deposit
Article XV	Withdrawal from the agreement
Article XVI	Miscellaneous Provisions

GATS

Overview of the GATS

The GATS, which was also negotiated during the Uruguay Round, sets out a comprehensive framework of rules governing trade in services. It sets out a set of basic rules, a clear set of obligations for each member country and a dispute-settlement mechanism to ensure that the rules are enforced. The GATS applies to all service sectors and all forms of trade in services, though with adjustments and exceptions tailored to the type of service. The types of services covered include telecommunications, insurance and financial services, research and development services, computer and information services and professional services. Professional services include legal services, as well as accounting services, engineering services, architectural services and so on.

The forms (or "modes") of trade in services are:

- Cross-border trade in services: a firm deals with a client in another country (e.g. electronically) without crossing the border;
- Consumption abroad: a client travels to a firm's country of operation to consume a service;
- Commercial presence: a firm establishes an operation in the market of another country; and
- Temporary movement of a natural person: a firm travels to the client's country of operation to provide the service.

The GATS has two basic components. The first component establishes a framework for regulating trade in services and contains a set of general multilateral rules that apply to national regulations governing such trade. This component also contains a series of annexes that address issues in certain service sectors. The second component consists of a set of schedules which lists specific commitments that apply to the service sectors that Members have agreed to include in their schedules.

a. Most Favoured Nation Obligation

The unconditional Most Favoured Nation (MFN) obligation is a core general obligation of the GATS: each service supplier from a Member country must receive from other Members treatment no less favorable than is accorded to other Foreign Service suppliers. This obligation applies to trade in all service sectors covered by the GATS, regardless of whether the Member has undertaken specific commitments in a sector.

The Annex provided Members with a one-time opportunity at the entry into force of the GATS to unilaterally create MFN exceptions with respect to other Members. Without such an exception, service providers from all Members must receive MFN treatment.

b. Specific Commitments:

In addition to creating general obligations, the GATS also provides a legal basis for negotiating the multilateral elimination of barriers to trade in services. The GATS negotiations are designed to improve market access and to reduce discrimination against service suppliers based on nationality.

i. Market Access: Market Access is a negotiated right and obligation under the GATS. A Member is obliged to provide market access to services suppliers from other Members only in those sectors which the Member has included in its schedule.
ii. National Treatment: National Treatment is a second negotiated right and obligation under the GATS. If a Member includes a service sector in its schedule of National Treatment obligations, that Member must "accord to services and services suppliers of any other Member . . . treatment no less favourable than that it accords to its own like services and services suppliers." This obligation essentially prohibits discrimination against foreign providers of services.

The GATS and the Legal Services

The GATS was signed in December 1993 and is one of several agreements signed in conjunction with the agreement creating the WTO. To date, 148 countries have signed the GATS. The GATS applies to legal services. This means that once a country signs the GATS; its regulation of legal services is automatically subject to certain provisions of GATS. For example, all GATS signatories are subject to a transparency requirement, which specifies that all relevant measures be published or otherwise publicly available.

In addition to these general requirements, most countries have included legal services on their Schedule of Specific Commitments, which means that legal services are subject to many additional provisions of GATS. For example, if a country lists legal services on its Schedule, then its regulation of legal services not only must be transparent, but must also be administered in a reasonable, objective and impartial manner.

Although most countries included legal services on their Schedules, thus making them subject to many GATS provisions, most countries specifically omitted from coverage their current set of regulations. This is because of Article VI, which provides: With a view to ensuring that measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services, the Council for Trade in Services shall, through appropriate bodies it may establish, develop any necessary disciplines. Such disciplines shall aim to ensure that such requirements are, *inter alia*: (a) based on objective and transparent criteria, such as competence and the ability to supply the service; (b) not more burdensome than necessary to ensure the quality of the service;(c) in the case of licensing procedures, not in themselves a restriction on the supply of the service.

India and the GATS

The process of Globalization has led many countries in the world to examine the question of regulating and the entry of foreign legal consultants and to see where such entry should be made subject to any restrictions designed to protect the domestic legal professions. With the liberalization of Indian economy since early nineties, and the globalization policy following the WTO, many multi nationals and foreign corporations are increasingly entering India. Foreign financial institutions and business concerns are also entering India in a fairly large number. They require to be advised on Indian laws affecting them. They need assistance of lawyers in drawing up agreements, contracts and other business ventures. They also require their services to appear for them in courts and tribunals in India.

The attack on foreign legal participation in India started with court proceedings in the Bombay High Court by “Lawyers’ Collective” against Ashurst of the UK and White & Case of the US, the former based in New Delhi and the latter in Mumbai. It was alleged that instead of merely operating as liasion offices as permitted by the Reserve Bank of India, these firms were indulging in active legal practice, in breach of the statutory requirements. These firms admitted that while not actively practicing in courts, they were advising and assisting non-Indian clients and Indian clients by drafting documents, conducting negotiations, reviewing and providing comments on documents, advising clients on international standards and customary practices relating to clients’ transactions - the Bombay High Court at the interlocutory stage has expressed the view that “practice of the profession of the law” would include legal practice outside the court (as done by these firms) - if confirmed, it would mean that representatives of these firms would have to enroll under the Advocates Act. Even the Reserve Bank has issued show cause notices alleging breach of the “liasion office” license.

The 15th Law Commission of India, headed by Shri Justice B.P. Jeevan Reddy, has taken up a study on entry of foreign legal consultants and liberalisation of legal practices in India in keeping with the guidelines evolved by the International Bar Association (IBA), and General

Agreement of Trade in Services (GATS), which is an organ of World Trade Organisation (WTO). The study by the Law Commission is intended to introduce the elements of competition, quality of services and satisfaction in the legal services and their clients in the country in tune with the emerging globalisation of Indian economy where competition and quality would, ultimately, become inescapable. Law Commission of India in 1999 prepared a review paper of the Advocates Act and suggested a series of radical measures (and accompanying amendments to the statute) - these include -

- to remove the existing barrier based on citizenship or nationality for regulating the legal profession and providing legal services in India
- to provide a legal framework for regulating the profession in the context of emerging globalization of legal services and to provide full and unlimited licensing to Foreign Legal Consultants (FLCs) and Foreign Legal Firms (FLFs) in India
- to recognize foreign law degrees and to enroll foreign nationals holding such degrees as Advocates in India
- to promote larger partnership of lawyers
- to provide for multi-disciplinary partnerships between lawyers and non-lawyers
- to have a positive approach to the internationalizing of trade in legal services

The law governing and regulating the legal profession in India is the **Advocates Act, 1961**. Provisions relevant to the present discussion are -

- Section 24 provides that only an Indian Citizen has the right to practice and be enrolled as an Advocate in India
- A proviso to the section provides that a national of any other country may be admitted as an Advocate, if citizens of India are permitted to practice law in that other country ("reciprocity")
- Section 47 clarifies that the Bar Council of India may prescribe conditions subject to which foreign qualifications in law obtained by "foreigners" (and not Indian Citizens) shall be recognized for admission as an Advocate
- Section 11 of the Companies Act, 1956 prevents partnership firms of more than 20 partners - professionals do not enjoy any exemption from this requirement; neither are they able to function as a company or limited liability partnership; solo practitioners and small formal/informal associations abound
- Multi-disciplinary practices are not allowed

India as a founder member of the WTO and GATS has the imperative that the restructuring of the regulatory regime, keeping in mind the GATS and the consequent imminent changes, should be done after thorough study and analysis, in a very careful and detailed manner. In India, in particular, e.g., it is felt that the following points should be kept in mind while restructuring a proper regulatory regime:

1) There is a distinction between those foreign lawyers who want to practice in Indian courts and those who want to work primarily as Foreign Legal Consultants.
2) Most foreign firms are interested in non-litigation legal consulting business.
3) Any regulatory regime must be decided after consulting the Bar as well as the various Bar Associations, Bar Councils, Law Officers and leading law firms, and must address the following issues.
    a) Reciprocity rights of the Indian lawyer in the foreign country's jurisdiction.
    b) Discipline control and maintenance of ethical standards as prevailing in India.
    c) Undertakings that the FLCs will not practice Indian law or employ.

The Bar Association of India has passed resolutions relating to this, keeping in mind the Preamble in the GATS:

a) that a task force should be set up to clearly define India's "National Policy Objectives" in relation to legal services; and
b) That appropriate guidelines and norms for regulatory entry of foreign lawyers/firms for rendering legal services in India be formulated.

The Bar Association is of the further view that the new regulatory regime should ensure:

1) A general reciprocity of rights, and non-discrimination;
2) Foreign lawyers/firms are subject to the same disciplinary jurisdiction as Indian lawyers; and
3) Greater opportunities for the future development of the entire legal profession in India.

Maritime Transport and GATS and WTO:

Maritime transport is a significant facilitator of world trade with approximately four-fifths of goods (by volume) being carried by sea and is an important service sector that makes significant contributions to some national Gross Domestic Products (GDP). Concerning the harmonization of the maritime transport regime, the literature is unevenly focused on the United Nations (UN) and the world trading system (including the predecessor General Agreement on Tariffs and Trade (GATT) system and the current World Trade Organization (WTO) system. Traditionally, the harmonization of the maritime transport regimes have been negotiated under the UN, but the UN framework has demonstrated shortcomings in fulfilling this task. Although the UN endeavors to foster a uniform regime by drafting the Rotterdam Rules, it will not easily replace the earlier effective conventions of The Hague, Visby, and Hamburg Rules to form a uniform regime worldwide. Moreover, the UN system of enforcement does not have the administrative framework at the international level to safeguard the application of these seaborne cargo conventions. Enormous emphasis has been placed on analyzing UN treaties; little scholarship, however, has been devoted to the harmonization of the maritime transport regime under the WTO. Moreover, there has been no literature looking at the WTO's capacity to address issues of harmonizing sea transport. Due to wide participation and a center-administrated implementation system, the WTO can make up these two pitfalls of the current UN approach to harmonization – restricted scope of coverage and the lack of central administration in implementation.

Multi-Forums of Shipping Related Negotiations and the Need to Harmonize:

Although they are two independent organizations, the WTO and the UN actively connect to each other. The emergence of the world trading system can be traced back to 1947. In that year, the UN's Conference of Trade and Employment adopted the Havana Charter for the International Trade Organization (ITO) that aimed to establish a multilateral trade organization. Although the ITO never came into force, the Havana Charter was partially integrated into the WTO. Furthermore, the cooperation between the two organizations is deeply rooted in the WTO agreements. In general, the legal basis of the WTO-UN relation is governed by the "Arrangements for Effective Cooperation with Other Intergovernmental Organizations-Relations between the WTO and the UN." Additionally, the GATS and GATT, two cardinal components of the WTO Agreements, specify collaborative relationships with other international organizations, which provide the legal basis for the cooperation with the UN and its specialized agencies on shipping.

In considering the multi-forum maritime transport, it is worthwhile to boost further cooperation. There are a number of UN specialized agencies handling shipping issues. The United Nations Conference on Trade and Development (UNCTAD), Organization for Economic Co-operation and Development (OECD), and United Nations Economic and Social Council (ECOSOC) have published statistical data on the shipping industry for years. These are considerable resources of background information for further GATS-based maritime transport negotiations. For example, UNCTAD has published *"The Review of Maritime Transport"* yearly since 1968. Moreover, the International Labour Organization (ILO), the United Nations Commission on International Trade Law (UNCITRAL), and the International Maritime Organization (IMO) deal with various aspects of shipping, for example, seamen, the international sea cargo regime, and international sale of goods. Amongst these specialized agencies, the Working Group III (on transport law) of UNCITRAL mainly works on the harmonization of the sea cargo regim with the assistance of a private international organization - the Committee Maritime International (CMI).

On the other hand, the WTO possesses two advantages over other forums on reinforcing harmonization of shipping regimes. This study focuses on the sea cargo regime and UNCITRAL, but the proposed way of cooperation in this paper might be extended to other respective shipping areas. First, the nature of legal documents administered by UNCITRAL and by the WTO is dramatically distinct. Most WTO agreements (including the GATS and TRIPS) are multilateral and legally binding for all members, but the UNCITRAL-administrated conventions can be regarded as plurilateral agreements. Unlike multilateral agreements, the category of plurilateral agreements is optionally applicable to UNCITRAL negotiating countries on a voluntary basis, and is only binding for those members who ratify the treaties. Moreover, UNCITRAL has also adopted additional legislative techniques in modernizing and harmonizing the law of international trade. Several different types of legislative texts are used on the basis of its mandate, including conventions, model laws, legislative guides and model provisions. Among these legislative texts, only the conventions are binding. As the maritime transport regimes, The Hague, Visby, Hamburg and Rotterdam Rules do not automatically apply to their negotiating countries, and their applications reply on ratifications.

In contrast, the second category of multilateral treaties consists of agreements that are compulsorily binding on all members, and WTO agreements mainly belong to this category. Thus, a WTO-based maritime transport regime is legally binding and likely to be applicable to all WTO Members. Due to all WTO Agreements being a single package, both substantive norms within the GATS and its procedural enforcement system will apply to all Members. The nature of a WTO administrated maritime transport annex is if a uniform sea cargo regime is part of the annex, it is a multilateral agreement and is significantly different from The Hague, Visby, Hamburg, and Rotterdam Rules.

The WTO has built up the widest coverage of Members and application of scope. Governing over 161 Members, the WTO engages in over 90 percent of all international trade in goods and services. It is comprehensive in the composition of its membership, including all developed countries and almost all developing countries. There are few other legal frameworks that are better at promoting the multilateral negotiations on the trade of goods and related maritime transport services. The WTO framework covers the broadest spectrum of Members and almost all stages of development of economic entities from developed nations to less developed countries. Therefore, a WTO-based maritime transport agreement will likely become binding for all WTO Members globally.

Due to its minimal political image, the WTO has earned great prestige over the developing world. In order to establish the WTO as a unified institution under the WTO Agreements, there were a variety of clearly unanswered issues after the conclusion of the Uruguay Round of negotiations. These issues entailed further negotiations on services and greater integration of developing countries, as well as monitoring of the WTO rules to ensure fair treatment of these countries the problem of integrating the "economies in transition" into the WTO system, and facing up to the problem of "state trading" entities.

Harmonization: WTO's Liberalization and UN's Unification

Both the UN and the WTO aim at the harmonization of the maritime transport regime, but each does so with different focuses. The UN stresses the unification of the sea cargo regime. As seen from the full name of the Hague Rules, the UN harmonization is targeted at establishing and updating universal rules for a wide range of countries. The WTO emphasizes Members' deeper commitment in existing sectors to achieve further liberalization. Meanwhile, the WTO does not intervene in its Members' regulatory autonomy over quality control of services supplied and the standardization of the service regulation worldwide. Both the WTO and the UN try to adjust diverse levels of domestic regulations to universal levels set by them. The UN's unification and the WTO's harmonization are both targeted towards global application and the level of standardization affects whether the scope of application could become global or not. Therefore, the harmonization of the UN and of the WTO faces a question: which levels of the standardization should be imposed on the UN's unification and the WTO's liberalization? In general, the standard of unification on limiting freedom of contract should be relatively low; in contrast, the standard of the WTO's liberalization seems to be higher.

Nonetheless, the standardization is harmonized at different levels under unification and liberalization. The level of unification of the different cargo regimes is balanced between low and high levels and regards the scope of application and liability. Additionally, the level for liberalization sets the standard at a relatively high level requiring removing unnecessary regulations, but the high standards are achievable through progressive liberalization. Moreover, both targets of liberalization and unification can be achieved under the WTO framework. According to GATS Preamble, the WTO's liberalization of shipping markets can be achieved without prejudice to UN's unification of the sea cargo regime. In practice, TRIPS proves that the WTO is capable of unifying different domestic regulations and liberalizing markets in one go.

Transportation and the WTO/GATS: Lessons Learnt from Progression and Regression

The harmonization of liberalizing maritime transport services and unifying maritime transport related regulations can be jointly negotiated under the WTO. To begin with, the WTO has successfully assumed the twin tasks under TRIPS. Moreover, the liberalization does not prevent the GATS from harmonizing the seaborne cargo regime of regulations. The past sea transport negotiations under the GATS mainly targeted harmonizing the levels of liberalization of shipping markets. The international regulations which are not competition distorting do not contradict liberalization. Thus, the GATS does not forbid harmonizing the different international regulations. Last but not least, the harmonizing of liberalization and of sea cargo regime/regulation engaged the same negotiating groups of countries (or territories). The tendency of liberalization in the international maritime transport area is also to produce a pattern of balancing and harmonizing countries with different transport interests. Whilst developed countries with renowned merchant fleets were pursuing the high level of liberalization worldwide, an opposite trend took place in the developing world with a prosperous export trade in goods but an infant shipping industry. Harmonization becomes more complex in comparison with other industries due to a distinct interest group of third-country transport. Hence, the WTO will be a feasible negotiating forum to further harmonize liberalization and sea-cargo regulations.

Sea transport has gained a prominent role in the WTO negotiating agenda under the GATS, along with IP under TRIPS, and maritime related service is an area on which WTO negotiations were scheduled under the GATS. Since the Uruguay Round Negotiations, the international trade-in services have been included in the WTO negotiations along with IP. The relationship between sea transport and the WTO can be traced back from the Uruguay Round till the current Doha Round. As Sturley commented, history is already repeating itself and there are lessons to be learnt from it; thus, many of today's arguments stem three decades or more. The lessons to be learned from past maritime transport negotiations on liberalization are not only enlightening for the WTO, but for as broad as all the treaties concerning maritime transport (including UN treaties), because of same negotiating countries and same respective interest groups these countries represent. In light of progress and regress, experience in this part sheds light on the harmonizing of entire maritime transport treaties.

Negotiations on Maritime Transport Service in the Uruguay Round Negotiations (1986-1994): the WTO, GATS and Maritime Transport Service:

Trade in services was one of the novel issues in comparison with trade in goods under the world trading system. The service issues were introduced into the world trading system (now the WTO) by the United States over the strenuous objections from both the developing and developed world. Services sectors were officially included in the multilateral negotiations of world trading system for the first time during the Uruguay Round negotiations. The negotiations on services were also separately structured from that on goods. This clear division highlights the importance of services and reduces the trade-offs risks between goods and services. It is worth noting that the negotiations on trade in services were accommodated in an independent multilateral discussion forum on the trade of goods.

The maritime transport negotiations need to address the trade-off problems amongst services sectors. In the Uruguay Round, the shipping industry strongly resisted the world trading system covering transport services. For instance, US shipping interests asserted that the inclusion of maritime transport services into the world trading system would be more harm than benefit. In contrast, a majority of countries supported a broad coverage in the negotiations of services, including maritime transport services. Additionally, the exclusion of maritime transport would cause domino effects through excessive claims from an increasing number of sectors requesting exclusion from the coverage. The debate came to an end with the invention of a dual approach to maritime transport negotiations.

The first progress in maritime transport negotiations is the introduction of the dual-approach. The dual approach was introduced by a "Group for Negotiations on Services" (GNS) meeting in 1990. Under this approach, sea transport negotiations were held at dual levels: being discussed in a general negotiation forum with all other service sectors at the one level, and a specific sectoral/sectional maritime transport negotiation forum at the other level. This approach had earned support from many participating nations. These countries agreed to follow the dual approach to accommodate the need of a particular annex on maritime transport regime, where a specific sector would be regulated under the world trading system. As a result of the dual approach, the maritime transport became one of exclusively negotiated sectors and an avid trade-off negotiating problem. Sea transport was negotiated under the transport-specific sectoral/sectional negotiations with air, road and inland waterways. The other specific sectors were financial services and telecommunications, which were also related to sea-borne cargo trade. Therefore, this dual approach has beneficiary effects of expanding the participation of maritime negotiations and shrinking the trade-off problem.

Another progress is the supplementary mechanisms to solve disagreements. On the one hand, the bilateral negotiation was introduced to supplement the on-going of multilateral negotiations. Although the GNS tried to promote consensuses on a multilateral basis, the European Community and the United States had dramatic bilateral conflicts. As a result, the majority of the initial commitments submitted to the conference contained little or far from sufficient consideration of the interests of the maritime transport sector. Consequently, the multilateral negotiations broke down because of conflicts between the two gigantic economic entities. The multilateral negotiations on services were not officially resumed until the United States and the European Community had agreed to enter into bilateral negotiations. On the other hand, a procedural mechanism was designed to assist substantial negotiations. For example, the GNS adopted "Procedural Guidelines" for substantial negotiations to solve the substantial disagreements. Consequently, the results of the negotiations successfully covered twelve service sectors and their subsectors, including transport service and its subsector maritime transport. It seems that a future agreement on maritime transport must be rooted in a consensus between the US and European countries.

The additional advance made by the Uruguay Round negotiations to maritime transport was the creation of a model scheduled approach. These modes were drawn up by the European Community in an "Ideal Quad Schedule on International Shipping" which was endorsed by three trade giants, the United States, Canada and Japan. According to the forms of supply, maritime transport services were divided into four modes: Mode 1 cross-border supply (*e.g.* international freights and passengers shipping); Mode 2 consumption abroad, (*e.g.* vessel repair); Mode 3 overseas commercial presence; and Mode 4 the supply of transport related services through the presence of natural persons. The classification of modes makes the participants' offers clearly comparable and saves negotiating time when there are disagreements on the levels of harmonization.

Although the inclusion of maritime transport into the world trading system was agreed upon after the introduction of the dual-level approach, one area where there is a lack of progress is the Uruguay Round. The draft "Annex on Maritime Transport Services" did not pass in order to become binding on Members. The difficulty in the passing of this maritime Annex was the bilateral disagreement between the United States and the European Community within the multilateral negotiations. For instance, they disagreed on the scope which service sectors covered and whether special agreements should be presented in the form of annexes to a general agreement on services. Maritime transport services were covered by a draft annex, which included air, road and inland waterway transport.

However, maritime transport became the unique sector that was drafted in an annex but not adopted, due to the lack of the general admitted levels of harmonization in Members' commitments. Nevertheless, the United States and the European Community had not given up maritime transport negotiations and agreed to settle their disputes by launching bilateral negotiations on controversial service sectors after the conclusion of the Uruguay Round. In terms of the coverage of incorporated transport service, the European Community drafted a maritime sectoral/sectional annex applying to all international maritime cargo transport services, including bulk cargo shipping and liner shipping. Their plan was too comprehensive to gain general support at the beginning stages of negotiations, and the broad spectrum would possibly encounter more difficulties. Therefore, the task of harmonization should be started from a small area, such as liner shipping.

The Final Act Embodying the Results of Uruguay Round of Multilateral Trade Negotiations was officially signed, and the GATS became an indispensable component of the WTO, in Marrakesh on April 15, 1994.280 The GATS disciplines generally apply to all service sectors with various degrees of unification from sector to sector. The inclusion of maritime transport services into the GATS is officially confirmed in the form of a GATS Annex entitled *"Negotiations on Maritime Transport Services"*. Therefore, further negotiations of harmonization may be situated under the Annex.

Progress in the NGMTS Negotiations (1994-1997): Bilateral or Multilateral?

The maritime transport negotiations occurred in the era of specific sectoral/sectional negotiations after the Uruguay Round Negotiations. According to *Ministerial Decision on Negotiations on Maritime Transport Services* and GATS "*Annex on Negotiation on Maritime Transport,"* the WTO provided the mandate for specific sectoral/sectional negotiations on maritime transport to be commenced no later than May 16, 1994 and closed by June 1996.

The first advancement was that the design of dual-level negotiations which was maintained as a specific secotral discussion forum under the "Negotiating Group on Maritime Transport Services" (NGMTS). This group was established for the exclusive handling of the maritime transport regime. Thus, the sectoral/sectional negotiations reduced the trade-off risks between service sectors and reduced the opposition from the shipping industry.

During the post-Uruguay Round Negotiations, the second advancement was that the NGMTS had integrated the UN agencies and elaborately worked together in depth for the first time. By the end of 1996, there were fifty-six members, as well as sixteen observers, in the NGMTS negotiations. These participants substantially engaged in the NGMTS negotiations through sixteen formal meetings at Marrakesh. However, only international organizations obtained the right of observership. Some of the international organizations included were the OECD, UNCTAD and World Bank.

The third advancement is the method by which the NGMTS exclusively based substantial negotiations on primary data. The NGMTS had its Secretariat prepare a questionnaire to collect primary information in 1994. The finalized questionnaire was very comprehensive, consisting of two parts. The questionnaire covered matters beyond liberalization and regulation issues, such as the economic structure, including trade flows and regulatory structures applying to liner and tramp shipping. Part I of the questionnaire covered economic structure and statistics on international shipping markets. Part II of the questionnaire dealt with the regulatory structures applicable for maritime transport in each Member. A wide range of participants committed themselves to responding. Almost all NGMTS members and observers responded to it, so that the information collected became comprehensive and worked as the factual background for the further negotiations.

Additionally, progress has been achieved in two other areas as well. First, a majority of participants recognized the need to increase transparency on various domestic shipping regulations and the value of legal certainty. Furthermore, the importance of multimodal transport turned out to be further highlighted at the WTO. For example, the United States delegation stressed the inclusion of the door-to-door supply of transport services within GATS framework in its informal statement on multimodal transport.

However, it is necessary to address the area of multimodal transport after the achievement in sea transport. As to inland transport by truck, members impose various domestic instruments, which make the harmonization of multimodal transport very difficult. Subsequently, the joint negotiations on all transport modes would make the sea transport negotiations more difficult. Owing to the absence of joint negotiations on air, sea and inland transport in the Uruguay Round and NGMTS, international multimodal transport arrangements should not be negotiated before addressing harmonization of sea and inland legs, as well as certain degrees of cabotage on inland waterways, respectively.

Even so, negotiations encountered a tug of war, which saliently happened between the United States and other participants. Also, a majority of participants had not rendered substantive offers for maritime transport. In particular, the US delegation failed to submit a timely and substantial offer. As a result, most other participants swiftly shifted backwards to their Uruguay-Round propositions. A number of negotiating representatives claimed that there was a need for a substantial offer from the world's major trading entities first. Subsequently, their feedback was far from the United States' expectation on substantial rules on maritime transport under the GATS. It seemed as though many participants were waiting for the United States' to submit their substantial offer first, but the U.S. was waiting for everyone else. Therefore, this historical period demonstrated the difficulty of addressing the tug of war in the multilateral negotiations.

So far, accomplishing a multilateral agreement on maritime transport under GATS is still far from being attained. The lack of a substantial US offer on maritime transport services has tremendous negative effects in other countries, particularly in developing countries, on the inclusion of this sector into the world trading system. On the one hand, the European Community proposed to promote a mere standstill agreement, taking the view that "the challenge in maritime [transport service] was not so much to liberalize as to bind the existing openness of most trade regimes." In contrast, the United States ardently appealed for an agreement, which in fact liberalized the shipping sector. The United States claimed that an agreement standstill was not sufficient, and emphasized that a sea-transport agreement should be promoting the level of liberalization rather than merely reflecting the current level. This was in spite of a last-minute unification effort by twenty-four participants that proposed a package of draft offers "conditional on a matching, comprehensive offer from the United States" in June 1996. The package constituted several substantial improvements on all three pillars of maritime transport services, as well as on multimodal transport. Nevertheless, the United States ultimately deemed it as merely reinforcing the *status quo* and repackaging the previous offers that were far from being sufficient. When the NGMTS was ended mandatorily, the improved offer submitted by twenty-four countries was rejected because of the US's resistance. Consequently, it was widely recognized that the NGMTS negotiations should not be continued at that moment, and the NGMTS negotiations between 1994 and 1996 fell into a stalemate at the end of June 1996. In order to address the tug of war in future negotiations, bilateral negotiations and multilateral negotiations might be undertaken.

History usually repeats itself. When the Uruguay Round was nearing its end, some participating members tried to make a last-minute effort to achieve maritime transport liberalization by offering varying degrees of liberalized offers, but these meaningful offers were withdrawn before the mandatory close of negotiations, due to the absence of a US offer. Other significant maritime powers either entirely withdrew (*e.g.* the European countries) or significantly diminished substantive offers (*e.g.* Canada, Japan and India). Again, the absence of a US substantial offer led the NGMTS negotiations between 1994 and 1996 to a deadlock. Although the US delegation claimed that the US regime for maritime transport services was almost the most liberal in the world, many NGMTS participants felt that there were some ulterior motives associated with the US reluctance to make a substantive concession on its domestic restrictive measures, for instance US unilateral cargo reservation for its domestic carriers and a conservative policy for its cabotage trade. As Parameswaran noted, the NGMTS seemed to encounter a tug-of-war between the United States and other participating negotiators: the United States was waiting for other negotiators to submit a set of comprehensive and adequate offers; nonetheless a considerable number of participating countries would not actively and voluntarily do so unless the US handed in a substantial offer as a premise.

At first glance at the failures in negotiations, the history of NGMTS negotiations has established that it is difficult to achieve a worldwide enforceable maritime transport regime without a meaningful participation from the United States. The previous negotiation practices teach us that a successful conclusion of an extended negotiation of Uruguay Round negotiation on the GATS is not achievable without the participation of the US. As further maritime transport negotiations developed, it became obvious that a substantial involvement of the United States was the precondition for the breakdown of the paralyzed maritime negotiations.

Further scrutiny of the United States' practice shows a bilateral approach may break the deadlock in multilateral negotiations. First of all, the absence of a US substantial offer is because there are two conflicting voices as to shipping within this country. It is the United States government who pioneered the inclusion of services sectors into WTO; meanwhile its domestic shipping industry tried to exclude shipping from being included. The shipping industry's resistance originated from the ship owners who feared that their interests granted by national instruments would vanish after maritime transport services were integrated at the world trading system. Moreover, conflicts within influential parties had not been properly addressed before the multilateral negotiations at the WTO level. For instance, the confrontation between the United States and the Europe was once very tough. The success of the US-EC bilateral agreement proves that the tough issues can be addressed by moving from a bilateral approach to extended multi- lateral negotiations. Further, in recent maritime negotiations, bilateral agreements are highly helpful between important trade regions, such as those concluded between the European Union and China, and the United States and China. Therefore, bilateral negotiations will help the multilateral trading negotiations remove difficulties.

Regression in Doha Round Negotiations (2000): Trade-off Problem and the Necessity of an Annex

On January 1, 2000, GATS negotiations were officially launched as scheduled. This new trade round was initiated at a Declaration during the Fourth WTO Ministerial Conference in Doha, Oatar in November 2001 (Doha Round). Currently, maritime transport services are included in this Round under GATS negotiations along with all other service sectors.

In an early phase of the Doha Round, the developed and the developing countries expressed their common interest in maritime transport services. In October 2000, the European Community prompted a joint statement specifically dealing with maritime transport.349 Later, Japan, Norway, the Republic of Korea, Chile, Australia and Colombia submitted respective negotiation proposals as well. As we have seen, the Doha Round inherits a request-offer approach from previous negotiations. In light of the previous offers, they aimed to reduce, or even to further eliminate, impediments to the shipping industry and to cultivate a free and fair competitive shipping market with merely a minimum level of regulation on reducing shipping tariffs thus benefiting consumers from all WTO member parties.

The principles of trade in services are contained in the GATS, including maritime transport service sectors. The specific regime for maritime transport services in the negotiations is defined by decision. The "Guidelines and Procedures for the Negotiations on Trade in Services" at paragraph 11 claims that "Liberalization shall be advanced through bilateral, plurilateral or multilateral negotiations […]".After the Hong Kong 2005 Ministerial Conference, the rigidness of harmonization on maritime transport services is amended with certain flexibilities with regard to countries at different stage of development.

A substantial advance in the Doha Round negotiations is that absence of a US offer on the maritime transport sector has not frozen the multilateral negotiations. Until 2003, the United States had not included any specific commitment on maritime transport service because the inclusion of the maritime transport into GATS/WTO negotiations under the Doha Round would reduce US flexibility on whether to undertake counteract. The inclusion means that the breach of WTO maritime transport will be a subject under the dispute settlement apparatus, instead of by any unilateral retaliatory measure, in addition that the US would be subject to the WTO dispute settlement system concerning maritime transport issues. Moreover, the US's hesitation caused negative reactions from other countries, particularly developing countries, such as India and Brazil towards handing in any comprehensive and substantial offers in the sector. Even so, developing countries have learnt not to rely heavily on the US attitude. There are an increasing number of developing countries that have made substantial commitments on maritime transport, including India and Brazil. As a result, the Doha Round has been developed without heavy reliance on the US offers like the NGMTS negotiations (1994-1996).

Unlike the NGMTS specific forum, the Doha Round is problematic owing to lack of a specialized maritime transport negotiation platform. Although the Korean delegation hinted that it was necessary to found the NGMTS-like negotiation forum, a specialized negotiation forum on merely maritime transport has not been established. The General Council of Services decided to undertake maritime transport negotiations along with all other services sectors. Firstly, it is unlikely for negotiators to be equipped with adequate knowledge in this sector due to the perplexing nature of sea transport.

Moreover, the mixed negotiations mean the sea transport sector encounters trade-off risks from other sectors. The cross sectoral/sectional trade-off bargaining practices existed in the previous WTO negotiations. This practice was widely manipulated by negotiators in their bargaining procedure in the transformation from the GATT system to the WTO system. From the perspective of a governmental negotiator, the overall service trade of the country gained an upper hand over domestic shipping industry only. Due to the lesser economic and political importance of the shipping industry compared with a country's overall services economy, the maritime transport sector faced a challenge from the trade-off process. Despite the acknowledgement of the essential importance achieved through GATT as to trade of goods, shipowners' associations in different countries might fear that the inclusion of maritime services negotiations in this framework is paralleled with all other sectoral/ sectional services bears the risk of cross-sectoral/sectional trade-off problem. The problem will remain outstanding unless the maritime transport is negotiated separately as a specific service sector; the agreements achieved in the independent negotiations will form a GATS annex.

Additionally, a request-offer approach used in the Doha Round bears a risk of creating a negotiation vacuum in WTO Member's offers. During 2003, WTO Members submitted a number of initial offers on all service sectors. Among them, some offers contained meaningfully substantial commitments on all three pillars of maritime transport, multimodal transport (referred to sometimes as the fourth pillar), and even on certain extents of cabotage domestic transport. Take the European Community offer as an example. The European Community mainly restates its 1996 NGMTS-negotiation offer with a high extent of liberalization on international shipping and on cabotage shipping as well. So do the offers of New Zealand, Australia, Canada, Japan, all of whom are maritime powers. Nevertheless, others omitted the shipping sector in their service GATS commitments entirely. A salient example was the US offer, which did not include any specific commitment to the shipping sector.

Last but not least, it is necessary to unify the system of classification before the next negotiations. The participants follow various classifications of maritime transport subcategories, so that it is very difficult to precisely identify common and conflicting areas for further negotiations. So far, the diversity of national commitments combine three commonly used forms of classification systems, mixing the Central Product Classification (CPC) system and services sectoral/sectional Classification List, as well as the Maritime Model Schedule (MMS). The diversity is further perplexed by the fact that some Members added their own *sui generis* definitions.

As of November 2005, WTO members collectively identified their sectoral/sectional and modal objectives for maritime transport negotiations. Unfortunately, many of the details of maritime negotiations contained in maritime transport negotiations remain restricted and unavailable for researchers. The key objective of this new round of maritime negotiations probably puts greater emphasis on developing countries, which is reflected in many articles in the 2001 Doha Ministerial Declaration. Active participation of China in the WTO negotiations and in the Rotterdam Rules' negotiations offer various chances for maritime transport service providers from all over the world to embody the Chinese maritime regime in a uniform regime under the WTO, in particular the GATS, framework.

It is worth noting that, within the WTO framework, a multilateral trading and negotiating system, there are a few nonreciprocal elements, albeit they usually erode the unification of an international transport regime. These exceptions originate from the progressive notion. According to some, these exceptions benefit less developed countries from a fully uniform GATS transport regime offered by developed member parities without requiring that the former groups adhere to the uniform standards at exactly the same degree as that of the later groups. In fact, it is reasonable to allow this non-reciprocity, because these LDCs are usually negotiating underdogs. Owing to their minor economic importance and unfamiliarity with the WTO rules of play, they cannot act as rule makers.

This merit distinguishes the WTO from other international organizations, contributing to the active engagement of the developing world. Thus, while it is important to strive for substantial unification in all major maritime powers from both the industrialized and developing world, the absence of GATS offers on all three pillars of sea transport sectors and multimodal transport from some will not inevitably result in the overall failure of GATS maritime negotiations. If the unification is achieved through a progressive process, the developing countries can tender substantial offers, which meet high standards but will be realized through progressive phrases. On balance, the aim of the developed world, for instance the U.S., cannot be achieved without considerations on the reluctance of the developing world.

Reopening of Maritime Transport Negotiations under the WTO Framework:

Based on the historical and doctrinal analyses of maritime transport negotiations within the WTO framework, the thesis argues that it is feasible to reopen the maritime transport related negotiations within the WTO framework now. The legal setting today is different from it was, and the WTO has been much developed since 1995. In particular, the TRIPS model of unifying intellectual property rights has become full-fledged after approximately 20 years' development. The TRIPS model has proved that the WTO is able to unify a fragmented area of law, and this will reduce the concerns of negotiators against opening of maritime transport negotiations. In addition, the nature of unifying intellectual property right regimes and unifying seaborne cargo regimes are almost the same. Thus, the success of the WTO in the TRIPS model provides the international community a feasible way to unify seaborne cargo rules. Moreover, the interest parties have recognized the increasing importance of maritime transport negotiations, such as in the US and other developing countries. Chapter Seven will address how to remove possible barriers to negotiations and the implementation of uniform maritime transport rules.

Traditionally, sea transport law is governed by conventions. Its harmonization has been negotiated under the UN framework; most notably in the Hamburg Rules and recently in the Rotterdam Rules since the 1970s. Unfortunately, these two UN conventions have had difficulties in achieving worldwide ratification in so far so as to form a uniform sea transport regime. Owing to the successful incorporation of another private right area of intellectual property into its framework, the WTO is likely to cooperate with the UN to foster a uniform sea transport regime and to address the issues on unification and liberalization in one go under the WTO's GATS annex. Furthermore, the WTO is an influential worldwide organization built upon comprehensive documents and complete legal framework.

The unification of seaborne transport is feasible under the GATS, since the WTO has successfully created a uniform IP regime under TRIPS. On the whole, the WTO possesses at least five advantages in boosting the pace of unification of the sea transport regime. First, it has the successful precedent of cooperation with the UN's WIPO in IP regime which can be followed in the sea transport regime. Second, the WTO's unique way under TRIPS of dealing with the WTO agreements and pre-existing international treaties on IP will shed light on the potential reference to previous sea cargo conventions, including the UN Hamburg and Rotterdam Rules to the GATS and its annex. Third, the WTO has developed a theory of balancing rights for the conflicting interest groups from TRIPS and will apply it to the maritime transport uniform law negotiations. Fourth, the WTO can establish minimum standards under its GATS to maintain the criteria of unification for sea transport as does TRIPS. Fifth, the WTO institution is effectively implemented under an enforcement procedure under a dispute settlement system. Based on these five merits, the endeavours to unify sea transport law will be increasingly accelerated with WTO and UN cooperation.

The relationship between the WTO and maritime transport regime can be traced backwards to GATS negotiations which contained maritime transport negotiations. In light of the history of the GATS-based maritime transport negotiations from the 1980s to today, there have been demonstrated a trend subject to both progression and regression. Since the Uruguay Round, maritime transport services have been integrated into the WTO negotiations for the first time. The necessity of its inclusion had been challenged and confirmed in the NGMTS negotiations from 1994 to 1996. The progress achieved during this period includes the formation of the specific negotiation forum and a statistical approach based on a wide range of questionnaires. Also, it explores a pre-bilateral approach combined with multilateral negotiations to address the problem of absence of substantial offers from importance entities, such as the US. In order to continue the NGMTS achievements, a significant drawback in the current Doha Round, namely the lack of a special negotiation platform for maritime transport services, should be removed. This is because seaborne transport bears trade-off risks, which require an independent negotiations forum and a special annex.

On the whole, the maritime negotiations within the world trading system are divided into three stages in Section V: the Uruguay Round (1986-1994), the NGMTS (1994-1997) and Doha Round (2000-). From the progress and regress within the three-stage negotiations, there are primarily three lessons learned which shed lights to future uniformity of maritime transport regimes. The first lesson is that the dual approach introduced within the Uruguay Round, has the beneficiary effects of expanding the participation of maritime negotiations, and of shrinking the trade-off problem. This dual approach was continued in the NGMTS negotiations; however, the Doha Round negotiations have not maintained it. Future maritime negotiations should maintain this dual approach in designing negotiating forums and concluding the negotiating results in an independent instrument (e.g. an annex) exclusively for maritime transport sector.

The second lesson regards the ways to engage a number of private participants in the shipping industry. In light of the NGMTS negotiations, in order to foster communications between the shipping industry and rule makers, future negotiations should consult non-government entities (e.g. ship owners' council and shippers' alliances). In future negotiations, the form of their participation is not restricted to the role of observers. For instance, the WTO can hold workshops similar to those the OECD currently holds and allow respective private parties to hear and speak out there.

The third lesson is on the merits of conducting empirical research on maritime transport. The questionnaire conducted by the NGMTS on the maritime transport is a worthwhile endeavor due to the general lack of worldwide statistical data concerning the seaborne transport service sector today. Even though the questionnaire was conducted in 1994, and some information is obsolete, a number of results are still worthy of attention in today's harmonized system. Cabotage is generally excluded from sea transport negotiations. That indicates that negotiators are very conservative on transportation within their Member's territories. Similarly, the multimodal transport might be a tough issue because of its inland transport legs. Thus, further GATS negotiations may discuss cabotage and multimodal transport issues but cannot harmonize them at the beginning stages of maritime negotiations. Moreover, the unification of sea cargo regulation under the GATS already had been initiated by a WTO member's response concerning the minimum standardization of transport service and conditions of carriage. Accordingly, it is also worthwhile of conducting a similar questionnaire in the further to obtain more first-hand information.

The last lesson is the introduction of the supplementary mechanisms, designed in the Uruguay Round and NGMTS negotiations, may avid tugs of war in negotiations. The two supplementary mechanisms, used in the NGMTS and Doha Round negotiations, for multilateral negotiations are helpful to solve disagreements, namely procedural rules of negotiations and bilateral negotiations. In order to avoid the deadlock of tugs of war in the next negotiations, it might be necessary to impose deadlines for all participants to submit offers.

Therefore, having been an important part of the negotiating agenda in the Uruguay Round, the NGMTS, and the Doha Round, maritime transport may be concluded within an annex to the GATS with reference to selected pre-existing conventions. Besides unification, the WTO will also need to tackle some shipping-related issues, because they are all components of the GATS-based annex on maritime transport.

MODULE-IV

International Shipping and Role of Ports

CARRIAGE OF GOODS BY SEA

The carriage of goods by sea has been the most useful and effective means of transportation for the international trading of goods. Its paramount importance for the world's economy increased dramatically over the last century when more countries went beyond their borders to compete in the international market creating in large part today's global economy. Boundaries fell away and free trade was opened between all nations. Today, the success of countries' economies is measured, among other factors, on the balance of payment of goods annually imported and exported. This international exchange of goods is possible thanks to vessels that currently move approximately 80% of the world's trade. Because of this, the shipping industry is not only of special importance to the private sector, but to the public sector as well. As a fundamental component of the economic growth and development policy, it has been the subject of public interest and States have endeavored to regulate it.

The maritime transportation is regularly performed under two contractual modalities: charter parties and bills of lading. The research focuses on the latter modality. At the present, the carriage of goods by sea under bills of lading is mostly governed by the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, adopted in Brussels in 1924 and commonly known as the Hague Rules. This regulation orders carriers to perform two duties: to practice due diligence to make the ship seaworthy and to care for the cargo. The prevention of cargo damage or losses is a goal of the liability rules set in the governing regime. It meets a social end too, as the economy and in consequence, the social welfare of most nations, depend on the safe arrival of the products at destination.

Both duties have been constantly impacted by the development of technology. Shipping technology has provided new resources, methods and tools to make the carriage of goods safer than ever. But which of these technologies can be expected by carriers to be applied as part of their obligation to practice due diligence?

CONTRACT OF CARRIAGE OF GOODS BY SEA

This contract is commonly defined as the contract of a ship for the carriage of goods by water, usually performed, as mentioned, under the modalities of charter parties or bills of lading, or a combination of both. It is a contractual obligation subscribed between a shipper and a carrier, where the latter undertakes the task of transporting the shipper's goods by sea, from a specific place to a specific destination, against the payment of freight. The carrier assumes some risks of the maritime adventure, which makes the obligation to be classified as one of result.

The Parties Involved

The contract has a bilateral character. As mentioned above, the shipper and the carrier are the main parties. The international conventions on the subject have underlined some definition of both parties, attending to each parties' participation in the contract and its engagement with the other party. The Conventions provide the following definitions.

The Shipper

Shipper is defined as the person who ships goods to another or the party who contracts the services of a carrier for the transportation of cargo. The Hague Rules does not present any definition of shipper. The Hamburg Rules include the following definition:

> *[A]ny person by whom or in whose name or on whose behalf a contract of carriage of goods by sea has been concluded with a carrier, or any person by whom or in whose name or on whose behalf the goods are actually delivered to the carrier in relation to the contract of carriage by sea.*

Though the Rotterdam Rules are the newest regulation enacted for this contract, the definition provided is more ambiguous: "shipper is the party who enters into a contract of carriage with a carrier."

The Carrier

Carrier is the person, individual or organization, engaged in transporting passenger or goods for hire. The same shipowner is the carrier when he personally operates his vessel. At the present, vessels often operate under a charter party. In this case, and depending on the type of charter party, the charterer who then resells space on the chartered ship to other particular shippers becomes the carrier for those particulars who ship goods with him. The Hague Rules do not provide a definition based on the function or the activity of the carrier. That is of general knowledge in the industry. The Rules identify the carrier regarding its status or legal relation to the ship and to the shipper. It says then, that the "carriers include the owner or charter who enters into a contract of carriage with a shipper". The Hamburg and Rotterdam rules present similar descriptions. A more detailed definition of the carrier's activity and their respective obligations has been developed according to the distinction made by the courts of two types of carriers: Private carrier and Common carrier.

Private Carrier: The private carrier is usually the shipowner who lets the whole ship or its whole cargo capacity for one or more voyages or for a specific period of time. This carrier offers his ship for carriage services to a specific shipper and under special agreement. Such agreement commonly appears in a formal letting of a ship known as a charter party, in difference with the common carrier who usually acts under a bill of lading. As the law of charter parties is still governed by the principle of freedom of contract, the parties in a private carriage enjoy some more liberties. The private carrier reserves the right to bargain and the right to decide whether or not he carries a specific cargo as he chooses. He is not necessarily available, nor obliged, to carry goods for the general public. It must be noticed, however, that the determination of the carrier's character based on the modality of the contract subscribed is not always exact. A shipper who takes up the full space on a ship for a specific voyage is contracting with a private carrier, even if the contract of carriage is documented in a bill of lading. The opposite may happen when a shipper lets a full deep tank or some other compartment of a vessel under a charter party, but other tanks or hatches of the same vessel are let to other shippers. In this case, beside the charter party, the carrier is to be held as a common carrier. The difference lies in the exclusivity of the contractual relation with the specific shipper for the use of the whole cargo capacity of the chartered ship. Regarding the standard of liability, private carriers are liable if the damage or loss is caused by their negligence in the performance of their duties.

Common Carrier: Common carriers are those who hold themselves, as a regular business, available to carry any goods, from any shipper who pays their charges, as long as there is enough space on the vessel, following a regularly fixed route. The contract under this modality is usually performed under the form of a bill of lading, but for the reason explained above, such a document is not conclusive to determine the character of the carrier. The common carriers were subject in the past to very strict regulations. Unlike the private carriers who were liable for negligence, the common carriers were subject to statutory regulation including strict liability for damages or loss of the goods. Under common law, common carriers were subject to three main obligations:

- They had a duty to serve all who applied for their services,
- Unreasonableness in their rates of charge and operation was prohibited; and,
- They were held to far stricter liability standards than those applied in general business law.

However, the strictness of the liability standard changed radically with the introduction of the Brussels Convention of 1924, commonly known as the Hague Rules. The liability of common carriers under the Hague Rules is measured attending to their negligent activity or omission resulting in damages or losses, similar to the liability for private carriers. Currently, a large number of companies operate as common carriers that own or hire several numbers of ships and offer carriage of goods throughout the world. They are known as cargo liners, whose development since the last century has enabled the rapid growth of the international exchange of goods. Their importance in the current maritime commerce has grown so much, that the recent Rotterdam Rules included a definition for this type of carrier. Most of the cargo liners perform their services under the Hague Rules, as they carry goods from or to States members of the Convention, or they commonly incorporate these rules in their bills of lading as the applicable law to the contract.

Respective Obligations

The determination of the rights and duties of each party depends on the modality of the contract they submit and the applicable law stated. In a Charter Party, the parties enjoy additional freedom; while under a bill of lading, parties are subject to statutory regulations. The doctrine and jurisprudence have distinguished two general groups of obligations in this contract. First, the express obligations refer to the specific characteristics of the contracted carriage. They include the obligation to provide the ship with the special features offered; the time of departure; the port or place of loading and delivery; the amount of freight; etc. On charter parties, the time period of the charter or the specific voyage hired are also particularly important. These obligations or special conditions are stated in the charter party or the bill of lading. Second, apart from the terms expressly stated in the contract, or set by statue or implied by custom, the courts have recognized and enforced some general duties that must be accomplished by the parties to give business efficacy to the contract. They are automatically incorporated in the contract, unless the parties have agreed to special clauses establishing the contrary. Although the existence of such general implied obligations is the result of jurisprudential enforcement, courts are not allowed to make new dispositions in the contract. This restriction applies even when they consider it reasonable for the correctness and efficacy of the contract.

<u>On the Carrier</u>

For carriers, in the common law, the general arising obligation from this contract is summarized as: "[the carrier] is to carry and deliver in safety, answering for all loss or damage which may happen to them (the goods) while they are in his hand as carrier." They are relieved of responsibility for loss of or damages to the cargo, when it is caused by an act of God; King's enemies; defect or infirmity of the goods or their package; or, through a voluntary sacrifice for the safety of the adventure. The access of these exceptions of responsibility is conditional upon the absence of any negligent act by the part of the carrier that exposed the cargo to the cause of loss or damage. To accomplish the main objective of the contract, the common law jurisprudence has developed three implied undertakings that must be observed by the carriers.

1. *To Provide a Seaworthy Ship:* The seaworthiness of the vessel is generally defined as the condition of being sufficiently staunch, strong and tight, properly equipped and in every way fitted to resist the perils and incidents that a seagoing vessel might ordinarily encounter. Such a condition covers the physical estate of the ship, the crew's competence, the equipment, and its capability to carry the specific cargo. In common law this obligation is absolute and its breach makes the carrier liable regardless of fault. Only when the contract is governed by the Hague/Hague-Visby Rules, is the standard reduced to the exercise of due diligence in making the ship seaworthy.
2. *Reasonable Dispatch:* In absence of a specific date for departure, the vessels must proceed and perform the carriage in a reasonable time. The reasonability of the time of departure will vary case by case, and must take into account, firstly, the different elements of the voyage, such as the conditions of the ship; the state of the cargo

handling technology; and, the special circumstances known to the parties. Certainly the condition of the ports, the distance to be sailed and the usual weather condition of the route play an important role. The second element to determine the reasonability of the time of dispatch is, if under the actual circumstances, the carrier was diligence in the execution of the voyage. The carrier, however, is not expected to take more than reasonable measures to accomplish this obligation. To assign carrier's liability for unreasonable delay, the courts must assess whether the circumstances that impeded the carrier to perform the carriage in a reasonable time, were normal or not. As the conditions in navigation may vary, and may be in some circumstances beyond the carrier's control, provisions in bills of lading and charter parties are generally stated releasing the carrier from liability for delays. Some others go further refusing any liability for delay of any type. These clauses are enforceable by American courts, releasing carriers for delays of 2 weeks, or even longer, and denying compensation for damages resulting, for example, from loss of market. Notwithstanding, other courts have been more cautious in recognizing such clauses and assign liability if the unreasonable delay was caused by the carrier's negligence.

3. *Not to Deviate from the Agreed Route:* The carriage must be performed not only in a reasonable time, but also, following the agreed route. In absence of any agreement regarding the geographical route, the carrier must proceed along the shortest, safest and usual direction to the destination port. A voluntary change without necessity or reasonable cause from the regular course or route shall be considered a deviation. Deviation means "an intentional and unreasonable change in the geographic route of the voyage as contracted." This concept was introduced into the law of carriage from the marine insurance law. Later, it was extended to other causes other than a geographic deviation, to include: "any variation in the conduct of a ship in the carriage of goods whereby the risks incident to the shipment will be increased." Under this extension, deviation was expanded to include: carrying in a different vessel than the agreed one; carrying partly by rail; dry docking with the cargo on board; unreasonable delay; and, carrying on deck. Other situations that under the same construction were considered deviation or quasi-deviation include: Carrier's corrupt or criminal miss delivery; negligence, gross negligence or willful misconduct; negligent stowage; stowage which greatly exceeds weight limitation of flat rack container; and, safe capacity of cargo cranes and related equipment.

   However, English courts have restricted the concept to geographical deviation. American jurisprudence still extends the concept to carrying on deck without authorization or in absence of a custom of carrying such goods in above deck stowage; over carriage, miss delivery and change in the route by truck inland. These cases are referred to as "quasi-deviation". The Hague/Hague-Visby rules do not define deviation nor establishes its consequences, but seems to keep the concept strictly for geographical deviation. The reasonableness of a deviation will depend on the law governing the contract; the surrounding circumstances; and the facts attending to the interest of all the parties. In principle, a deviation is reasonable exclusively in case of rescue of life at sea, which is now also a statutory duty established in national and international regulations. The norm introduced by the HR extended it to the rescue of property at sea as well, and to “any reasonable deviation”. Consequently, American and English law also recognizes this same cause as valid. In addition, a deviation may be allowed to avoid danger of the ship or to the cargo; or when it is made necessary by some default on the part of the charterer. Carriage of containers on deck has been also considered a reasonable deviation. Containerships are specially designed to transport containers safely on deck, so the cargo is not exposed to greater risks. With the pass of time, it became a well-established trade custom in a world-wide basis.

Unreasonable deviation is regarded as fundamental breach in the common law, and the carrier is held as an insurer of all damages caused to the cargo by the deviation. Both English and American legislations hold the carrier liable for damages or losses resulted from unreasonable deviation and deprive the carrier from relying on any legal or contractual stipulation in his favor. Under the HR an unreasonable deviation will produce similar consequences, depriving the carrier to rely on the exceptions and limitations of liability. In some cases, however, such as the excluded situations listed above, American courts have allowed the limitation per package. Under English law, the contractual freight is also reduced to a reasonable sum if the goods are delivered in the destination port. General average cannot be claimed unless the breach of contract by deviation is waived.

<u>On the Shipper or Charterer</u>

1. *Not to Ship Dangerous Goods:* Shippers shall not ship dangerous goods without previous notification to the carrier regarding its dangerous condition. The objective of this obligation is to provide the carrier with sufficient knowledge about the potential danger. Such notification enables them to refuse to carry the goods or to take reasonable measures to assure the safety of the vessel, crew and other cargo on board. When the carrier is already aware of the condition, there is no obligation to give notice. Under English law the concept of dangerous goods is not merely restricted to inflammable or explosive goods. It also includes everything that could put the vessel or other cargo in danger, including for example, infected cargo or cargo prohibited or subject to quarantine, or cargo which may not be allowed in the destination country. Notwithstanding, as the determination of what a dangerous cargo is presents frequent problems, the International Maritime Organization adopted in 1965 the International Maritime Dangerous Goods Code (IMDG). This code establishes and regularly updates a list of goods considered as dangerous.

Under the Hague/Hague-Visby Rules, the carrier is allowed to discharge, destroy or render innocuous any inflammable, explosive and dangerous goods loaded without the shipper's knowledge or consent. These actions release them from paying compensation and hold the shipper liable for all damages or expenses directly or indirectly arising from these measures. The situation varies when the carrier has knowledge of the potential danger and the goods become, after loaded, a real danger to the ship or to other cargo. In this case, the carrier shall proceed in the same way, without any liability for the shipper and releasing him from any expenses.

2. *To Nominate a Safe Port:* This obligation falls mostly upon the shipper under a charter party, where the charterer determines the ports the ship must visit. Shippers, under a common carriage governed by a bill of lading, must accept the ports the carrier specifies for loading and discharge. A shipper contracts with a common carrier depending on whether the ports offered suit his need of carriage or not. The shipper here has no power to decide or to order the carrier into which port he must call. It is the charterer, contracting with a private carrier in a charter party, who must nominate safe ports to protect the safety and integrity of the vessel. A safe port means that the loading and destination ports are adequate: […]in the relevant period of time, the particular ship can reach it, use it and return from it without, in the absence of some abnormal occurrence, being exposed to danger which cannot be avoided by good navigation and seamanship.

   The relevant period of time means the entire period from the moment of the vessel's arrival till the time of her departure. To be qualified as a safe port, there must be sufficient depth of water; absence of ice or rocks limiting the free access to the port; adequate administrative systems such as safety equipment buoys, warning lights and radars; absence of political hostilities; adequate weather forecasting systems; availability of trained pilots and tugs; enough and always available sea room and room to maneuver. Natural hazards and political danger to the physical safety of the vessel must be factored in as well as, the special characteristics of the vessel and the season when the port is nominated. The effect of this warranty allows the carrier or shipowner to refuse to proceed to the nominated port without breaching the contract. If the ship proceeds complying the charterer's order, he is liable for any damages to the vessel and for extra charges incurred in loading or unloading, if the unsafe conditions require such additional expenses. The shipper is released of liability in two situations. First, when the port becomes unsafe after it was nominated. In this case, the charterer must substitute another port, attending the circumstances. The second is when the master proceeds to the unsafe port with knowledge of its bad condition. In this case, the damages must be divided proportionately if the fault is shared between the charterer and the master.

<u>INTERNATIONAL REGULATIONS FOR THE CARRIAGE OF GOODS BY SEA</u>

The Hague Rules, 1924

Hague Rules apply to every aspect of the carriage of goods which it seeks to regulate. These rules deal with the contractual relationship between the carrier and the shipper. They determine the responsibilities and liabilities as well as the~ privileges and immunities of the carrier in relation to the loading, handling, stowage, carriage, custody, care and discharge of goods.

The Convention applies to all bills of lading issued in any of the Contracting States. It does not apply to charter parties but when bills of lading have been issued thereunder, they shall be governed by the rules of the Convention. On demand, the carrier will issue a bill of lading showing the necessary details and this document will serve as the prima facie evidence of the receipt of the goods by the carrier. The duties of the carrier are summed up by due diligence. The duty of due diligence pertains to both seaworthiness and cargo-worthiness. All clauses in the contract of carriage which have the effect of relieving or lessening the liability of the carrier with regard to the damage to the goods arising from the negligence, fault or failure in the duties and obligations prescribed in the Convention are declared null and void and of no effect.

Generally in any contract of affreightment, the ship-owner must deliver the cargo in the same order and condition, as it was, when shipped. But Hague Rules contain specific provisions exonerating the ship-owner from this liability in certain circumstances listed as:

(a) 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;
(b) fire, unless caused by the actual fault or privity of the carrier;
(c) perils, dangers and accidents of the sea or other navigable waters;
(d) act of God;
(e) act of war;
(f) act of public enemies;
(g) arrest or restraint of princes, rulers of people, or seizure under legal process;
(h) quarantine restriction;
(i) act or omission of the shipper or owner of the goods, his agent, or representative;
(j) strikes or lock-outs or stoppage or restraint of labour from whatever cause, whether partial or general;
(k) riots and civil commotions;
(l) saving or attempting to save life or property at sea;
(m) wastage in bulk or weight or any other loss or damage arising from inherent defect, quality, or vice of the goods;
(n) insufficiency of packing;

(o) insufficiency or inadequacy of marks;
(p) latent defects not discoverable by due diligence;
(q) any other cause arising without the actual fault or privity of the carrier, or without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.

The carrier who seeks the benefit of these exception clauses has the burden of proving that the loss or damage was caused by an excepted peril.

The Hague-Visby Rules, 1968

The Visby Amendments brought very important changes concerning the 1924 Convention. The main points of the revision concerned the widening of the scope of the Hague Rules and the adoption of the limits of carrier's liability to the changed monetary circumstances. In particular, the Visby rules raised the ceiling of the limit of liability and placed the unit of limitation on a more inflation resistant basis. The unit of limitation amount was to be determined by reference to Poincare Francs. Neither the carrier nor the ship is entitled to the benefit of the limitation of liability if it is proved that the damage resulted from an act or omission of the carrier done with intent to cause damage, or recklessly and with knowledge that damage would probably result. Moreover, the Protocol included provisions concerning the carriage of goods by sea in containers and extended the privilege of liability limitation to the servants and agents of the carrier.

The carrier or the ship is not responsible for loss or damage or in connection with, goods if the nature or value thereof has been knowingly mis-stated by the shipper in the bill of lading. Hague-Visby Rules did not affect the provision of any international convention or national law governing liability for nuclear damage. The provisions of the Convention applies to every bill of lading relating to the carriage of goods between ports if:

(a) the bill of lading is issued in a Contracting State;
(b) the carriage is from a port in a Contracting State;
(c) the contract contained in or evidenced by the bill of lading provides that the rules of this convention or legislation of any State giving effect to them are to given the contract, whatever may be the nationality of the ship, the carrier, the shipper, the consignee, or any other interested person

The Hague Rules stipulate that the carrier is discharged from all liability if no suit is brought within a year after the delivery of goods or from the date when such delivery would have been expected. Under Hague-Visby Rules this period may be extended if the parties agree after the cause of action has arisen.

The Franc Poincare a monetary unit introduced in 1968, was repealed by the Special Drawing Rights (SDRs) defined by the International Monetary Fund by the 1979 Protocol. Besides, a third option was granted to the cargo owners to calculate the compensation not only per package or unit, but also per kilogram of gross weight of the goods lost or damaged, whichever is the higher.

The Hamburg Rules, 1978

The Hamburg Rules are applicable to all 'contracts of carriage by sea' between two different States, if:

(a) the port of loading as provided for in the contract of carriage by sea is located in a Contracting State; or
(b) the port of discharge as provided for in the contract of carriage by sea is located in a Contracting State; or
(c) one of the optional ports of discharge provided for in the contract of carriage by sea is the actual port of discharge and such port is located in a Contracting State; or
(d) the bill of lading or other document evidencing the contract of carriage by sea is issued in a Contracting State; or
(e) the bill of lading or other document evidencing the contract of carriage by sea provides that the provisions of this convention or the legislation of any State giving effect to them are to govern the contract.

The application of the Hamburg Rules does not depend upon the nationality of the ship, the carrier, the shipper, the consignee or any other interested person. These rules do not apply to charter parties. However, they apply to bills of lading issued pursuant to charter parties, if the bill of lading governs the relation between the carrier and a holder of the bill of lading who is not the charterer.

The Hamburg Rules have been given a relatively wide scope of application substantially wider than that of Hague Rules. Unlike the Hague Rules, which apply only when a bill of lading is issued by the carrier, the Hamburg Rules govern the rights and obligations of the parties to a contract of carriage regardless of whether or not a bill of lading has been issued. This is becoming important as more and more goods are carried under non-negotiable transport documents, rather than the bills of lading.

<u>Liability of the Carrier</u>

Period of Responsibility:

The responsibility of the carrier for the goods under the Convention covers the period during which the carrier is in charge of the goods at the port of lading, during the carriage and at the port of discharge. The Hague Rules cover only the period from the time the goods are loaded onto the ship until the time they are discharged from it. They do not cover the loss or damage occurring while the goods are in the custody of the carrier prior to loading or after discharge. But the Hamburg Rules ensure that such loss or damage to goods is the responsibility of the party who is in the control of the goods and thereby best able to guard against the loss or damage.

Basis of Liability:

Liability is based on the principle of presumed fault or neglect. It means the carrier is liable if the occurrence that caused the loss, damage or delay in delivery took place while the goods were in his charge. He may escape liability only if he proves that he, his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences. This principle replaces the itemization of the carrier's obligations and the long list of his exemptions from liability under the Hague Rules, and eliminates the exemption from liability for loss or damage caused by the faulty navigation or management of the ship.

The carrier is liable for loss or damage to the goods or delay in delivery caused by fire, if the claimant proves that the fire arose from fault or neglect on the part of the carrier, his servant or agents. He is also liable for such loss, damage or delay in delivery which is proved by the claimant to have resulted from the fault or neglect of the carrier, his servants or agents, in taking all measures that cou1d reasonably be required to put out of the fire and avoid or mitigate its consequences.

If the fault or neglect of the carrier, his servants or agents combines with another cause to produce loss, damage, or delay the carrier is liable only to the extent that the loss, damage or delay in delivery is attributable to him. But he has to prove the amount of the loss, damage or delay attributable to him. The carrier is not liable where loss, damage or delay in delivery resulted from measures to save life or from reasonable measures to save property at sea.

Deck Cargo:

It is evident that sea cargo is not covered under the provisions of the Hague Rules. Sea cargo carried on deck was traditionally subject to high risk of loss or damage from the elements of nature or other causes. For this reason the Hague Rules do not cover goods carried on deck by agreement of the parties, permitting the carrier to disclaim all liability for such cargo. However, developments in transport and packaging techniques, and in particular containerization, have made it possible for cargo to be carried on deck with relative safety. It is common for container to be stored on deck in modem container ships.

The Hamburg Rules take these developments into account. Firstly, they expressly permit the 'carrier' to carry goods on deck not only if the 'shipper' so agrees, but also when such carriage is in accordance with a usage of particular trade or if law requires it. Secondly, they hold the carrier liable on the basis of presumed fault or neglect for loss, damage or delay in respect of goods that he is permitted to carry on deck. If he carries goods on deck without being permitted to do so, he is made liable for loss, damage or delay resulting solely from the carriage on deck, without being able to exclude that liability by proving that reasonable measures were taken to avoid the loss, damage or delay.

Liability of the Carrier and Actual Carrier:

When the performance of the carriage or part thereof has been entrusted to an 'actual carrier', the carrier is still responsible for the entire carriage. The carrier is responsible, in relation to the carriage performed by the actual carrier, for the acts and omissions of the actual carrier and of his servants and agents acting within the scope of their employment. Where the carrier and the actual carrier are both liable, their liability is joint and several.

Hamburg Rules enable the carrier to exempt himself from liability for loss, damage or delay attributable to an actual carrier only if the contract of carriage specifies the part of carriage entrusted to the actual carrier and names the actual carrier. Moreover, the exemption is effective only if the shipper can institute judicial or arbitral proceedings against the actual carrier in one of the jurisdictions set forth in the Hamburg Rules.

The actual carrier is responsible for loss, damage or delay in delivery caused by any occurrence which takes place while the goods are in his charge. Hamburg Rules governing the responsibility of the carrier are also applicable to the responsibility of the actual carrier.

If the servant or agent of the actual carrier proves that he acted within the scope of his employment, he is entitled to invoke the defences and limits of liability that the actual carrier is entitled to invoke under the Hamburg Rules. He loses the benefit of the limits of liability if it is proved that the loss or damage or delay resulted from an act or omission of the carrier done with intent to cause the loss, damage or delay, or recklessly with knowledge that the loss, damage or delay would probably result.

Limits of Liability:

The Hamburg Rules limit the liability of the carrier for loss of or damage to the goods to an amount equal to 835 units of account per package or other shipping unit, or 2.5 units of account per kilogram of gross weight of the goods lost or damage, whichever is the higher. The liability of the carrier for delay in delivering the goods is limited to two and a half times the freight payable for the goods delayed, but not exceeding the total freight payable under the contract of carriage. The carrier and the shipper can agree to limits higher than those can, but not to lower limits.

The Hamburg Rules maintain the dual per package/per kilogram system established in the Visby Protocol. The purpose of this system is to take account of the fact that the value/weight ratios of the goods carried by sea differ markedly. Sea cargo ranges from cargo such bulk commodities, which have a low value relative to their weight, to cargo such as complex heavy machinery, which has a much higher value/weight ratio. Under the dual system, the relatively low limit of 2.5 units of account per kilogram would apply to unpacked commodities carried in bulk, while the higher per-package limit would apply to items carried in packages or other shipping units. The break-even point is 334 kilograms: if a package or shipping unit is under that weight, the per'- package limit would apply; above that weight, the perkilogram limit would apply. For the purpose of calculating the limits of liability the packages· or shipping units contained in a container or deemed to be those enumerated in the bill of lading or other transport document evidencing the contract of carriage.

A carrier loses the benefit of the limits of liability if it is proved that the loss, damage or delay resulted from an act or omission of the carrier done with the intent to cause the loss, damage or delay, or recklessly and with knowledge that the loss, damage or delay would probably result. A servant or agent of the carrier loses the benefit of the limits of liability in the event of such conduct on his part.

If a servant or agent of the carrier proves that he acted within the scope of his employment, he is entitled to avail himself of the defences and limits of liability that the carrier is entitled to invoke under the Hamburg Rules.

Liability of the Shipper

The shipper is liable for loss sustained by the carrier or the actual carrier, or for damage sustained by the ship, only if the loss or damage was caused by the fault or neglect of the shipper, his servants or agents.

Hamburg Rules impose particular obligations with respect to dangerous goods. The shipper has responsibility to mark or label dangerous goods as dangerous in a suitable manner. The shipper must also inform the carrier of the danger presented by the goods and the precautions to be taken. Failures to meet these obligations in particular cases entitle the carrier to be compensated for loss suffered from the shipment of the goods. The carrier is not liable for compensation if he has taken the goods with the knowledge of their dangerous character. The carrier may be entitled to dispose of dangerous goods or render them innocuous without compensating the shipper if the shipper fails to meet his obligations with respect to the goods, or if the goods become an actual danger to life or property.

The Hague-Visby Rules are much clear but in their enumeration of the kinds of dangerous goods and in the separation which they describe from goods that are inflammable or explosive, might have been more limiting than the Article 13 (1) of the Hamburg Rules which provide that dangerous goods must be labelled or marked dangerous. Except few technical changes both the Hague-Visby and Hamburg Rules were same.

The Hamburg Rules provide no definition of dangerous goods or any list of any dangerous goods. It may at least make a reference to the IMO Code on dangerous goods. They are also silent on the question of whether defective cargo can be considered dangerous.

Claims and Actions

Limitation of Actions:

A claim must be brought in judicial or arbitral proceedings within a two-year limitation period. The party against whom the claim is made may extend the period. The Hamburg Rules further provide that a party held liable has an additional period of time after the expiration of the two-year period to institute an action for indemnity against another party who may be liable to him.

Jurisdiction:

The Hamburg Rules contain provisions governing judicial as well as arbitral proceedings brought in one of the ·specified places, which are broad enough to meet the practical needs of the claimant. They are:

(i) the principal place of business or the habitual residence of the resident;
(ii) the place where the contract of carriage was made, if made through the defendant's place of business, branch or agency there;
(iii) the port of lading or the port of discharge;
(iv) any other place designated in the contract of carriage or arbitration agreement.

Judicial proceedings may also be instituted in a place where a vessel of the owner or the carrying vessel has been validly arrested, subject to the right of the defendant to have the action removed to one of the places mentioned in the preceding sentence. Notwithstanding those options, the parties may by agreement designate a place where the claimant may institute judicial proceedings. The Hague Rules do not contain provisions with respect to jurisdiction and arbitration. Currently arbitration is important because some legal systems preclude the settlement by arbitration of disputes relating to the carriage of goods by sea.

Revision of the Limitation Amounts

The Hamburg Rules contain an expedited procedure for revising the limits of liability in the event of a significant change in the real value of the limits resulting, for example, from inflation. But these rules are not clear in the scope of inflation factor. These rules should be revised in order to moderate the inflation factor because the limits vary directly with the change in the rate of inflation. Inflation forces the shipper to expend additional resources in order to meet frequently changing prices. It is impossible for the ship-owners and their insurers to predict with any degree of accuracy what total amount of exposure will be as result of disaster involving damage to ship and cargo. The insurers must first know where litigation is likely to take place and what currencies and methods of fixing the unit limit are to be used before being able to approximate guess in liability exposures. The Montreal Convention for the Unification of Certain Rules for Carriage by Air, 1999 is providing wider scope for the inflation factor.

Transport Documents

Under Hamburg Rules the carrier must issue a bill of lading on demand of the shipper. Bill of lading must itemize the particulars required. The absence of one of the required particulars does not affect the legal character of the document as a bill of lading. The information given in the bill of lading is prima facie evidence of the taking over or loading by the carrier of the goods as described in it. If carrier knows or reasonably suspects that information in the bill of lading concerning the general nature of the goods, the number of packages or pieces, or their weight or quantity, is not accurate, or if he had no reasonable means of checking information, he may, insert a reservation specifying the inaccuracies, grounds of suspicion or the absence of reasonable means of checking in the bill of lading.

Sometimes, a shipper asks the carrier to issue a bill of lading without inserting a reservation even though carrier may have grounds to question the accuracy of information supplied by the shipper for insertion in the bill of lading or may have no reasonable means of checking information, or may have discovered defects in the condition of goods. In return, the shipper agrees to indemnify the carrier against loss suffered by him as a result of issuing the bill of lading without reservation. Such an agreement is valid as against the shipper, unless the carrier intends to defraud a third party who relies on the description of the goods in the bill of lading. However, the agreement has no effect as against the third party transferee of the bill of lading, including a consignee.

Where a carrier issues a document other than a bill of lading to evidence the receipt of the goods to be carried, such a document is prima facie evidence of the conclusion of the contract of carriage by sea and the taking over by the carrier of the goods as described in the document.

The Hague Rules apply only when a bill of lading has been issued, and they do not deal with other type of non-negotiable transport documents like sea waybills. There is growing practice in maritime transport for carriers to issue such documents, rather than bills of lading. The Hamburg Rules facilitate these developments.

Other Provisions

Hamburg Rules pertain to the relationship between the rules and the law of general average and other international conventions. It is noteworthy that by accepting the 1978 Hamburg Rules a State, is obliged to denounce the Hague Rules, 1924, as well as the amending

Protocols of 1968 and 1979, from the date when the 1978 Conventions enters into force in this particular State.

The Rotterdam Rules, 2009

Adoption and Generalities

After the failure in ratification of the Hamburg Rules, the Comité Maritime International undertook the discussions of a new set of rules in 1998. Later, in 2002, the UNCITRAL Working Group in Transport Law continued the discussions and drafted the final project of a new Convention on the topic. The result was "The United Nations Convention on Contracts for the International Carriage of Good Wholly or Partly by Sea", also known as the Rotterdam Rules, opened for signature on the 23rd of September 2009. At the preset, these rules have been ratified only by Spain and Togo.

One of the main objectives of these rules is to "modernize and harmonize" the rules governing the international carriage of goods by sea, addressing specifically the "technological and commercial development since the adoption of The Hague, Hague-Visby and Hamburg Rules. This Convention applies almost the same obligations already stated in the HR in relation to the duties of seaworthiness and due care. It repeats most of the same wording of many provisions of the HR, as an effort to maintain the large jurisprudence developed on the H/H-VR, yet introducing some slight changes that make considerable differences with the previous Hague Rules regime.

The Convention introduces in Article 1 some basic definitions that are worthy of examination. First, the "contract of carriage" is defined using the classic description of the activity of a carrier who for the payment of freight, undertakes to carry goods from one place to another. But the definition is not limited to that; it adopts a wider extension to include the land legs of a multimodal carriage, which these rules are also intended to regulate. The rules introduce also the distinction between the mere contractual carrier and the actual carrier, described under the terms of performing party and maritime performing party, which is a person other than the carrier assigned to perform some of the carriers' obligations.

Period of Responsibility

The period of responsibility also differs from the current H/H-VR. Taking distance of the "tackle to tackle" formula, it is closer to the Hamburg Rules. It establishes in Article 12 that the period of carrier responsibility covers the time from when "the carrier or the performing party receives the goods for carriage and ends when the goods are delivered". The carrier is responsible during the entire period he is in possession of the goods, as the Hamburg Rules state. But it intends to cover also the multimodal transport, in accordance with Article 11, which expressly states the main obligation of the contract, which is to "carry the goods to the place of destination and deliver them to the consignee." The rule was made contemplating the carriage in the door-to-door modality, using the expression "place of destination" instead of "port of destination". Notwithstanding, paragraph 2 of the same article clarifies the exclusion of the carrier's responsibility during the period the goods are under the custody of an authority or third party appointed thereto by law or regulation of the place of reception or delivery. This is the time, for example, when the goods are at the customs clearance or quarantine services, frequently located at the ports facilities to make inspections on inbound/outbound cargo, and where the carrier is obliged to collect or deliver the cargo, in compliance with certain local regulations.

Liability Rules

The main duties for the carriers are established in Articles 13 and 14. It changes the order of the HR by stating first the specific obligations for protecting the cargo, the duty of care. This foresees that the carrier has responsibility from the reception of the goods, which occurs before to its upload onto the vessel. Second, it states the specific obligations of practicing due diligence to make the ship seaworthy.

(1) Duty of Care

The duty of care of the cargo is stated in Article 13 and reads as follows:

> *Article 13: Specific obligations*
>
> *1. The carrier shall during the period of its responsibility as defined in Article 12, and subject to Article 26, properly and carefully receive, load, handle, stow, carry, keep, care for, unload and deliver the goods.*
>
> *2. Notwithstanding paragraph 1 of this article, and without prejudice to the other provision in chapter 4 and to chapter 5 to 7, the carrier and the shipper may agree that the loading, handling, stowing or unloading of the goods is to be performed by the shipper or the consignee. Such an agreement shall be referred to in the contract particular."*

The provision makes clear that the obligation is to be exercised during the entire period of the carrier's responsibility. The provision excludes its enforcement when the carrier is not undertaking different legs of transport. The clarification is for cases of multimodal transport, or for the period before they receive the goods or after its delivery. Article 26, thereon referred to, covers the period before loading onto and after discharge from the ship, and the liabilities based in local laws or regulation that covers such periods. The convention also grants to the carriers the possibility to be released from liability for damage or loss during such periods when the shippers partially undertake these functions.

The rest of the provision states practically the same obligations as the HR with the inclusion of two new points: the carrier must now properly and carefully receive and deliver the goods.

The same responds to the new period of responsibility that covers these two operations. It replaces the term "discharge" for "unload", but this is purely a stylistic change. The latter refers to any means of transport, while the former is more commonly used for maritime transportation. Again it provides that the carrier must perform these actions "properly and carefully". The invariability of these terms responds to the interest in preserving the long-standing jurisprudence related to the H/H-VR where both terms were analyzed. The second paragraph of the article resolves the problem raised by the FIO's clauses that grant the opportunity to the carrier to contract out the performance of the tasks described in paragraph 1, and the shipper to assume those tasks. It expressly admits the possibility that is recognized in English law but not in other jurisdictions.

(2) Seaworthiness

On the obligation to provide a seaworthy ship, the rules state the follow:

> *Article 14: Specific obligations applicable to the voyage by sea*
>
> *The carrier is bound before, at the beginning of, and during the voyage by sea to exercise due diligence to:*
>
> *(a) Make and keep the ship seaworthy;*
> *(b) Properly crew, equip and supply the ship and keep the ship so crewed, equipped and supplied throughout the voyage; and*
> (c) *Make and keep the holds and all other parts of the ship in which the goods are carried, and any containers supplied by the carrier in or upon which the goods are carried, fit and safe for their reception, carriage and preservation."*

The Convention repeats the same obligation stated in the HR, but introduces two details that make some significant changes. The obligation of practicing due diligence in making the ship seaworthy is not limited to before and at the beginning of the voyage, it is a continuous one. The carrier is obliged to continue exercising it to avoid any cause of unseaworthiness before and during the voyage. The obligation is not limited to make, but now also to keep the vessel in proper condition. The provision brought great concern and was objected to under the argument that it would alter the overall risk allocations between the carrier and cargo interest. It places a major burden on the carrier that could be translated into higher freight rates. However, this is simply another argument, and as Sturley argued with respect to the Hamburg Rules, there is not empirical evidence to justify such a hypothesis.

The obligation of due diligence remains the same as in the HR. Carriers must do what is reasonably possible under the circumstances. The exercise of this obligation depends on where the vessel is and when the unseaworthiness condition is discovered. If it is discovered while the vessel is at port, it may more easily facilitate the carrier in its repair, whereas the same problem will present much more difficulties while at sea. It is obvious that for a carrier it would be more difficult to carry out reparations on the ship during the voyage in high seas as opposed to while in port or at a shipyard. It is not expected that the carrier performs the same activities or actions that would be possible on shore. The carrier therefore, must keep the vessel specially equipped to avoid any possible unseaworthiness condition during the voyage. On this point, technology can and will play a very important role.

An uncertainty in the convention that may bring difficulties regards the extension of the obligation of due diligence in making and keeping the vessel seaworthy, throughout the voyage at sea. When is the voyage at sea over? Is there liability for damages due to lack of seaworthiness during the unloading process? These are new questions to be clarified by the Courts. Another innovation of these rules is the inclusion of provisions on containers. The continuity of the obligation also includes the obligation to make and keep fit and safe every place where the goods are carried, including the holds, but also the containers supplied by the carrier.

The Rotterdam Rules are another effort to update the H/H-VR regime and to create uniform rules for some other areas of the modern carriage of good by sea. Unfortunately, at the moment of this writing, they do not enjoy much acceptance for ratification.

TECHNOLOGIES USED IN MARITIME TRANSPORTATION

The shipping industry has constantly introduced new technologies in its operations. Technological appliances are implemented as a fundamental condition for the carriage of certain cargoes; as a way of precautionary measures for protection against common risks of navigation, or to improve the care of the cargo. Through continued use, some technologies have become a common practice in the industry. Still others have reached a level of importance that has become mandatory through national statutes, international regulation or standards set by the classification societies. In some other cases, carriers offer special services based on technological discoveries that make possible the carriage of particular cargoes or provide better care of traditional ones. In these cases, the implementation of these technologies is contractually agreed upon with shippers, who normally assume an additional payment for the same. Another group of technologies do not reach a mandatory enforcement nor are they contractually agreed to, but shipowners continue applying them as common practice of the industry. Carriers implement the latter unilaterally to make more efficient the service they offer. Thus, it is possible to approach our analysis through a classification of these technologies according to the source from where they are applied. First, we distinguish technologies applied unilaterally by carriers. Second, technologies offered by the shipowners to shipper for the special care of the cargo and are contractually agreed upon. And third, the technologies required by statutes, regulation or standards of classification societies. We will address them in this same order.

Technologies Applied Unilaterally by Carriers

As mentioned, the shipping industry has been continuously applying new scientific advances and new technological devices to improve its operations. New vessel design, more advanced equipment, and new methods of inspections and stowage are constantly tested and applied. They seek to make processes safer, faster, while reducing costs. Once a new technology is repeatedly used over a period of time, it becomes a common practice or a standard of the industry. Sometimes, it is included in regulations and becomes statutorily mandatory, as we will see later. But, in other cases, the use of a technology remains as a common practice of the industry and is never included in statutes, or only much later. When a new technology becomes a custom within the industry, its application is expected. These are then equally required as part of the seaworthiness condition of the ship.

This is exactly the group of technologies that offers some problems for the determination of liability for damages or losses caused by its non-application or its defectiveness. The problem stems from trying to determine when the use of a technology has become a common practice. On common practices in navigation, Judge Hand in Anglo-Saxon Petroleum Co. v. United States (1955) stated that:

> *"…in order to give any custom the force of a law there must be evidence that it is a definite, uniform and known practice." In addition, he pointed that even if it is a generally followed practice, it must be also considered how convenient it is or "how far it would be of much value".*

Certainly, many of the technologies that in the past were held as a common practice are now part of one of national or international regulations. This is the case for example with the compass, radio communications, radars, routing systems, etc. But there are always new technologies coming into the market that offer more efficiency and eliminate or substantially reduce the possibility of occurrence of some risks. When can these new technologies be required to be applied as part of the H/H-VR duties? The case law relating to these technologies, in some cases when they were not statutorily ordered, offers some analysis on the application of technologies that may shed some light for the current technologies and those that are to come in the future.

<u>Radio Communications</u>

Since the discovery of the use of electric waves to transmit wireless messages, a whole industry of wireless world-wide communications, direction finding, radars, etc. was developed. One of the first users of the Marconi´s technology was Lloyd's, which installed his system in all of its signal stations on the coast to receive and transmit wireless communications since 1898. The ship Kaiser Wilhelm der Grosse, owned by the German Company Norddeutscher Lloyd, was the first merchant vessel equipped with a Marconi's wireless telegraphy system around 1900. By 1903, some liners equipped 19 of their vessels with same system. Ten years later, by June 1913 there were 686 transatlantic ships using Marconi's wireless telegraph stations, and some additional ones using other routes. During the First World War more improvements were achieved, such as the increase of the range of coverage and wireless telephonic communication between ships. The English Merchant Shipping Act (Wireless Telegraphy) of 1919 ordered that every ship carrying 200 passengers or more hadto carry three Radio Officers for all voyages exceeding 48 hours from port to port. The use of radio wireless proved to be so convenient and became so extended that in 1923 legislation was introduced in England making it compulsory for foreign-going vessels with more than ten lifeboats to equip at least one with wireless telegraphy. The issue of the 30th of October of 1941 of the shipping journal Fairplay referred to the long-distance wireless as "common" in the industry.

The Compass

The compass is perhaps one of the oldest and most useful technological instruments applied in navigation. Though the compass was known in the West after the 9th century, it was not yet universally available and not always accurate. It is said to have been discovered and used in maritime navigation in England after the 12th century. At the beginning of the 19th century, the compasses' condition was still not optimal, because, with the slightly magnetized needle, accuracy became harder to achieve through the increasing use of iron on ships. Seamen paid little attention to this issue and regarded many of the disasters resulting from this lack of accuracy as acts of God.

Navigation Charts

During the 19th century, the British naval vessels surveyed oceans and coasts of the world and issued navigation charts and sailing directions that were unique or better than any other in existence. Navigation charts became an essential instrument in navigation. To carry them out of date was a cause for unseaworthiness. In The Maria (1937), faulty charts caused the stranding of the vessel. A new set of charts reporting changes in the lightship and the buoy were made known by the United States. Official publications reporting such changes were available in the United States, England and Italy, as well as corrected charts, pilot books and daily memoranda being available at the ports this ship was calling on prior to her stranding. The shipowners alleged that the information on board the ship provided by such navigation charts, light lists, etc., were an issue of the navigation of the ship and not related to its seaworthiness. Then, the owners attempted to construct an exception of error in the management of the ship to exclude their liability. But the court found that the vessel was navigated using the out of date charts and navigational data provided by the shipowner. The court categorically rejected such an argument and held the carrier liable for lack of due diligence. It was stated that "charts, light lists, and similar navigation data are essential equipment for the safe navigation of a ship, that she is unseaworthy without them, and it is the duty of her owner to supply them." All those documents are necessary sources of information for the navigator and the shipowner must provide them.

Though such a function is often delegated to ship officers, the carrier remains liable if that is not diligently done. What the carrier is delegating is an issue related to the vessel's seaworthiness. A failure in performing this task by a crew aware of that condition constitutes unseaworthiness and cannot be transformed into bad seamanship.

This was perhaps the first case stating that navigational charts are part of the vessel's seaworthiness. In a previous case, the shipowner was released of liability because, though the charts were not updated, there were on board navigational supplements and documents that showed the changes making it possible to correct the charts. The shipowner practiced due diligence as he had provided "adequate equipment or sources of information". The stranding was due to the failure of the master to correct the charts with the information that was available on board. Then, the conclusion reached in The Maria followed the reasoning of this case. The cases opened the path for the analysis of electronic charts. The SOLAS Convention accepts the use of electronic charts on board.

The Radar

The Radio Detection and Ranging, better known as Radar, has been one of the most useful technological discoveries to improve safety in navigation, especially for the prevention of collision. After the Second World War, the shipping industry started considering the use of radars for commercial navigation. The shipping press of that time reported that to become commercially used a "first-class servicing organization" was needed. It was also necessary to assure its reliability, ease of maintenance, and that the use on board could be handled by deck officers instead of a skilled radio officer. Although at that time such equipment was expensive, the savings that large vessels could realize in arriving on time at their destination, when the difference of a few hours could result in economic losses, making the use of radars was highly profitable. The economic benefit was, of course, more evident in the prevention of collisions or strandings. The application of a device used and developed during war times, available now for commercial navigation during peacetime depended in its capacity to fulfil some requirements. It had to be: (1) reliable, (2) simple to operate, (3) easy to maintain, and (4) cost efficient. It had to provide a continuous and outstanding service for a minimum care, attention and cost. Its application in navigation was the subject of discussion in the International Conference on Safety of Life at Sea of London in 1948. It was largely agreed that this device had become one of the most helpful pieces of equipment for navigation. The Conference issued a recommendation establishing certain minimum performance standards such as range and bearing discrimination, urging Governments to promote its application with the recommended standards.

However, its implementation on ships remained just a recommendation, not compulsory equipment. The technology became compulsory some decades later. The analysis of this device in the case law has been initially and mostly within the scope of collision cases. Later, its failure or lack of it on board the vessel was judged as a want of seaworthiness.

<u>Newer and Safer Methods</u>

Some new modalities in the stowage, ships' inspections, and carriage of the cargo that improved the operations are expected to be applied by shipowners. However, new methods that render more efficiency in operations cannot be immediately required as part of the obligation. For the enforcement of these new modalities applies also the rule of regular use in the industry. This was evidenced in the The Venice Maru (1943). A fire of a highly flammable cargo, sardine meal, was attributed to an improper stowage. Improper stowage makes the vessel unseaworthy. The sardine meal was shipped in 1934 using rice ventilators in the holds to prevent excessive heating. This method was already largely accepted as appropriate for the carriage of heat sensitive cargoes, but it was not totally safe. By that time, a newer method of stowage had been tried and proved to be more efficient to prevent excessive heating and fire. This method, however, did not become the common standard until 1935. The court held that the carrier had used the common methods of stowage. Therefore, he was not at fault for not applying a newer system that was not yet of general use. It could not be expected that the shipowner apply the new method, although it was a better way of stowage, the year prior to it becoming the standard.

Other cases relating to more efficient methods of stowage also argued against the opinion expressed in the T.J. Hopper. It was in the same Second Circuit in Nuzzo v. Rederi (1962). Judge Hincks questioned the arguments of Judge Hand, based on two decisions of the Supreme Court issued after the T.J. Hopper that reaffirmed the criterion of the common usage as the standard for seaworthiness. It was in Boudoin v. Lykes Bros. S.S. Co., Inc. (1955), and Mitchell v. Trawler Racer, Inc. (1960). None of them related exactly to the use of new technologies on ships, but affirmed that the standard of seaworthiness was not a one of perfection. It was claimed that the stowage was incorrect, and that by that time there existed a safer method. The court held that the vessel does not need to be prepared to face any single hazard that may be encountered in the maritime adventure. Such a statement seems reasonable at a first look and we may agree. But the shipowners should not ignore that the new scientific advances allow them to detect and foresee some of the common risks of navigation, as well as any new risks, and must take reasonable actions against them. In this case, the no need for perfection criterion was applied to deny claims where unsafe stowage cause personal injuries of stevedores. Judge Clark dissented in this opinion remarking that the holding of this case might introduce concepts of negligence in the law of seaworthiness, which in cases of personal injury, was still an absolute obligation. He criticized that injured persons must be the ones who bear the consequences of the vessel's unseaworthiness.

New methods of carriage have required the modification of some judicial rules on carriers' liability. Carriage under a clean bill of lading was traditionally interpreted as cargo carried below deck. Carriage on deck without agreement with the shipper, or when it was not a customary port to trade common practice for the specific cargo, was regarded as an unjustifiable deviation that made the carrier liable as an insurer.

With the implementation of containers, carrying them on deck of ships specially designed for this type of carriage was held as a reasonable deviation. The newer ship's design did not expose the cargo on deck to greater risk than those stowed under deck, nor when it was carried in other type of ships. It was affirmed in Du Pont de Nemours Inter, S.A. v. S.S. Mormacvega (1974). The court found that the ship was specially reconstructed for the purpose of carrying cargo safely on deck, and concluded that "technological innovation and vessel design may justify stowage other than below deck". The same criterion was adopted in Electro-Tec Corp. v. S/S Dart Atlantica (1984), adding that "[w]hat was unreasonable yesterday may be reasonable today". Indeed, by 1998 it was expressly recognized by an American Court that since 1991, after 35 year of the launch of the first carriage using containers, "on-deck stowage of containers on containerships was a well established custom of the trade in ocean transportation on a world-wide basis". That meant this type of carriage was not considered an unreasonable deviation. It must be observed, however, that such common use of containers was already in use far before 1991. The technology developed for carrying containers on open decks of vessels specially designed for that purpose, made it safer, reducing the risk of falling overboard. It proved to be more efficient and became a common practice in international trade that could not be categorized as a deviation anymore.

New methods of stowage have not been the only improvement in the shipping industry. New technological methods that might help to reveal more precisely the condition of the ship before sailing have been a subject of discussion. Under English law, a more advanced method of inspection of the vessel's hull was alleged by claimants to be part of the obligation of practicing due diligence. It was analyzed in Union of India v. NV Reedrij Amsterdam (The Amstelstot) (1963). A system called Magnaflux offered a more accurate method to inspect the hull and detect cracks. The process may have helped to discover the cracks in the vessel that were not discoverable through a visual inspection. Such cracks made the ship unseaworthy, causing later claims for damages. The allegation was however rejected by the first judge and was not discussed again in the appeal. It was decided that the proper sort of examination was the mere visual inspection. Lord Reid expressly pointed that:

> *[…] that test is never applied to this kind of machinery unless there is some special reason for applying it, and there was no such a reason here… for it would be plainly impracticable to make elaborate scientific test for every defect which could possibly be present in any part of the machinery.*

This test seemed to be highly advanced and its practice on a ship seemed complicated. That certainly would be out of the scope of reasonableness. According to case law, the application of new methods that prove to be safer and more efficient will be enforceable only if they are a common practice in the industry. However, a first failure in the application or functioning of the method or a first breakdown of a particular issue does not mean immediately a want of due diligence. After the first failure, the carriers must pay special attention to the particular issue.

Other Equipment

Another invention of Marconi applied to maritime navigation was the direction-finding device. This equipment enabled the master to receive the essential bearing for determining location and direction when those astronomical observations were prevented due to climatological elements such as fog, clouds or heavy rains. Because of its cost, shipowners were initially reluctant to apply it to their merchant vessel, but its value in saving time and money was rapidly recognized and many shipping companies adopted the technology by 1923. During this time, it proved its convenience in saving lives, cargo and ships in cases of casualties and above all, the saving of time during heavy fog, evidencing, therefore, its cost efficiency. The British Chamber of Shipping recommended to its members in 1927 to install this technology in all their ships. In 1929 it became mandatory for British ships, as consequence of the Safety of Life at Sea Conference of that year, that ordered all passenger ships of 5000 tons gross and upwards, to bear a directions-finding apparatus. Then in the Convention for the Safety of Life at Sea of June of 1948, it was made compulsory for ships of 1600 tons gross.

This technology was used by the Sealand Voyager in November of 1988. The ship was routed by Navitech, “a vessel routing service, which made recommendations prior to sailing giving advice on the route to take according to predicted weather.” The cargo damage was attributed to a containerunseaworthiness caused by a want of due diligence before the voyage. There were strong winds during the voyage yet they were below the 9 of the Beaufort scale which was not considered storm weather capable of affecting the ship as long as it was well prepared for normal weather. The use of the information provided by this technology was not analyzed by the court.

A fathometer is a device used to measure the depth of the water beneath the ships. It belongs to the group of Echo Sounding Devices. In The Chickasaw (1969), previously mentioned above, the judge of the first instance held the carrier liable for having an inoperable Fathometer. The master was made aware of the defect, but he did nothing to repair it. As mentioned before, the Court of Appeals of the Ninth Circuit affirmed the first instance decision, not only due to the defective Fathometer, but also due to the failure to have on board an up-to-date correction card or chart for the radio direction finder apparatus, made mandatory by statue to have such a device in proper order.

However, in another case, the lack of a Fathometer did not render the vessel unseaworthy because on board the vessel were other instruments that allowed fixing the position of a vessel involved in lightering. The use of weather forecast systems has been held as necessary to assure that a port is safe. In Islander Shipping Enterprises, S.A. v. Empresa Maritima del Estado, S.A. (The Khian Sea) (1979), Lord Denning MR decided a case where the warranty of nominating a safe port was in discussion, argued that if a port is to be held safe, it must be provided with this system.

Technologies Contractually Agreed

Some measures of special care for particular cargoes are frequently offered by the carriers as part of their services. As mentioned, some cargoes required specific care and handling that can be only provided by the application of specific technological appliances. In these cases, as technologies are strictly necessary for the nature of the contract, its failure in providing it or any defect in the technology that results in damage, holds carriers liable. One of the first and best examples of this type of technology is the refrigeration apparatus. This is obviously not a new technology anymore, as it has been in use for over a century. But its initial application in maritime transportation and the first courts' analyses deciding cargo claims originated from failures in these systems, offer a source of reference that can be applied now, for example, deciding liability when reviewing any new technology such as the controlled atmosphere system for containers.

<u>Refrigeration Systems</u>

The first attempts for the carriage of refrigerated cargo were reported by the end of the 1860s and early 1870s, when the United States, Argentina and Australia tried to export meat to Europe using refrigeration systems, but with not much success. The first entirely successful carriage in the world´s history of frozen meat occurred in 1877. During 1878 and 1879, some shipments of cooled meat, not frozen, were sent from the United States. Another success was reported in 1880 by the Strathleven, carrying beef and mutton that were frozen on board, from Melbourne, Australia to London. Similarly, in 1882 a New Zealand sailing ship, The Dunedin, equipped with insulated meat chambers, boilers and refrigeration machinery, sailed from Port Chalmers, New Zealand to London, carrying frozen mutton and lamb carcasses, arriving in perfect condition at their destination.

After these voyages the industry experienced a gradual growth in the carriage of meat and dairy products from Australia, New Zealand and Argentina. In the first decades of use of refrigeration systems, some cargo claims arose from damage caused to goods that required refrigeration. Judges assigned liability based on the obligation of providing such apparatus in good condition as this special service was explicitly contracted.

Controlled Atmosphere Containers

Anew technology that makes the carriage of perishable goods for long distances more efficient is the controlled atmosphere containers. Reefer ships and containers with modified or controlled atmosphere (CA) employ a technology that delays the time of ripening of fruits and vegetables. The metabolism of these products runs very fast since they are cut at their plantation to be transported long distances to the market where they will be sold. They are affected by the temperature, the level of oxygen they are exposed to and some other surrounding conditions. Modified atmosphere (MA) was used first in reefer ships. It consisted of the application of a specific temperature while the level of oxygen was reduced. But controlled atmosphere uses a more complex technology that enables some perishable products to have longer shelf life. By 2006, 20 percent of the big reefer ships used the CA system, while 50 percent of the reefer ships run usually MA or CA systems. Around 3 to 4 million tons of bananas are transported with this system with an increasing tendency.

This technology is being increasingly offered by cargo liners for the transport of perishable goods. It is especially useful for the carriage of perishable goods to the new Asian markets, which are experiencing fast growth and big demands for food. Exporting perishable goods from Latin America to the Asian markets may require this technology to assure a longer shelf life of the products. Without carriage in a controlled atmosphere container, the transport of some goods would be perhaps impossible, or at least not convenient nor profitable. The carrier´s failure in the preparedness of such systems before and at the beginning of the voyage, that then cause any malfunction during it, may raise liability for want of due diligence. The reasoning applied to cases on defective refrigeration may be extended to cases arising from defects in this technology.

Technologies Ordered by Statutes, International Regulations and Standards of Classification Societies

Through experience and the scientific development some minimum standards that allow safer navigation have been stated in statutory regulations. The opinion of Bouviers issued over a century ago, and reproduced in The Southwark, may no longer hold up in court. Some aspects of the seaworthiness condition can be, and have been, established by positive laws. This is what we have explained as the objective aspect of seaworthiness. Since the last century, public policy has been evidenced in the increasing and generalized governmental interest in regulating the ocean transportation.

National and international regulations have been adopted to govern every aspect, from the financing of ships' construction until its sale as scrap. At the present, there are regulations for some operative issues such as equipment, crewing, cargo handling, operations at ports, and environmental issues. Such regulations cover not only an interest for safety, seafarer's health and liability issues, but also respond to national interests for security, prestige, competition, policy and trade protection. Regulation established in national laws, international conventions, coast guard rules, or classification societies relating to the vessel's construction, equipment, manning, stowage methods, among other aspects, must be accomplished by the shipowner or they may be held liable for want of due diligence.

Liability for not complying with statutory regulations related to navigation was already established in the 19th century in American law, particularly in collision cases. In The Pennsylvania (1873), the Supreme Court of the United States ruled that the failure to comply with statutory regulations intended to prevent collision, creates a reasonable presumption that such failure "if not the sole cause, was at least a contributory cause of the disaster". On that presumption, the court established that the shipowner must prove "not merely that her fault might not have been one of the causes or that it probably was not, but that it could not have been" the cause of the incident. The rule is hard, but as the judge explained, it intended to enforce the obedience to the statutory regulations.

This rule was initially and mostly applied for non-observance of rules of road and manning. Later, it was extended to cases for failure in providing equipment required by statute, as stated in The Chickasaw (1969). In this case, the stranding of the vessel caused its total loss and substantial loss of the cargo. The occurrence of the stranding was attributed to defective equipment on the ship. The ship was so badly equipped that the captain had no accurate source of information to determine her location. Apart from an inoperative Fathometer, the mechanical sounding device was taken away, the radar was broken, and the radio direction finder was defective with no recent compensation or deviation cards on board. By the time of the stranding, the US Code established that vessels leaving harbors or ports of the United Sates navigating in open seas must be equipped with an efficient radio direction finding apparatus, properly adjusted, in operating condition and approved by the Federal Communication Commission.

Applying the Pennsylvania rule, the court held the carrier liable for not having such technological devices in good working order. Therefore, the lack of fulfillment of regulations establishing the application of certain technological equipment on the vessel or newer and safer methods of stowage raise liability for the carrier if such a failure is the cause of the damage or proximately contributed to the damage or loss. Regulations establishing technological equipment are to be found in the national laws of some countries. But it has been in the committees of the International Maritime Organization (IMO), that such newer standards for safety of navigation have been more studied and then established through the adoption of some international conventions. Classification Societies and the International Organization for Standardization also offer some recommendations regarding navigation or safer stowage and care of the goods.

INTERNATIONAL SHIPPING

It is generally accepted that more than 90 per cent of global trade is carried by sea. Throughout the last century the shipping industry has seen a general trend of increases in total trade volume. Increasing industrialization and the liberalization of national economies have fuelled free trade and a growing demand for consumer products. Advances in technology have also made shipping an increasingly efficient and swift method of transport.

As with all industrial sectors, however, shipping is not immune to occasional economic downturns ñ a notable fall in trade occurred, for example, during the worldwide economic recession of the early 1980s. However, although the growth in seaborne trade was tempered by the Asian financial crisis of the late 1990s, there was a healthy growth in maritime trade since 1993.

The shipping industry is now feeling the effects of the slowdown in world trade and the reduced demand for shipping services. The industry faces problems created by the collapse of the global debt markets and the exit of many equity investors from shipping at a time when the order-book for new ships is at an all-time high and shipyard capacity has grown to an unprecedented level.

Two years ago, global trade was booming, fuelled by the phenomenal growth taking place in several rapidly-industrializing countries, most notably the Peopleís Republic of China and India. Shipping was gaining full benefit from an upsurge in demand for the transport of all kinds of raw materials, components, finished goods, fuel and foodstuffs needed to feed a growing world's healthy appetite. Money was relatively easy to come by and spending it was firmly in fashion. By and large, shipping was enjoying some of its most profitable results of modern times, if not of all time.

As the first decade of the 21st century draws to a close, the world now faces an uncertain and difficult future. Who, two years ago, could possibly have predicted the truly traumatic year, from an economic perspective hat 2008 turned out to be? The financial crisis that has, since the middle of 2008, beset the world has, by now, touched most people and few, if any, will be immune from its consequences in the current year. Shipping has already been bitten and markets, which saw VLCC rates drop from Worldscale W170 to W81 and the Baltic Dry Bulk Index plummet by more than 11,000 points from an all-time high of 11,793 in just a few months, have claimed their casualties and it seems unavoidable that more are bound to follow.

Growth in world seaborne trade

World seaborne trade figures i.e. the amount of goods actually loaded aboard ships have increased considerably since the 70í s and in 2007, reached 8.02 billion tons of goods loaded, a volume increase of 4.8% over the previous year. During the past three decades, the annual growth rate was 3.1 %.

Strong demand for maritime transport services was fuelled by growth in the world economy and international merchandise trade. Despite rising energy prices and their potential implications for transport costs and trade and despite growing global risks and uncertainties from factors such as soaring non-oil commodity prices, the global credit crunch, a depreciation of the US dollar, and an unfolding food crisis, the world economy and trade have, so far, shown resilience.

The world fleet and modern ships

The history of shipping is a glorious and proud one. There is no doubt, for example, that the magnificent square riggers of the era of sail or the early 20 th centuryís prestigious ocean liners could stir the hearts of all those that beheld them. But the ships of today are just as worthy of our admiration, for shipping today is in another truly golden age. Ships have never been so technically advanced, never been so sophisticated, never been more immense, never carried so much cargo, never been safer and never been so environmentally-friendly as they are today.

Mammoth containerships nudging the 11,000 TEU barrier yet still capable of 25 knot operating speeds; huge oil tankers and bulk carriers that carry vast quantities of fuel, minerals, and grain and other commodities around our planet economically, safely and cleanly; the complex and highly specialized workhorses of the offshore industry; and the wonderful giants of the passenger ship world are all worthy of our greatest admiration.

In shipping today we can see many marvels of state-of-the-art engineering and technology that deserve to be ranked alongside the very finest achievements of our global infrastructure. We all marvel at the wonders of the modern world skyscrapers, bridges, dams, ship canals, tunnels and so on. Although they all deserve our admiration, there should be no question that today's finest ships are also worthy of the sort of recognition usually reserved for the great icons of land-based civil engineering ñ with one substantial difference in favour of the former: while skyscrapers, bridges, dams et al are static structures designed to withstand the elements coming to them, the very essence of vessels sends them out to sea to face the elements at full force, alone in the vastness of the ocean. They should, therefore, be robust when built and maintained as such throughout their entire lifetime.

Ships are high value assets, with the larger of them costing over US $100 million to build. They are also technically sophisticated: you are more likely to find one of today's modern vessels being controlled by a single joystick and a mouse-ball in the arm of the helmsman's seat than by a horny-handed bosun grappling with a spoked wheel; the chief engineer will probably have clean hands and the calluses on his or her fingers will be from tapping a keyboard rather than wielding a spanner. The crew accommodation will be clean, light and airy with modern recreation facilities; the food will be good; and you may well find the first officer exchanging emails with his family at home via the satellite communication system. Ships today are modern, technologically advanced workplaces and the work of the International Maritime Organization (IMO) has played, and continues to play, an important part in shaping that environment.

Overview of Ship Types

General Cargo Ships

Although general cargo ships are still the largest single category, the trend among new ships is more and more in favour of specialization, although it could be argued that handy-sized, geared bulk carriers and versatile medium-sized containerships, of which some have the ability to accommodate several different box sizes as well as palletised cargo are the natural successors of the old general cargo vessels.

Tankers

Tankers make up the second largest category. There are many different types of tanker, ranging from those carrying crude oil, through those built to transport various refined hydrocarbon products, to highly specialized ships that carry liquefied petroleum gas and natural gas. There are even tankers designed to carry cargoes such as fresh water, wine or orange juice. In size terms, the heyday of the tanker was the early 1970s, when the so-called Ultra-Large Crude Carriers (ULCCs), capable of lifting more than half a million tonnes of cargo, sailed the oceans. After the oil crisis of the 70s, tanker owners became a little more modest in their ambitions and, since then, most large modern tankers are in the 200-300,000 tonnage range. These are still massive vessels and enormously expensive to build, but today's high price of oil means they can pay for themselves in a relatively short period of time.

The world's largest ship today is a 564,765 dwt tanker with an interesting and varied history. She was built in 1976 and having undergone some work to increase her load-carrying capacity, was finally floated two years later and named Seawise Giant. At first, she operated in the Gulf of Mexico and the Caribbean Sea, but was then used for exporting oil from Iran during the Iran-Iraq War. In 1986, she was attacked but not sunk in the Strait of Hormuz and at the end of the war in 1989 she was repaired and renamed Happy Giant. In 1991, she was renamed again, this time to Jahre Viking.

In March 2004, the ship was sold and sent by its new owner to be refitted as a floating storage and offloading unit. There, she was given her current name, Knock Nevis and she is operated in the Al Shaheen oilfield in the waters of Qatar.

An increase in demand for LNG carriers reflect concern for global warming; traditionally, these vessels have been propelled by steam turbines but marine engine builders are now offering diesel-electric propulsion as an alternative for such ships: the breakthrough initially coming as a result of the evolution of the medium speed dual-fuel engine, which allows this cargo gas to be used as a part-replacement for heavy oil.

Perhaps more typical of the kind of large crude oil carrier being built today is the Irene SL, also built in Japan in 2004. Selected as one of the Naval Architect's 50 'Significant Ships' of 2004, Irene SL has a design deadweight of just under 300,000 dwt, a double-hull construction and is capable of handling three different grades of oil simultaneously in her 15 cargo tanks. Her cargo and ballast control systems, including the operation of pumps, valves and ullage measurement are all computerized. For safety, inert gas is pumped into the cargo tanks when they are empty and, to comply with the most recent requirements on emissions, the ship is fitted with a scrubber system to clean the exhaust gas.

Bulk carriers

Bulk carriers are often called the workhorses of the international shipping fleet. They can be thought of as simple, relatively unsophisticated but nevertheless highly efficient vessels that typically transport commodities such as grain, coal and mineral ores. If tankers provide the fuel that powers the modern economy, bulk carriers are responsible for moving the raw materials that are its lifeblood.

In terms of size, the world's bulk carrier fleet has three categories; ships of up to 50,000 dwt are known as 'handy-sized'; ships of 50,000 to 80,000 dwt are known as 'Panamax' (being the largest ships able to transit the Panama Canal) and ships of more than 80,000 dwt are known as 'capesize'. Bulk carriers embrace a number of variations ñ single or double hull, with or without their own cargo-handling equipment ñ but all are characterized by the huge hatch covers that can be rolled or lifted away to reveal to cavernous holds beneath.

Because of the nature of the cargoes they carry ñ often heavy, high-density commodities ñ accidents involving bulk carriers have sometimes resulted in considerable loss of life. For this reason IMO has, over a long period of time, undertaken a great deal of work to improve the safety of this type of vessel. There is, for example, a special chapter on bulk carrier safety in the Safety of Life at Sea Convention (SOLAS), covering such topics as damage stability, structural strength, surveys and loading.

Passenger ships

Passenger ships come next in the world fleet league table. There are two basic categories ñ which can be summed up as 'fun' or 'function'. In the latter category are those which are designed to move people and, often, vehicles on regular itineraries from one place to another as quickly and cheaply as possible (i.e. ferries) and, in the former, those which the passengers see as a leisure destination in their own right (i.e. cruise ships). In both categories, the size, sophistication and the sheer number of passengers that can be carried have reached mind-boggling proportions. Because of their individuality, as well as their resonance with the great ocean liners of a bygone era, these ships tend to be the best known and most recognized among the general public at large.

One of the finest modern examples is the Queen Mary II, built in France for Carnival Corp's Cunard in 2004. QM2 is the largest, longest, tallest, widest ocean liner ever and has cost an estimated $800 million dollars. She incorporates all the very latest international standards with regard to safety, security and environmental protection, offering her passengers an unparalleled opportunity to experience the wonders of ocean travel in the finest style. The Independence of the Sea which was built in Turku (Finland) and started work in Southampton in April 2008 is bigger at 340m and able to carry 4,375 passengers and more than 1,000 crew. It will be surpassed in 2009 by the Project Genesis, a £ 700 million vessel which will be able to carry 5,400 guests.

With ships such as this, it is little wonder that, over the past ten or fifteen years, the cruise and passenger sector has become one of the industry's most vibrant sectors and is now a major force within shipping, both in terms of technological development and commercial success.

<u>Container ships</u>

But the one sector which can be said to have transformed the face of shipping, certainly in the latter half of the 20th century, is that of container shipping. Unheard of before the 1960s, the container is now ubiquitous and is the standard unit of cargo for just about every form of manufactured item on the planet (there are exceptions: cars, for example, are transported in special ships designed solely for the purpose).

Today's giant containerships typically operate between purpose-built ports served by massive cranes that can load and unload containers at astonishing rates. Containership operators can offer fixed sailing schedules with tight delivery margins and these ships are now an integral part of the modern, multi- modal transport and logistics industry.

The largest containership is the M/S Emma Maersk, built by Odense Steel Shipyard. The ship which was delivered to Maersk in 2006 measures 397x56m and is able to carry 11,000 20-ft. containers. The MSC Daniela built in 2008 by Samsung Shipbuilding & Heavy Industries Co. Ltd for the Mediterranean Shipping Company is the size of an aircraft carrier; Daniela completed its maiden run packed with 13,800 containers each big enough to contain the contents of a three-bedroom house.

STX Shipbuilding of the Republic of Korea reported in May 2008 that it had completed the design of a 22,000teu containership that at 450 metres in length would be the longest ship to ply the oceans. Two alternative versions have been designed, one with a single propeller and the other with twin propellers. Compared to Emma Maersk, the world's largest existing containership, the new design represents a 50% increase in capacity and some 50 metres extra in length.

By the beginning of 2008 there were 4,276 ships with a total capacity of 10.76 million TEUs. This represents an increase of 9.5 7% in the number of ships and an increase of 14.2% in TEU capacity over the previous year.

At a time when the global economy is slowing, throughput statistics for the World Top 100 Container Ports show a very buoyant industry with an increase of over 45 million TEU in 2007. The total volume handled at those 100 top ports was just over 404.3 million TEU. Drewry Shipping Consultants' figure for total global container port throughput for 2007 is 494.4m TEUs. This means that the top 100 ports account for 82% of the world total, while the balance of 18% was handled by 500 or so smaller ports.

Fishing vessels

The world totals for fish catching vessels amounts to 22,358 ships with a GT of 9,760,738 and an average age of 27 years. Other fishing vessels (fish carriers, support vessels etc.) amount to 1,258 with a GT of 1,557,802 and an average of 24 years.

What ships carry – Oil, Containers, and Dry Cargo

Ocean shipping can roughly be divided into two sub-markets – on the one hand liquid cargo such as oil and petroleum products, on the other dry cargo. Dry cargo is made up of bulk goods, the five most important being iron ore, coal, grain, phosphates and bauxite. Other dry cargo consists of bulk materials such as non-ferrous metal ores, feed and fertilizers, and particularly a variety of goods packaged in smaller transportation units. The latter are labeled as general cargo and shipped on liners, i.e. vessels with scheduled sailings, chiefly in containers. Liner shipping usually offers its services according to fixed conditions that are agreed on between competitors at so-called liner conferences.

The single most significant type of cargo worldwide is crude oil, which alone accounts for roughly a quarter of all goods transported by sea. The major importers are the European Union, the United States of America and Japan. All three are supplied by the Middle East, the most important oil-producing region. North America also obtains oil from West Africa and the Caribbean, while Europe imports from North and West Africa. The main shipping lanes therefore stretch westward from the Arabian Gulf around the Cape of Good Hope or through the Suez Canal, and from Africa northward and westward to Europe and North America. Others connect the Arabian Gulf to East Asia and the Caribbean to the Gulf Coast of the United States. Of course, crude oil is not the only commodity transported by sea. Smaller, specialized ships (product tankers) carry processed petroleum products from major peripheral refinery locations to the consumption areas of North America and Japan. This amounted to about 815 million tonnes worldwide in 2007.

In terms of quantity, iron ore and coal are significant dry-bulk goods. Iron ore is transported over long distances in very large ships, mainly from Brazil to Western Europe and Japan, and from Australia to Japan. The most important coal routes are from the major export countries of Australia and South Africa to Western Europe and Japan and also from Colombia and the East Coast of the United States to Western Europe, as well as from Indonesia and the West Coast of the United States to Japan. Most of the coal transported is utilized as steam coal to generate electricity in power stations. A third is used as coking coal for smelting in the iron and steel industry.

Dry bulk goods also include grain and oil-bearing seeds (wheat, barley, rye, oats, sorghum and soya beans). Here however, the quantities and direction of transport routes fluctuate much more than other vital commodities depending on harvest seasons and yields. The USA, Canada, Argentina, Australia and France are the major grain exporters. Africa and East Asia are major importers due to frequent local shortages. Although the main grain producers (the United States, Russia, China and India) retain most or even all of their production in their own country, what remains for global trade is still enough to include grain among the bulk commodities.

Increased international division of labour, in motor vehicle production for instance, has led to general cargo such as cars and parts accumulating in such large quantities that entire shiploads can be forwarded on specialized ships outside the scheduled liner services. Large car carriers and special tankers for chemicals or fruit juice concentrate also belong to this special shipping sector, operating on contracted routes.

Today most other dry cargo is transported in container ships. These standardized containers have brought a flood of technical innovations (such as special cranes at transshipment points) and fundamental organizational innovations in their wake. Being standardized, they can be transported with any mode of transport and rapidly transferred to trucks or railway cars fitted with the appropriate equipment. From an economic point of view this has dramatically reduced transportation costs, mainly as a result of faster loading and unloading. Capital investment along the entire transport chain was necessary to ensure the containers were used efficiently, considerably increasing capital intensity. In contrast, labour intensity was sustainably reduced, as fewer dockworkers were needed for loading and unloading.

Since 1985 global container shipping has increased by about 10 per cent annually to 1.3 billion tonnes (2008). During the same period its share of the total dry cargo transportation rose from 7.4 per cent to a quarter. A total of 137 million containers, measured in TEU, were transported in 2008. This quantity, however, decreased again in 2009 by 10 per cent.

Typically the cost of transporting a TEU containing more than 20 tonnes of freight from Asia to Europe is roughly the same as a one-way Economy Class flight along the same route. This weight in everyday goods such as electrical appliances in most cases represents a transportation cost of less than 1 per cent of the selling price.

The key shipping routes

If all commercial goods are taken into account it becomes clear that there is a relatively small number of principal transport routes, and these pass through only a few areas of the oceans. The busiest are the approaches to the ports of Europe and East Asia, particularly Japan but also Shanghai, Singapore and Hong Kong, and the United States. The East Coast of the United States in particular is a major sender and receiver of cargo. Narrow straits further concentrate maritime traffic. Bottlenecks include the Straits of Dover, Gibraltar, Malacca, Lombok and Hormuz, and the Cape of Good Hope at the southern tip of Africa. Traffic builds up in these areas, making ships vulnerable to attack by pirates.

Cargo imbalances are a typical feature of the traffic with Asia – depending on the trade balance. Much more cargo is being shipped from Asia than in the opposite direction. This imbalance is particularly notable on the Pacific route, at almost 10 million TEU (2007). From Asia to Europe it is almost 8 million TEU. The North Atlantic traffic between the highly-developed economies of North America and Europe, however, are much better balanced, registering a difference of barely 2 million TEU. The reason for this situation is that since the mid-1980s so many manufacturing processes have been relocated from the traditional industrial countries to the developing nations and emerging economies, particularly China and the countries of South East Asia. With the prevailing exchange rates, China in particular has become the cheap "workshop of the world".

This process has been promoted by the introduction of the container and the corresponding increase in shipping productivity. The transportation costs between where goods are manufactured and where these goods are consumed have been reduced considerably. Dry cargo such as automobile and machinery parts – until now transported by conventional means – has been increasingly containerized, contributing to the growth in container traffic.

Until the global economic downturn the demand for new ships was great, but as the effects of the crisis were felt the tide turned and many companies cancelled their orders. All the same we can assume that even more marine transport capacity will become available in the near future as new ships are delivered, overtaking demand. Freight rates are therefore unlikely to recover from their current all-time lows any time soon.

RIGHT OF SHIPS OF ACCESS TO PORTS

In order to examine the law regulating ports under international law as well as foreign flagged vessels' rights of access to port states, one must also consider the principle of freedom of the high seas in relation to right of access to ports as well as the several attempts at establishing a right of access of foreign flagged vessels to ports. One must also look at the right of states under international law with regard to right of denial of foreign vessels' access to port on the ground of a security threat and this is done with specific reference to the sovereign rights of a state. A port state may deny access to its ports where a ship has failed to meet the requirement of such entry, hence the international instrument which gives right of access to ship becomes worthless and this is why the paper argues that the instrument only barks and does not bite. The regulation cannot also avail the ship in the circumstance under consideration as the port state considers its interest, particularly where entry would affect the security and peace of the state. The issue of security or security interest in the maritime sector deserves great attention in the light of changing dynamics it is assuming in ports and the high seas. Security issues or interests remain significant particularly having regard to the interest of different states, inter-state relations and indeed the internal decision- making of a state. The protection of sovereignty and national interest remain fundamental to maritime security as there is increasing acceptance of common interests that exists among states when seeking to respond to a variety of maritime threats (Natalie Klein, 2011). This is why states view access to port as part of international and domestic interest and will not deny access except for good cause.

What is Right of Ship of Access to Ports?

The right of access to ports is the corollary of a foreign flagged vessel to enter into the ports of another state known as port state control. Apparently, the principle of freedom of the high seas under Article 87 of UNCLOS does not apply to ports, hence the several attempts to establish a right of access of foreign flagged vessels to ports. The 1923 Convention on the International Regime of Marine Ports was the first treaty that dealing with this issue and it provides for reciprocity by states to the convention allowing access to vessels of all member states.

By the principle of public international law, states must open their ports to foreign vessels except in circumstances where the interest of the states will be jeopardized (Connell, 1984). The issue of access to ports of other states by foreign flagged vessels has been a subject of controversy among scholars (Vasilos, 2007). Although, the right of access is usually granted by treaty between the states concerned, the general view is that there is no such separate customary right. A more accepted view is that the states are entitled to prescribe and enforce circumstances for port entry (Louise, 1996). It has been observed that the coastal state enjoys power to regulate access to its ports by virtue of its sovereignty notwithstanding the rule of international law that ports of a state must be open to foreign vessels. While some authors agree that the right of access to port exists in favour of a foreign vessel, others believe that rationalizing that states are legally obligated to maintain open ports, due to the general right and interest is based on free trade and navigation existing between states concerned. However, this view is far from certain as the legal position and argument of scholars opined given above were expressed in opposition to each other. Consequently, scholars have refuted the argument or notion that ports of a state are presumed open under international law (Vasilos, 2007). They however maintain that customary international law does not advocate a general notion of a right of port state access that establishes no basis for a right of entry into maritime ports.

Argument in Favor of Right of Access to Port

Some scholars of international law have contended that foreign vessels have a right of access to ports of other states. The advocates of this regime, beginning with Hugo Grotius who was considered the founding father of the law of the sea pronounced the legal doctrine of the freedom of the sea and perhaps the ocean as incapable of being occupied by a state or a state cannot claim sovereignty to the ocean, hence the oceans and seas are free to all nations (Grotius, 1916). This argument was further fortified by the notion that no sovereign could deny port access to a foreign merchant vessel and that any state who denies foreign vessels access to its ports neglects the advancement of international interaction, navigation and trade which customary international law imposed on it (Grotius, 1916). It is on the basis of this that a scholar posited that no state appears to be an island itself from outside the world or refuse to relate with other states in terms of economic and commercial advancement. Expectedly, a state that is willing to achieve this development must be willing to allow access of foreign vessels to its ports. Therefore, the freedom of navigation will be of no meaning if the states do not have the right to the sea and ships cannot traverse the territorial sea of another state to trade with them and improve their economy. Perhaps the circumstances where states would deny the right of access to foreign vessels except on the ground of quarantine or time of war is almost unthinkable. In a nutshell, the reasons for the supposition of the view that there should be a right of access of foreign flagged vessels to state ports control could be summarized as follows:

i. Every nation is free to travel to every other and trade with it;
ii. Preventing a foreign flagged vessel access to a port state is tantamount to neglect of the duties of the promotion of international relationship and economic development;
iii. States are bound to build ports for the sake of maritime commerce and security must be furnished to the merchants ;
iv. The circumstances under which a state can deny right of access to ports is during the time of war, quarantine etc.; and
v. Customary international allows the right of access to ports.

Argument Opposing the Right of Access to Ports

Contrary to the view expressed by the proponents of the right of access of the foreign flagged vessels to the ports of other states, scholars have expressed reservation that port states reserve the right to deny access. The proponents made use of the principle that access to port was deemed customary international law as stated in the case of case Saudi Arabia v ARAMCO, where the issue involves the interpretation of a contractual disagreement between the parties. The Tribunal announced a general responsibility of all littoral states to allow port access to foreign flagged vessels. According to the Tribunal, the ports of every state must be open to all vessels except where the circumstances demand especially the vital interest of the state. What informed the Tribunal decision is the fact that it recognized a sovereign interest of a state in controlling its ports and denying access to its ports during specific situations as provided under the 1923 Ports Convention which permits a contracting state to depart from the principle of equal treatment among sea-going vessels where emergency affecting the safety of the state or the vital interests of the country has occurred. Thus, the circumstances under which a foreign flagged vessel will be denied access must be a temporary one as the state ports control is under obligation to respect and observe the bilateral relationship among them.

In a sharp disagreement with the position stated, scholars have observed that the states are not under obligation to open their ports to foreign flagged vessels and their position was supported by the decision of the International Court of Justice in the case of Germany v Denmark ((1969) where the court reflected on the drafters' intent in adopting Article 6 of the 1923 convention to the effect of whether the equidistance principle was to be codified as an existing international customary rule. The court noted that international custom develops based on the significant participation of the state actors and action by a few states cannot constitute customary norms.

Therefore, in exercising the right of denial of access to ports by port states control, it is expected that such will be done in accordance with the customary international law, the treaties which the states have ratified as well as the undertaking it has assumed. The right of access cannot be denied to a foreign vessel where there is a bilateral agreement between the states but in a situation where there is no such agreement the state's sovereign right extends over its internal waters, including ports and a foreign flagged vessel does not have an inherent right under international law to access a port of another state without prior permission. Indeed, the decision of the ICJ in the case concerning the military and paramilitary activities in Nicaragua v. United States of America is of paramount importance in this circumstance as the court stated emphatically that it does not recognise a customary right of maritime port entry for foreign ships. Actually, the decision of the court was informed by the fact that the United States entered into a bilateral agreement with Nicaragua to allow access to her ships which presupposes the rights of navigation and trade. The notion was that the United States could terminate the agreement as specified in the treaty between the parties, however, notice of termination needs to be given to Nicaragua and the United States could not deny access during the period of notice.

From the foregoing, the argument against right of access can be summarized as follows;

i. The port states reserve the right to deny foreign vessels access to its ports;
ii. Where there is an agreement between states on the right of access to ports, the states are under obligation to honour the agreement;
iii. The right of access cannot be denied where the agreement is in existence and will not be denied during the pendency of the notice to terminate;
iv. Right of entry or access to ports is tantamount to sovereign right of a state

Bearing the argument on the pros and the cons above, it can be deduced that the right of access to ports is from customary international law. Essentially, foreign flagged vessels would only have right of access to state ports provided that three conditions are met. First, there is a bilateral agreement on the right of access to ports between the two countries in question.

In the case of Khedivial Line v Seafarers' International Union (278 F.2d 49,(2d Cir. 1960) a United Arab owned merchant vessel was denied access to the port of New York, wherein the plaintiff sought interalia, an injunctive relief and damages based the on international right of access. The court in deciding the case stated as follows;

> *"Plaintiff concedes that there is no treaty between the United States and the United Arab Republic granting the latter's vessels free access to United States ports. Plaintiff has presented no precedents or argument to show either that the law of nations accords an unrestricted right of access to harbors by vessels of all nations or that, if it does, this is a right of the foreign national rather than solely of the nation. In any event the law of nations would not require more than comity to the ships of a foreign nation, and here they are cause of the picketing is a harassment of American shipping and seaman by the United Arab Republic that is not denied."*

It is apparent from the decision of the court that the United States has the sovereign right to deny access to foreign vessels, but preserves the principle of equality of treatment of foreign vessels, hence denial of port access should not be done random or unjustifiably (Vasilos, 2007).

The two other conditions are;

1. The foreign flagged vessels have met the requirements for ports entry as laid down by the port state. These requirements are often found in the laws and regulations of the port state. (Patterson v Bank Eudora, 190 U.S (1903);
2. The port state may publish regulations guiding port entry (Vasilos, 2007).

Ports and United Nations Convention on the Law of The Sea (UNCLOS) 1982

The United Nations Law of the Sea Convention (UNCLOS) 1982 is one of the most remarkable and innovative multi-lateral treaties in world history. In its quest to create a new and all-inclusive legal regime of the world's sea, the UNCLOS encompasses nearly every use of the oceans resources. Indeed, not only does the UNCLOS codify existing concepts of the ocean law, such as the territorial sea and contiguous zone, it also creates fundamentally new maritime zones; such as the exclusive economic zone, archipelagic waters and international straits. Thus, the UNCLOS provides exhaustive articles on both the rights and duties of the coastal state, as well as the freedoms and limitations of ocean-going vessels in each respective maritime zone, the latter being the subject of discourse in this heading.

Consequently, in the face of its innovative work, the UNCLOS only ostensibly deals with the issue of right of access to ports. It is evidenced from the provision of the UNCLOS that apart from one narrow provision concerning the right of innocent passage in internal waters which has been considered as part of a coastal State's territorial sea, the UNCLOS provides only definitional articles. The UNCLOS defines ports as outermost permanent harbor works which form an integral part of the harbor system, regarded as forming part of the coast. Hence, the scope of the UNCLOS with respect to ports is to merely delineate internal waters and ports from the territorial sea. A cursory look at the provisions of the UNCLOS reflects as if the legal regime of ports access is not within the scope of international law of the sea but comes instead under the sovereignty of a state which includes both its territory and inland waters. It is logical therefore to infer that ports will be governed by a legal regime similar to the national law of a state quite different from the international law of the sea.

The UNCLOS covers all areas of four Geneva Conventions of 1958 and a lot more. It focuses inter-alia on the rights and duties of states in the territorial sea and the exclusive economic zone, the right of transit passage in international straits, environmental protection (Abdul Ghafur, 2011). The UNCLOS (Article 218 (1) makes provisions regulating ports and allows state to institute proceedings for violation of its national laws and regulations to enhance port state jurisdiction as a possible concession between the maritime and coastal state interests. It allows for the port state's enforcement jurisdiction of appropriate international rules and standards for violations taking place on the high seas but does not make allusion for the port state to exercise jurisdiction over violations occurring in the state's EEZ outside the territorial sea. In essence, Article 218 (1) of the UNCLOS does not confer power on port states more than the coastal state to take national measures exceeding those international rules and standards. However, dissimilarity could perhaps be drawn between offending ships that are port- bound and those that are simply transmitting. It has been argued that the limitation of generally accepted international rules and standards is germane only if the rules are to be implemented against transiting ships, but not so where the ships have willingly entered port and any national laws envisaged under the UNCLOS that go beyond the applicable international rules and standard must relate either to discharge violations in the territorial sea or discharge violation in the EEZ (Alan Khee-Jin, 2010).

Indeed during the early period of the United States Convention on the Law of the Sea negotiations, maritime interests had expressed concerns over the recognition of port state enforcement jurisdiction regardless of the locus of the violation. As a sequel to this, a series of draft versions of Article 220(1) at that time showed the emerging idea that the port state's enforcement jurisdiction must be somehow curtailed, either by restricting its enforcement of national measures to the territorial sea alone or permitting the enforcement of only international measures in areas outside the territorial sea (Alan Khee-Jin, 2010 and Renate 1974). Therefore, it was crystal clear that there were already doubts whether to accord enforcement powers to the coastal state if the locus delicti was outside the territorial sea, notwithstanding the fact that the offending ships were to later come into port.

Consequent upon the above, the general opinion at the UNCLOS negotiations was for national actions to be allowed in internal waters and the territorial sea only, with international measures being pertinent outside the territorial sea. So, any divergence from this general principle would have to be unequivocally provided for and at the same time these national measures which have been specifically provided are subject to the important safeguards laid out in section 7, Part XII (Alan Khee-Jin, 2010).

Although freedom of navigation is allowed, the coastal states have the rights to protect their internal waters. International law assumes that every port of a state is open to all vessels as this constitutes an essential engine that drives the global economic progress and development (John, 2009). Hence, uninterrupted access of vessels to ports is considered as an important component of the seaborne trade's success story. It has been asserted that port states achieved their economic progress and development by allowing ships access to their ports, albeit international terrorists activities which pose danger to port states that hinder the free flow of vessels access to ports as the state port restrict access owing to national security.

The foregoing is not to say that the port state is powerful over violations occurring in its EEZ, but is only restricted to enforcing the applicable international rules and standards. Hence, the port state could look for alternative forms of remedy where it finds the international rules to be insufficient. It was observed that to avert the strictures of the Article 220 enforcement regime, the following remedies could be useful;

i. *Resources Protection Measure*- One remedy would be to seek to characterize any national measure within the EEZ as strictly a resources protection measure, as opposed to merely for pollution control. Thus, an attempt at resource protection would be predicated upon the port or coastal state's aspiration to guard its resources within the EEZ from being damaged by ship pollution, steady with its sovereign rights over these resources (Bodansky,1991).
ii. *Prescriptive Jurisdiction outside of UNCLOS*- Another remedy suggested was to look for prescriptive jurisdiction outside the United Nations Convention on the Law of the Sea in the form of alternative bases of jurisdiction under general international law such as an effects jurisdiction over extra-territorial conduct. Where this proposition is accepted, it could justify port state jurisdiction over

ships' conduct in all the EEZs of states and the whole of high seas. On this score, port states authority need no longer be restricted, as long as an effects link can be made known to exist between the port state and the offence. Interestingly, this extra-territorial line of argument is highly contentious and has received little support, either in state practice or in academic writing (Noyes, 2000). The fact that UNCLOS had sought to provide expressly for Article 218(1) is strong evidence in itself that the parameters identified within that provision must govern port state jurisdiction for extra-territorial events, at least in as far as state parties to UNCLOS are concerned (McDorman, 1997).

iii. *Territorializing the offence*- The port or coastal state may possibly adopt the approach of re-characterizing the offence by making the entry into port or the territorial sea itself the relevant offence where the ship has not complied with national requirements on discharge or operational measures. Conversely, this approach of territorializing the offence is no less a controversial strategy to get around the accord reached by UNCLOS. It is fundamentally a premeditated avoidance of the restrictions imposed on jurisdiction that should not be permitted or encouraged (Alan Khee-Jin, 2010). Despite the fact that the approach may continue to be advocated by some to be technically legal, it is, at best, jurisdiction with a feeble and contested prescriptive foundation.

It is however argued that despite the omission of inland transit rights by UNCLOS, a great body of international law on the scope does exist.

Convention on the International Regime of Maritime Ports 1923

This 1923 Convention on ports came into force on July 26, 1926 and has remained in force till now. However, there are moves to amend the provision of the convention and as of December 31, 2002, accession, ratification or notification of succession had been deposited by 42 states, but United States was not included in the list. Treaties are not a new phenomenon and a number of attempts have been made to guarantee access of foreign flagged vessels to ports through bilateral agreement, such was the Convention on the International Regime of Maritime Ports, 1923. This convention points to a principle of free access to ports to member states' maritime ports and guaranteeing long- standing relationships among the members. However, this Convention has a limited number of signatories and in all likelihood does not represent the position of existing customary law.

It has been argued that the Convention on Ports does not state unequivocally that

1. all merchant ships have right of access to port with a lawful purpose, notwithstanding their nationality or ownership and prior or following the port of call.
2. the type of ports for which the right of access is granted;
3. the type of ships for which right of access is granted;

4. the circumstances in which the right of access can be denied; and
5. the procedures governing the right of access to ports (Justin, 2002).

Although, the 1923 Convention on ports makes a general provision to the effect that equal treatment is accorded to all vessels, there are exceptions to the equality of treatment of vessels. In essence, there would not be equal treatment to all vessels where a particular vessel constitutes a security threat to a state. Therefore, the convention allows each contracting state to take necessary protective measures in respect of the transport of hazardous goods or goods of a related character, as well as general police measures, including the control of ingress or egress on its territory as long as all these do not result in discrimination which is contrary to the principles of the statute.

The issue of right of access to ports of foreign flagged vessels as enshrined in the 1923 convention on ports enjoys limited support even from court decisions. This position could be gleaned from the approach of the Arbitration Tribunal in Saudi Arabia v. ARAMCO when it held that a great principle of public international law recognizes that ports of every state must be open to foreign merchant ships and can only be closed when the vital interests of the state so demand. However, with regard to the arbitration, it can certainly be argued that the fundamental interests of a state would comprise the necessity to keep its country free of the threat of terrorist attacks (Justin, 2002).

From the provisions of the convention under consideration, the following emerged:

1. *Restricted Access to Strategic Ports*. The port convention of 1923 gives the right of access to ports for foreign trade and this principle is not applicable to military or other strategic ports.
2. *Access to Ports and Multilateral Treaties*. The ports convention allows right of access to ports through multilateral treaties. The UNCLOS does not expressly provide for access to ports but merely makes provision for a right of innocent passage though the territorial sea for the purpose of entering or leaving internal waters (Sohn and Noyes, 2004).
3. *Access to Ports and Bilateral Treaties*. The convention gives room for bilateral arrangement between states and indeed there are several agreements between states which incorporate and confirm the principle of freedom of access to ports.
4. *Reciprocity and Access to Ports*. The right of access of a foreign flagged vessel to ports of states is subjected the principle of reciprocity and some national laws like in the United States and reflect this provision of the convention (Sohn and Noyes, 2004). It is important to mention here that a land-locked or doubly landlocked states may not be denied right of access to ports on the ground of reciprocity. This is because in the first place states that are not naturally endowed with sea talk more of ports, hence reciprocity is not possible.

MODULE-V

India and Maritime Trade

INTRODUCTION

Maritime transport, which plays a vital role in the development of the country, comprises ports, shipping, shipbuilding and ship repair, and inland water transport systems. According to the Ministry of Shipping, Government of India, approximately 95% of the India's trade by volume, and 70% by value, is moved through maritime transport. India is among the top 20 leading countries having large number of merchant fleets in the world.

India has 12 major and 200 notified minor and intermediate ports. The Indian ports and shipping industry plays a vital role in sustaining growth in the country's trade and commerce. India is the sixteenth largest maritime country in the world, with a coastline of about 7,517 km. Since ports handle almost 95% of trade volumes in India, the rising trade has contributed significantly to the country's cargo traffic. Capacity at major Indian ports reached 1,477 million tonnes by Financial Year 2019.

The Government of India has allowed foreign direct investment (FDI) of up to 100% under the automatic route for projects related to the construction and maintenance of ports and harbors. Ports sector in India has received a cumulative FDI of US$ 1.64 billion between April 2000 and June 2019. Approximately 10,000 jobs were created through projects initiated under Sagarmala during last three years. In August 2019, India became the first country in the world to issue Biometric Seafarer Identity Document (BSID), capturing the facial bio-metric data of seafarers.

Freight rates and earnings of the shipping companies are primarily a function of demand and supply in the markets. Demand drivers are a function of trade growth and geographical balance of trade (which determines the length of haul required). On the other hand, the supply drivers are a function of new ship building orders as well as scrapping of existing tonnage. The industry is regulated by the rules and regulations of International Maritime Organization (IMO), classification society, and the requirements of the flag state. Apart from these, there are also the rules and regulations of various countries where the vessel operates.

HISTORICAL ASPECTS OF INTERNATIONAL TRADE AND ROLE OF MARITIME TRANSPORTATION

This section attempts to outline the Indian maritime sector in its historical setting, in four sections: (1) Maritime trade in ancient India; (2) Maritime trade in colonial India; (3) Liner Conferences and Indian shipping; and (4) Maritime transport in the independent India.

Maritime Trade in Ancient India

In ancient times Indian shipping dominated the sea for a significant period of history. Ancient India was counted as one of the foremost maritime countries; she had colonies in Cambodia, in Java, in Sumatra, in Borneo, Malaya, Indonesia, Champa and many other countries in those days through her naval power (Rao, 1965, Couper, 1972). India had teak hulled ships constantly ploughing the seas carrying peacocks, elephants, cattle, most resplendent cottons and silk manufactures (both indigenous and imported from China), every variety of spices, pearls and rare gems (noted for their beauty and size), dye-stuffs, embroidered and woolen fabrics, and coloured carpets, gums, resins, aromatic oil, drugs, brassware, ivory, perfumes, sandalwoods, unguents, camphor, leather, timber, sugar and a host of other cargoes which were eagerly sought after all over the then known civilized world and had to be paid for in gold as there was little that those countries could sell to India (Jog, 1969).

There were two routes from India to Europe, one, ships from Indian ports sailed to the ports in the Persian Gulf and from there caravans took the great road through Syria and Turkey to Mesopotamia; the second route was through continuing sea voyage from the Persian Gulf along the coast of Arabia into the Red sea, from there cargo were carried over land to Tyre and Sidon (in Lebanon), and from there again by sea to Mediterranean ports.

Despite all the flourishing trade, Indians were not seafarers. It was the Arabs and not Indians, who carried the trade to the West. A new force emerged at the advent of Arab empire in the seventh century A.D., which brought about far reaching changes in the maritime world. The phenomenal rise of Arab power, by their conquest of Syria, Damascus, Palmyra, Antioch, Jerusalem, and Persia, had revolutionary effects on the maritime world. In the west they conquered Egypt and crossed over to the sea to Spain, thus, the sea and the land routes between the East and the West came under their complete control, and the Eastern trade became a practical monopoly of the Arab merchants, when the routes to the pepper land were cut off by the hostile Arabs. The growth of maritime power in the Arabian had dramatic effects on European economy. Venice and Genoa and Alexandria lost their importance. Entrepreneurs of the Mediterranean lands had been effectively barred from direct access to the Orient by the intervening Arab and Turkish powers. Thus there was a pressure and an urge that began to mount up in Europe for finding a new route to India (Chopra, 1982).

The Arab Empire came under the banner of Islam, a good number of Persians refusing to convert to the new religion, left their motherland, and sought asylum in the Western ports of India and enjoyed the hospitality of the Rashtrakutas who were ruling ~t that time. These are the Parsees of India, who in later times contributed greatly to the commercial shipping, shipbuilding, and industrial development in India.

Maritime Trade in Colonial India

Vasco da Gama's historic voyage was to set m train of events that finally changed the whole face of India and the East and imposed the imperialism of the West on the East for over a century and half, during which her traditional industries that had been the source of her wealth were destroyed and the people, driven to the soil for sustenance, became backward and agriculturalist. The centre of gravity of European commerce with the East shifted to the West coast of European Continent. The Portuguese remained practically unchallenged on the sea till the turn of the sixteenth century (Rao, 1965). During the 259 years between the arrival of Vasco da Gama at Calicut (1498) and the Battle of Plassey in 1757; India still flourished under the Moghul Empire. India's maritime supremacy was maintained under the Moghuls; and the naval powers under the Marathas put up a brave fight against the supremacy of the European powers from 1694 to 1758 (Jog, 1977 Rao, 1965).

Towards the close of the sixteenth century, two Portuguese ships carrying merchandise from India were captured by the English that was laden with spices, calicoes, silks, gold, pearls, drugs, porcelain, ebony etc., It created an impatience in the English to engage in so opulent a commerce with India directly. In the captured ship they also found papers containing information regarding the traffic in which the ships were engaged in. And the Dutch were selling spices by over 150% profit, the English had either to directly get it from the producers or give up the spices all together. Thus the East India Company was formed to break the monopoly of the Dutch, for which it received a charter from the Queen in 1600. By 1700, the English Company's trade had grown so much that the Company's policy itself underwent a vital change. A peaceful trading body was transformed into a power eager to establish its own position by territorial acquisitions, largely in view of the political disorders in the country (Rao, 1965 p.25).

With the growing influence of the Europeans in the foreign trade of the country and the establishment of their supremacy over the sea, an important change began to occur in the mode of Indian trade. So long, many Indian merchants had their own ships and the shipper was often the ship-owner. But as the Europeans entered these trades one by one the Indians became just buyers and sellers confined to their shores (Rao, 1965 p.26).

The trade with traditional partners such as Persia came under the control of the European power on account of their superiority in the sea. In 1815, when Napoleon was defeated, the long drawn struggle between the European powers ended, and England acquired unchallenged supremacy in the Indian Ocean (Chopra, 1982). The sea trade was organized in the form of Joint Stock Company by the English through Royal Charter. After losing American colonies in 1776, the Britain started consolidating her Indian Empire that was under the control of East India Company till 1858, when the Indian Empire was transferred to the British Crown.

Shipping industry flourished in Ancient Maurya period, it got accelerated with the advent of Arabs, but during the British period very little progress was achieved in India in the shipping sector, as the transport of goods and cargo was carried out by foreign ships, largely European, to and from India (Qasim, 2000).

Liner Conferences and Indian Shipping

Having had a glorious past, the Indian shipping almost ceased to exist by the middle of the 19th century, largely due to the unfavorable policies followed by the then alien government. Gandhiji described the situation thus: "Indian shipping had to perish so that the British shipping might flourish."

The first Liner Conference was formed in the UK-Calcutta liner trade in 1875, since Calcutta was the main trading port in those days. British ship-owners operating a regular service in this route joined together and formed the Liner Conference to regulate the number of sailing, and to fix freight rate.

The members of Liner Conferences and non-members (who are called 'outsiders), both were engaged in the liner trade. The conference wanted to have monopoly over the trade route and for that purpose they wanted to block the entry of new traders in the liner business, and they also wanted to oust the existing non-member liner ships from their business; and they engaged in all kinds of monopolistic and unfair practices such as: rate war, deferred rebate system, dual rate system, and placed fighting ships.

From 1850 onwards, Indian entrepreneurs from Bombay and Ahmedabad, ventured into shipping. This period saw the registration of more than fifty Indian shipping companies, all by Indian entrepreneurs, with an estimated sterling capital of over ten million (Trivedi, 1980 Rao, 1965). Although many attempts were made by Indians to float shipping companies towards the closing decade of the 18th century and in the beginning of the 19th century, none of them survived and all had to go into liquidation, because of the freight war and unfair practices of the British shipping companies; and the indifference of the then Government to the promotion of national shipping. Even then several Indians ventured into shipping with the deliberate object of fighting the British shipping monopoly in the Indian trades. Some outstanding examples are: the Tata Line, the Swedeshi Line, the Bengal Steam ship, and the Mogul Line, and all of them went into liquidation. Later, the Scindia Steam Navigation Co., was established to challenge the might of British sea power. It was during the hey day of British empire and the sad experience of Tata Line, Swadeshi Line, and a host of other national ventures had been glaringly before them as grave warnings, but undeterred by the dangers that threatened, they embarked on the founding of a shipping company. Soon after, on 5th April, 1919 the Scindia ship S.S. "Loyalty," sailed from Bombay to UK unfurling the flag of Indian merchant marine on the high seas. One of the British journalists stated: "the arrival in the Port of London of Indian produce in Indian built ships created a sensation among the monopolists, which could not be exceeded if a hostile fleet had appeared in the Thames. Shipbuilders of the port of London took the lead in raising the cry of alarm. They declared that their business was in danger and that the families of all the shipwrights in England were certain to be reduced to starvation" (Trivedi, 1980).

The Loyalty sailed to London but the return journey presented difficulty, British shipping interests saw to it that British shippers and travel agents virtually boycotted the Indian ship. Undeterred, Walchand, purchased 500 tons of pig iron and 1000 tons of cement and booked passengers and sailed back to India with enough cargo and passengers. It was symbolic of the courage with which India was fighting an unequal battle. Thus Scindia Navigation Company could survive as a force during the British era. The British interests tried till the very last to suppress the challenge of Scindias with every means, fair or foul at their disposal (Jog, 1977). The Scindias' ship lifted 6400 tons of cargo from Rangoon, which roused the ire of British India Steam Navigation (BISN) Company, which then enjoyed a monopoly of Burmese trade. It threatened the shipper with dire consequences if they patronized Scindias. Apart from the ultimate weapon of rate war, it had an ace up its sleeve in the deferred rebate system. The merchants were under the mercy of foreign shipping concerns; the BISN threatened them of forfeiture of their rebate. Also the BISN reduced its freight rate from Rangoon to Bombay and also from Rangoon to Colombo, from Rs.l8 to 15 per ton, and subsequently to Rs.5 per ton. Consequently, Scindias had to suffer crippling losses and yet they fought back. The shippers were not coming forward to do business with the Scindias and they had to load ship with their own cargo. Narottam Limited was formed to purchase rice in a big way in Burma and transported it from Burma to India, and sugar from Java to India. This eventually hurt the BISN which also suffered losses because the rate war was a "double edged sword." Lord Inchcape, the Chairman of BISN, stooped to conquer Scindias by making a lofty offer to buy them out altogether, which was not accepted. Then he made revised offers which were also refused by the Scindias, and then reached out to individual shareholders of Scindia Naviagation Company. Even they could not be lured, and they turned down the offer, because for them Indian shipping and the honour of the nation was a higher consideration than narrow personal gain.

The BISN wanted to end the rate war because it was hurting their businesses both Scindias and BISN were making losses due to the rate war, Lord Inchcape, came forward for a compromise and a ten year agreement known as the "Delhi Agreement" was signed on March 14, 1923 and a truce was called between the warring parties. This agreement was labeled as "bond of slavery," which blocked the road to progress and prosperity of the Scindia Company. Through this agreement the Scindia' s main gain was that the rate war ended and they were admitted to the Indian Coastal Conference which, till then, was an exclusively British body. However, they had to pay the price for this concession; a) They had to confine themselves to coastal trading and not to engage themselves in international operations; b) It placed restriction on increasing their fleet; and c) the Scindias were barred from charging lower rates than those charged by the BISN.

Maritime Industry in Independent India

Until independence India had to struggle for its very survival against foreign interests. Indian trade was carried by foreign ships and India had to pay tremendous freight bills year after year, which amounted to approximately forty to fifty million rupees which could have been retained instead to build ships. At the beginning of World War II India possessed only about 1.5 lakh GRT of ocean-going shipping. More than ninety-five percentage of the entire foreign trade of India was carried in British ships and the balance in ships of other foreign flags. About seventy-five per cent of the coastal trade was carried in British ships. Developments during the World War II revealed the grave consequences oflndia's dependence on foreign shipping.

The 1923 Delhi Agreement was revised, in April, 1933 a seven years tripartite agreement between Scindia, and two British companies. This agreement also barred Indian shipping from all foreign trade and the coastal trade was to be shared proportionately between the three parties. This agreement was to end on December 31, 1939 but it continued for eleven years more, until 1950 i.e., three years even after independence till the coastal trade of India was reserved for national shipping (Jog, 1969).

The Tripartite agreement did not cover trade between the US and India. The Scindia Company therefore ventured forth to acquire several liberty vessels from the laid up fleet in the USA at the end of 194 7, and started the India-USA and Canada service, having become members of the relevant India-USA liner conference. In 1948 it began participating in the trades between India and the European continent including the UK, and became the member of shipping conference serving the trade in that route, after purchasing four more liberty ships.

After the Second World War, considering the inadequacy of the Indian shipping fleet, the British Government of India set up a Post-war Reconstruction Committee in 1941. This committee in tum appointed another committee called Reconstruction Policy -- Sub-Committee on Shipping in October, 1945 which submitted its report in July, 1947, which frankly admitted the weak condition of Indian shipping that was fully exposed under the stress of war, and that the Government had not sufficiently helped the development of Indian mercantile marine. The Government desired to rectify the position "not only for commercial reasons but also because of the development of the Royal Indian Navy." The Report and the Resolution constitute veritable Magna Carta of Indian shipping (Jog, 1969). The government also accepted the responsibility of helping the development of national shipping, so that it could acquire a reasonably adequate share in the world's carriage of trade. It committed itself to taking the required steps to secure 100% share in the country's coastal trade for Indian ships and a 50% share in its overseas trade. It defined "Indian shipping" to be the one that is "owned, controlled, and managed by the nationals of India." The recommendation for the Indian shipping interests for the purchase of British ships and for a share in India's foreign trade was turned down. This was said to be last imperialist attempt to throttle Indian shipping. The very next month India became free.

Soon after independence, the Government of India announced its Industrial Policy on 6th April, 1948 which adopted a policy of mixed economy whereby shipping was open to private enterprise although the State would also progressively participate in it. The Government floated the first shipping corporation, the Eastern Shipping Corporation Ltd., on 24th March 1950 at Bombay on State-cum-private ownership basis; the Government holding 74% of the shares, and the Scindia Company holding the balance 26% which later became wholly government owned. The objective of the Second Five Year Plan was to build a fleet of tankers to meet the increasing wet cargo requirements. In 1968, the Shipping Corporation of India (SCI) was set up, to fulfill this and several other objectives.

The Government of India also adopted various measures to develop national fleet to meet the country's sea borne trade requirements, such as:

a) Establishment of nautical engineering colleges in Bombay and Calcutta in 1948-49.
b) Several tax concessions were given to the shipping industry; shipping was exempted from wealth tax and development rebate of 40% was given under income tax.
c) In 1950, the government adopted a policy on reserving coastal shipping for Indian vessels, a move that later received legal sanction with the enactment of the Merchant Shipping Act, 1958.
d) Another important step was the consolidation of the merchant shipping laws in one single act-the Merchant Shipping Act 1958 which facilitated the registration and regulation of Indian ships.
e) A statutory and non-lapsable Shipping Development Fund Committee (SDFC) was set up under the Merchant Shipping Act 1958.
f) In order to provide cargo support a chartering organization-the TRANSCHART was launched. One of the objectives of the TRANSCHART was to conserve foreign exchange for the country, by giving preference to Indian flag-ships in the allocation of cargoes.

After Independence, the Government of India welcomed and encouraged the admission and participation of Indian Lines, in the Conferences governing the major international overseas trade. One of the first liner conferences in which Indian line were admitted as full members was the India-Pakistan/UK-Continent Conference. Until 1957, the Conference acted on the principle that, the conference is not obliged to consult its customers on the pricing of its services. However, in 1961 there was a strong opposition from the Government of India; the Conference then held discussion with the Government of India on alternate system to effect rate changes. The Conference thus abandoned its right to fix rates without reference. In principle the Conference agreed that it would hold consultation with representative body of shippers before affecting a general rate increase. In 1961 the Indian lines were entitled to 39% share in the whole trade. As a result the Indian Shipping Companies' Indo-Polish Service was introduced in 1960-61, following the signing of Trade Agreement between Poland and India. India-Black Sea Services were started in 1965 under the Bilateral Shipping

Agreement signed by India and the USSR. Liner services expanded gradually to cover India/ UK-Continent, the US, Gulf, Atlantic, Great Lakes, the US-Pacific ports, Singapore, Hong Kong, Taiwan, Japan, East and West Africa, and West Asian Gulf ports. The establishment of bilateral shipping services as a corollary to bilateral trading agreements with the USSR and other socialist countries, further enlarged the scope of activities of shipping industry in India.

Since independence the shipping industry was developing under the protective umbrella of the state. After the brief phase of positive support, which brought about the milestone of 6 million GRT, the direction of progress was reversed. There were clear signs of industry stagnating and getting marginalized in its role in Indian economic development. Indian shipping was carrying only 35% of India's total seaborne trade, and the rest of the trade has been serious drain of scarce foreign exchange which is paid as freight. Several initiatives taken by the government after the independence got abolished, for instance, the SDFC stood abolished in 1986.

It is only natural that Indian cargoes should move in Indian bottoms. However, in actual practice, the Indian cargoes continue to be taken away by foreign flag vessels and the Indian shipping was not able to participate to its full capacity, both in terms of exports and imports which it was legitimately entitled to. In view of this low share of the Indian shipping in national overseas trade, it is imperative that cargo support measures to improve the movement of cargo in Indian vessels are undertaken and streamlined. Moreover India has been facing a major crunch in foreign exchange. During 1995-96, Indian ships carried only 24% of the trade, and if petroleum products are excluded then only 11% (Dev, 1997).

This should be a cause of concern to the Indian shipping and the Government. India has only 7 cellular ships for general cargo and it is paying Rs.l5,400 crores in freight to foreign owners; Dev (1997) laments that no one in this country is concerned about this large outflow of foreign exchange and the scant regard that is paid towards the development or expansion of the Indian fleet in spite of the fact that this is one of the few industries, which contribute such large amounts to the foreign exchange earnings of the country. A bulk carrier of 60,000 dwt requires approx. one year to pay back the cost of ship. It earns foreign exchange four times its investment over the remaining part of its life (Dev, 1997).

Studies have shown that the presence of a strong and viable national fleet, helps keep down the freight levels in shipment of import and export of goods, and maintain export competitiveness. Also, experience suggests that the economy stands to lose, if the Indian shipping industry does not grow. The presence of strong shipping industry strikes at the root of international cartels and monopolies formation, which is very common in shipping industry. At the same time, it exercises a moderating influence over freight rates charged by foreign shipping lines. If the national fleet capacity remains stagnant, then it would have its implications on its contribution to the country's foreign exchange and future balance of payment scenario.

There are several combination of factors that brought about stagnation m the shipping industry:

a) Passenger trade gradually got diverted to air, and cargo-cum passenger services become less remunerative and ultimately totally unviable.
b) Coal and salt carried by coastal shipping got diverted to railways.
c) Worldwide recession and the oil crisis affected the freight rates that were subject to market forces, and over-tonnaging. There were depressed freight rates which barely covered the fuel costs of the services provided to the shippers.
d) The Indian tonnage declined because the rate of scrapping of old ships outpaced that of the addition of fresh capacity.
e) The primary problem faced by the Indian shipping industry is lack of adequate funds to finance its expansion plans.
f) The government's policy of reservation of cargo for national shipping lines through the TRANSCHART and making it mandatory for the govemment agencies to import on FOB basis and export on CIF basis generated lot of controversy. Exporters and importers felt constrained by such regulation and felt deprived of the benefits of free competition and saving freight costs.
g) Advances in the shipping technology such as containerization, and shipbuilding technology have brought in faster and larger ships, which require mechanized handling at the ports.
h) The development of containerization required a co-ordinated approach with the Indian Railways and Roadways which are still lagging behind.
i) The prime requisite is the ability of railways and road system to handle and move containers; but the weak bridges, condition of Indian roads, and impediments like stoppage at several points for octroi collection reduced the speed of rail and road transportation.
j) Ports provide an interface between the ocean transport and land-based transport but the port management and operations fall under two separate agencies i.e., the Port Trusts and the Custom Department. Though they are part of the Central Government system, they are usually at loggerheads, which inevitably affect the user interests. Hence, Desai (1988) suggests that, there should be an alternative system of port management.

The decline continued for the Indian shipping industry, which is a highly capital-intensive industry. There is an urgent need to beef up the fiscal policies, to ensure that the shipping industry gets the right support to sustain its growth.

REGULATORY FRAMEWORK OF SHIPPING INDUSTRY IN INDIA

Shipping in India, being a Central subject, is dealt by the Ministry of Shipping. The Indian shipping industry is mainly governed by the following Acts;

- The Merchant Shipping Act, 1958
- The Inland Vessels Act, 1917
- The Coasting Vessels Act, 1838
- The Multi-modal Transportation of Goods Act, 1993

Some other statutes that have indirect relevance on Indian shipping include:

- The Indian Ports Act, 1908
- The Dock Workers (Regulation of Employment) Act, 1948
- The Major Ports Trust Act, 1963
- The Seamen's Provident Fund Act, 1966
- The Inland Waterways Authority of India Act, 1985

There are various subordinate offices, autonomous bodies, societies and associations, and public sector undertakings, which help the Ministry in regulating the shipping industry. Some of them are:

- The National Shipping Board, a statutory body, which advises the Central Government on shipping matters;
- The Directorate General of Shipping, the main administrative authority which 4issues orders and notifications on various aspects of shipping;
- The Mercantile Marine Department, which comes under the administrative control of Directorate General of Shipping, dealing with the registration and survey of ships;
- The Transchart Wing, responsible for making shipping arrangements for import cargo under the control of Govt./PSUs;
- The Indian Register of Shipping, a classification society.

The Indian shipping industry, apart from the regulations is also governed by the various IMO/ILO instruments (Conventions & Protocols) ratified by the Government of India and also has to comply with the rules and regulations issued by Ministries of Finance, Company Affairs, and Commerce and Industry, Government of India.

Ministry of Shipping:

Although the nomenclature of the Ministry has changed several times over the years similar to as in other government departments, but the function, by and large, remains the monitoring and development of maritime transport infrastructure in the country.

Presently, the Department of Shipping under the Ministry of Shipping, Road Transport, and Highways is responsible for formulating policies and programmes for development of shipbuilding, ship-repair, major ports, and inland water transport.

National Shipping Board:

To advise the Government of India on matters related to shipping and its development, the National Shipping Board is a permanent statutory body established in 1959 under section 4 of the Merchant Shipping Act, 1958.

The board comprises six members of parliament, five representatives from central government, three representatives each of ship-owners and seamen, and five representatives of other interest and is re-constituted after every two years.

Directorate General of Shipping:

The Directorate General of Shipping is an attached office of the Ministry of Shipping, Govt. of India and deals with all executive matters, relating to merchant shipping. Indian shipping remained a deferred subject till independence. It was only thereafter, the development of shipping attracted the state policy. The subject of Shipping was, in the beginning, dealt with by the Ministry of Commerce, till 1949 and subsequently, in 1951, it was shifted to the Ministry of Transport and Shipping. In 1947, the Government of India announced the National Policy on Shipping, aiming at the total development of the industry. In order to accelerate the developmental efforts, the necessity for a centralized Administrative organization was felt and accordingly, it was in September 1949, the Directorate General of Shipping with its Headquarters at Bombay was established.

This Directorate deals with all matters concerning the Maritime Administration, Maritime Education and Training, development of Shipping Industry and other related subjects.

The initial objectives of the Directorate General of Shipping were :

- Matters affecting Merchant Shipping & navigation and administration of the Merchant Shipping Law ;
- Measures to ensure safety of life and ships at sea;
- Development of Indian Shipping;
- International Conventions relating to Maritime matters;
- Provision of facilities for training of Officers and ratings for Merchant Navy;

Regulation of Employment of Seamen and there welfare;

- Development of Sailing Vessel Industry and
- Regulation of Ocean freight rates in overseas trades.

The Directorate deals with implementation of shipping policy and legislation so as to ensure the safety of life and ships at sea, prevention of marine pollution, promotion of maritime education and training in co-ordination with the International Maritime Organisation, regulation of employment and welfare of seamen, development of coastal shipping, augmentation of shipping tonnage, examination and certification of Merchant Navy Officers, Supervision and Control of the allied departments and officer under its administrative jurisdiction.

The Director General of Shipping is vested with statutory powers under Section 7 of the Merchant Shipping Act, 1958. He is assisted, on the administrative side, by the Addl. Director General of Shipping, Dy. Directors General of Shipping, Asstt. Directors General of Shipping and Executive Officers whereas on the Technical side, by the Nautical Advisor, supported by Dy. Nautical Advisors and Nautical Surveyors; on the Engineering side by the Chief Surveyor, supported by Dy. Chief Surveyors, Dy. Chief Ship Surveyor, Engineer & Ship Surveyors and Ship Surveyor and also with supporting staff. The Nautical Advisor and the Chief Surveyor are also the Chief Examiners of Masters/Mates and Engineers respectively on behalf of the Director General of Shipping.

Vision Statement

To be recognized globally as a highly effective, efficient, responsible and progressive maritime administration.

Mission Statement

- Provide an effective supervisory and regulatory regime conducive to;
    - achieve safe, efficient and secure shipping,
    - protect the marine environment,
    - all round growth of maritime university.
- Provide support to the Government of India in developing and implementing a holistic and integrated maritime development program that has a positive impact on national economy;
- Develop and Implement policies that facilitate an environment which is conducive for promoting an investment in the expansion of a modern merchant fleet under the Indian flag and develop globally competitive ship building and repair facilities;
- Develop and sustain a high quality human resource management catering to the needs of global including national maritime industry for competent seaferers;
- Ensure good governance by adhering to the highest standards of integrity, quality and efficiency in delivery of shipping services through constant innovation, technology upgradation and value addition
- Develop measures to ensure compliance of relevant international instruments relating to safety and security of ships, protection of environment and welfare of seaferers.

Mercantile Marine Department:

The Mercantile Marine Department (MMD) functions under the Directorate General of Shipping, Ministry of Shipping. The main functions and duties of the MMD is to implement the provisions of the Merchant Shipping Act, 1958, as amended which includes inter-alia registration of sea-going vessels, survey and certifications of merchant ships, conduct of examinations of seafarers towards issuance of Certificate of Competency and others. The jurisdiction of MMD Mumbai encompasses the State of Maharashtra and Goa.

Office of the Principal Officer, Mercantile Marine Department (MMD), Mumbai is one of the three districts, others being Kolkata and Chennai . All these offices are under the administrative control of Directorate General of Shipping, situated at Mumbai, of Ministry of Shipping, Road Transport & Highways Government of India. MMD Mumbai's jurisdiction encompasses the States of Maharashtra, Gujarat, Goa, upper part of Karnataka (Upto Mangalore).

MMD Mumbai came into being in 1929 under the erstwhile department of Commerce. Under provision of Merchant Shipping Act of 1923, several other MMD districts also came into existence then. They were Aden, Karachi, Madras, Calcutta and Rangoon. MMD Mumbai is presently located at "Old C.G.O Building", at New Marine Lines, Mumbai-400 020.

The Subordinate offices of MMD Mumbai include MMD Kandla, Jamnagar, Goa and Mangalore. Another Sub-office at Noida (near Delhi) conducts only Examination work. Mercantile Marine Department administers implementation of Merchant Shipping Act, 1958 under guidance and directives of Directorate General of Shipping. Area of implementation covers wide-ranging aspects of Registration of ships and all related matters.

Services:

- Registration of ships & all related matters , Surveys for cargo & passenger ships under statutory certification encompassing international conventions like SOLAS, MARPOL, Int. Load Line etc., Survey during construction of ships; shipping casualties inquires & investigation; participation in search & rescue; Inspection and approval of statutory equipment, e.g. Life-saving and fire-fighting appliances, GMDSS, navigational aids, pollution prevention equipment etc.; Supervision of repairs and construction of ships on behalf of State and Central Govt. Organizations ; Flag State Implementation and Port State Control inspections; ISM & ISPS audits.
- Examination and Certification of various grades of Certificates of competency of Master and Mate & Marine Engineer Officer (MEO).

The Shipping Corporation of India Ltd:

The Shipping Corporation of India (SCI) Ltd. was formed on October 2, 1961. The present authorised capital of the company is Rs 450 crore and paid up capital is Rs 282.30 crore.

The status of SCI has been changed from a private limited company to public limited from September 18, 1992. The SCI was conferred "Mini Ratna' status by the Government of India in February 2000. At present, the government is holding 80.12 per cent of the share capital and the balance is held by financial institutions, public and others (NRIs, corporate bodies, etc.)

The share of SCI in total Indian tonnage in terms of GT is about 39 per cent and in DWT terms about 40 per cent. The SCI's present fleet stands at 86 vessels aggregating about 2.7 million GT (4.6 million DWT) comprising general cargo vessels, cellular container vessels, crude oil tankers (including combination carriers), product tankers, bulk carriers, LPG/Ammonia carriers, acid carriers, passenger vessels and offshore supply vessels. The SCI provides the services for liner and passenger services, bulk carrier and tanker service, and offshore services and specialised services, etc.

1. Cochin Shipyard Limited:

Cochin Shipyard Limited (CSL) was incorporated on March 29, 1972 as a company fully owned by the government. The yard is designed to construct ships of size up to 1,10,000 DWT and repair ships up to 1,25,000 DWT.

The yard has constructed and delivered nine large ships (five bulk carriers and four crude oil tankers). The yard delivered the Cargo Launch Vessel, the first export order, to its owner National Petroleum Construction Company, Abu Dhabi. It has also constructed 36 vessels.

2. Hindustan Shipyard Limited:

Hindustan Shipyard Limited (HSL), Visakha-patnam, was set up in 1941 in the private sector and was taken over by the government in 1952. In 1962, the shipyard became a Central public sector enterprise. The shipbuilding capacity of the yard is 3.5 pioneer class vessels of 21,500 DWT each. The maximum size of the vessel that could be built is 50,000 DWT.

The yard has slipways, covered building dock, wet basin and outfit jetty. HSL is the first shipbuilding yard in the country which was awarded ISO: 9001 certification by Lloyds Register of Quality Assurance, London, for international standard of quality assurance. For ship repairs, the yard has facilities such as modern dry dock, wet basin, repair ships, etc., and it can undertake repairs of submarine, tankers and ships up to 70,000 DWT.

Container Corporation of India:

Container Corporation (CONCOR) of India was set up in 1988 with the objective of developing multi-modal logistics support for India's international and domestic containerized cargo and trade. The task was to provide customers with the advantages of direct interaction and door to door services while capitalizing on the Indian Railway network.

Though rail is the mainstay of CONCOR's containerized freight transportation plan, road services are also provided according to market demand and operational exigencies. CONCOR also operates container terminals across the country to cater to the needs of trade.

The major services offered by CONCOR are as follows:

i. Transit warehousing for import and export cargo
ii. Bonded warehousing, which enables importers to store cargo and ask for partial releases, thereby deferring duty payment
iii. Less than Container Load (LCL) consolidation, and reworking of LCL cargo at nominated hub
iv. Air cargo clearance using bonded trucking

Various strategic options for transnational operations and selecting the optimal strategy have also been examined. A business enterprise has to strike a balance between global integration and local responsiveness while managing its global operations.

The concept of supply chain which comprehensively covers a range of activities from procurement of inputs, through operations to making goods and services available to the ultimate customer, has become crucial to achieve business competitiveness.

The principal objective of any supply chain system remains that the goods reach to final customer in correct quantity, at desired location, at right time, in usable condition and in most cost-efficient manner.

All these logistics objectives are interrelated to each other and may be achieved by a firm's integrated supply chain management strategy. The global expansion of business has necessitated global development and management of supply chain too.

Since maritime transport is the oldest and the most cost-effective means of transport used in international trade, it is governed by a large number of shipping practices derived by the customs of trade. Depending upon the size, type, and nature of trade operations, a firm may either opt for charter or liner shipping.

Containerization and 'multi-modal' transport facilitates cargo exports from inland locations using more than one means of transport. International shipping industry often uses a framework of global regulations on matters such as construction standards for ships, navigational rules, crew qualifications, etc.

Indian Register of Shipping:

Indian Register of Shipping (IRClass) is an international ship classification society providing ship classification and certification as well as technical inspection services. The not for profit entity was founded in 1975. IRClass took over Chairmanship of the International Association of Classification Societies (IACS) effective July 1, 2019.

IRClass is continually paving the way for progress – setting standards for safety, environment protection and tackling issues affecting the maritime industry. IRClass provides complete solutions for your requirements and is committed to be ‘Your Partner in Maritime Risk Management’.

PORTS IN INDIA

Cargo handling at Indian Ports has matured over time. The development of non-major ports due to growing private sector participation has led to a shift of cargo traffic from major ports that operate at above-optimum capacity, to the non-major ports. There has been an uneven development of port infrastructure across the country. As the addition of handling capacity has gradually outpaced the cargo traffic at ports, capacity utilization at the major ports has decreased.

Historically, ports along the west coast have dominated the cargo traffic due to their proximity to India’s major consumption centers and the industrial belt in North – West India. China’s emergence as India’s leading trade partner, India’s ‘ Look East’ Policy and overcapacity at the west coast ports provide the east coast ports the opportunity to develop. The 50 ports that are situated along this coast is said to drive the overall growth increasing the total trade and capacity addition.

Maritime Agenda 2010-2020

- The Maritime Agenda is the foundation of an ambitious development plan. Each state government is also having a Maritime Policy of it’s own and an endeavor is being made to assimilate the spirit of such policies in this document. Future policy milestones, which are foreseeable priority deliverables, have also been identified and incorporated in to the document.
- It has been decided in a meeting of the Committee of Infrastructure that the major ports have been asked to prepare a long prospective business plan of each port with the help of international consultants.
- All these plans have been co-ordinated at the central level by the Indian Ports Association, by engaging the Port of Rotterdam Authority and a consolidated

business plan, combining the projections of traffic and development plans was prepared.

- This consolidated plan is only for the major ports and does not take into consideration the needs of non-major ports, which are large in number irrespective of the volumes.
- The Planning Commission in the mid-term appraisal has suggested that the document be more comprehensive and provide scope for inclusion of the non-major ports. It is in this context that the Ministry of Shipping has prepared this ambitious Maritime Agenda for the decade with the intention of creating, building and sustaining the maritime infrastructural needs of the country for the decade.
- During the post liberalization period due to the emergence of a large number of state and private ports as well as private terminals within major ports. Competition is emerging among various ports and also ports within and outside the region.
- The vision of the Ministry of Shipping is to be recognized globally as a highly effective, efficient, responsible and progressive maritime administration.
- Agenda for the decade, addresses port capacity, port policy measures, environment, technology for efficiency, safety and security, human resources, shipping policy, finance, shipping programmes, ship building and repairs, tourism, inland waterways, institutional development, legislation and international matters.

Major Ports

The brief description of major ports of India is given here:

1. Mumbai:

It is a magnificent natural harbour on the West Coast of India. The deep 10-12 metre sea adjoining the harbour with no sand banks enables big ships to enter the port easily. It handles approximately one-fifth of India’s foreign trade with predominance in dry cargo and mineral oil from the Gulf countries. It is the biggest port of India. It handles foreign trade with the Western countries and East African countries. The opening of the Suez Canal in 1869 brought it much closer to the European countries. In the year 2002-03, this port handled 24,304 thousand tonnes of cargo out of which 14,027 consisted of imports and the remaining 10,277 thousand tonnes was exports.

Mumbai has a vast hinterland covering the whole of Maharashtra and large arts of Madhya Pradesh, Gujarat, Rajasthan, Delhi. This hinterland is very rich in agricultural and industrial resources. The entire hinterland has undergone large scale economic improvement which has helped in the rapid growth of this port. A dense network of roads and railways connects the port with its hinterland.

Mumbai is a gateway to India from the west and handles large scale trade of great variety. The major items of export are cotton textiles, leather, tobacco, manganese, machinery, chemical goods etc. while the imports include crude oil, superior quality raw cotton, latest machines, instruments and drugs. This port is likely to progress further with the economic development of its hinterland.

2. Jawaharlal Nehru Port:

Formerly known as Nhava Sheva port, this port was opened on 26th May, 1989. This new port has been built at an island named Nhava Sheva across the famous Elepthanta caves, about 10 km from Mumbai. Built at the cost of Rs. 880 crore, this port is named Jawaharlal Nehru port as a tribute to the first prime minister of India. The main purpose of this port is to release pressure on the Mumbai port.

The port is equipped with the most modem facilities having mechanised container berths for handling dry bulk cargo and service berth etc. Most of the operations are conducted with the help of computers. The port is linked by road and rail to other railway routes and National Highways avoiding Mumbai city altogether.

The initial capacity of the port was 5.9 million tonnes in 1995-96 which was raised to 9.9 million tonnes in 1997-98. The first private sector project Nhava Sheva International Container Terminal (NSICT) became operational in 2000. This terminal has already captured a substantial share of container handling not only in the region but also among all the major ports of the country. The sea is quite deep near the port and there will be no need for dredging in this port.

Jawaharlal Nehru Port Trust (JNPT) Navi Mumbai, signed an agreement with P & O Australia, for development of a two berth container terminal on 'Build, Operate and Transfer' (BOT) basis for a period of 30 years in July, 1997. The work was completed in April 1999 at the cost of Rs. 900 crore. Another agreement was signed on August 10, 2004 with Gateway Terminals India Pvt. Ltd. for development of the third container terminal which will result in addition of 1.3 million TEUs (twenty feet equivalent units) container handling capacity of the port. JNPT is also taking preparatory action for setting up of fourth container terminal.

As a result of the above mentioned initiatives taken to enhance its capacity, Jawaharlal Nehru port has come to rank 28th among the world class container ports. Currently the port handles 55-60 per cent of the country's containerised cargo. This port handled roughly 2 million TEUs in 2002-03 and 2.3 million TEUs in 2003-04. It is a twin port of Mumbai so far its hinterland is concerned.

3. Kandla:

This port is located at the eastern end of Gulf of Kachchh about 48 km away from Bhuj. It is a natural sheltered harbour in Kandla creek with average depth of 10 m. The port is equipped with all the modem facilities and state-of-the-art technology. The traffic handled at Kandla consists of crude oil, petroleum products, fertilizers, food grains, salt, cotton, cement, sugar, edible oils and scrap.

Kandla has a capacity of handling a total traffic of 23.3 million tonnes. This port has been developed after independence to relieve congestion on Mumbai port. With the loss of Karachi to Pakistan as a result of partition of the country in 1947, the necessity of constructing a port on the Gujarat coast was keenly felt. Consequently this port was constructed in 1951. During 2002-03, Kandla port handled 30,259 thousand tonnes import and 10,374 thousand tonnes export cargo.

This port has a vast hinterland covering large parts of Gujarat, Rajasthan, Haryana, Punjab, Delhi, Himachal Pradesh, Jammu and Kashmir and Uttaranchal. The port is well connected by roads and railways and has a bright future.

4. Marmagao:

It is an important port of Goa located at the entrance of Zuvari estuary and occupies fifth position in handling the traffic. Its harbour is protected and holds about 50 streamers in fair season and 15 steamers in rainy season. It has the capacity to handle 16.1 million tonnes of cargo traffic.

For a long period, it handled the export of iron-ore from Goa. Currently the major items of exports are iron ore, manganese, coconut and other nuts, cotton etc. Imports through this port are very few. In the year 2002-03 the total exports through this port were 19,269 thousand tonnes while the imports were only 4,380 thousand tonnes i.e., the exports were more than four times larger than the imports. It has a comparatively small hinterland covering the whole of Goa and parts of north Karnataka coastal region and southern Maharashtra.

With the opening of the Konkan railway, the importance of this port has increased significantly and it is fast emerging as a multi-commodity port. Four new harbours are being constructed in the Vasco Bay for handling container traffic and general cargo.

5. New Mangalore:

This is an important port located at the southern tip of the Karnataka coast north of the Gurpur River. Initially it was designed for small ships. However, it was upgraded in the Fourth Five Year Plan to accommodate larger ships. A harbour was constructed so that business could be carried on throughout the year. Its hinterland lies in Karnataka and northern part of Kerala.

Tea, coffee, rice, cashew nuts, fish, rubber etc. are exported through this port. The major items of import through this port are crude oil, fertilizers, edible oils etc. Its main importance lies in export of iron ore from the Kundremukh mines. The port is well linked through broad gauge rail line and NH-17 with Mumbai and Kanniyakumari.

6. Kochi:

It is another natural harbour on the west coast of India and is located on the coast of Kerala. Kochi has sheltered backwater bay. The port is located close to Suez-Colombo route and enjoys the proximity of a trunk maritime route. It handles the export of tea, coffee and spices and imports of mineral oil and chemical fertilizers.

The Kochi Oil Refinery receives crude oil through this port. It is also a ship-building centre. Imports through this port far excel the exports. For example, the total imports through this port in the year 2002-03 were 10,839 thousand tonnes as against exports of only 2,110 thousand tonnes in the same year. In other words, imports are about five times more than the exports.

Its hinterland lies mainly in Kerala and Tamil Nadu. It is served by a well developed network of transport routes.

Establishment of a container transshipment terminal at Vallarpadam, construction of a liquefied natural gas (LNG) terminal at Puthuvypen; and an international bunkering terminal are to be taken up in the near future.

7. Kolkata-Haldia:

It is a riverine port located on the left bank of river Hugli about 128 kms inland from the Bay of Bengal. Kolkata port handles goods coming from South-East Asian countries, Australia and New Zealand. Kolkata port is called the ‘Gateway to Eastern India.

It is the world’s most important centre of jute industries. Kolkata is the main port for exporting jute products, tea, coal, steel, iron ore, copper, leather and leather products, textiles, manganese and many more items. The imports consist mainly of machinery, crude oil, paper, fertilizers and chemical products.

The Kolkata port suffers from a number of problems. It is located on the bank of the River Hugli, which suffers from the problem of silting as tidal bores enter this port frequently. Sandy bars and islands have been formed at several places.

The river is in its old stage and bends at several places creating lot of problems for the ships because they do not find a straight passage from the coast to the port. To sum up Kolkata port has a serious problem of ‘bends’, ‘bars’ and ‘bores’.

The depth of water is gradually declining. This has necessitated constant dredging so that larger vessels are able to enter the port. Expert pilots are required to conduct the ships and the cost of maintaining the port has become prohibitive.

To rid the Kolkata port of some of the problems mentioned above, a barrage has been constructed across the Ganga at Farakka. This barrage is designed to divert water along the Bhagirathi-Hugli. However, with the signing of water treaty between India and Bangladesh, adequate water is not available in the Hugli River. Only a change in the treaty can improve the situation.

The Kolkata Dock System will be going in for privatisation of modernising and replacing port craft; strengthening of cargo handling equipment; better utilisation of dry docks and deep drafted areas and promotion of ship-breaking activities.

Kolkata port has a vast hinterland. Almost whole of the eastern and north-eastern parts of the country are included in the hinterland of this port. The main areas comprising the hinterland of Kolkata are West Bengal, Bihar, Jharkhand, Uttar Pradesh, Uttaranchal, Sikkim, Assam, Arunachal Pradesh, Nagaland, Manipur, Mizoram, Meghalaya, Tripura and northern parts of Chhattisgarh and Madhya Pradesh.

Haldia port has recently been developed on the confluence of rivers Hugli and Haldi about 105 km downstream from Kolkata. Its main purpose is to release congestion at Kolkata. It receives larger vessels which otherwise would have to go to Kolkata. Some of the large vessels which cannot enter the Kolkata port can easily come upto Haldia.

Haldia has an oil refinery and a fertilizer factory. A large integrated petro-chemical plant has also been set up here. An important rail link connects Haldia with Kharagpur. The main items of trade are mineral oil and petroleum products. Haldia-Dock complex is considering plans to develop a berth on BOT basis. The hinterland of Haldia covers the same territories as that of Kolkata although to a much lesser extent.

The Bhagirathi River has changed its course recently as a result of which Haldia's future has become uncertain. With the large-scale deposition of silt near the port (Nayachar), the entry of large ships has become difficult.

8. Paradwip:

It is a deep water (depth 12 metres) and all weather port located on the Orissa coast about 100 km east of Cuttack. Because of its great depth, this port is capable of handling bulk carriers of over 60,000 DWT. Construction of an exclusive oil jetty to handle about 6 to 8 million tonnes of petroleum products and crude tankers of 85,000 DWT were completed recently.

Constructed in the Second Five Year Plan period, this handles iron-ore and coal along with some other dry cargo. Large quantity of iron ore is exported to Japan through this port. The imports through port are only half of its exports. In the year 2002-03, it handled 16,910 thousand tonnes of exports while the imports were only 6,991 thousand tonnes. The hinterland of Paradwip port is comparatively small and covers Orissa only.

9. Vishakhapatnam:

It is the deepest land-locked and protected port built at the coast of Andhra Pradesh. An outer harbour has been developed to handle the export of iron-ore. Elaborate arrangements have been made to handle crude oil and other petroleum products. It also handles fertilizers. Vishakhapatnam has a capacity of handling 16.7 million tonnes of cargo traffic. It also has the ship-building and ship-repair industry.

The primary export items are iron ore (especially from Bailadila mines to Japan), manganese ore, spices and wood. The imports comprise mainly of mineral oil, coal, luxury items and other industrial products. In the year 2002-03, this port handled 18,544 thousand tonnes of imports and 20,279 thousand tonnes of exports.

The hinterland of Vishakhapatnam port commands an approximate area of 3.4 lakh sq km which is constituted by Andhra Pradesh and the contiguous parts of Chhattisgarh, Madhya Pradesh, Maharashtra and Karnataka. This part of the country is very rich in mineral resources and agricultural produce.

10. Chennai:

Chennai is the oldest artificial harbour on the East Coast of India. It does not possess a natural harbour and an artificial harbour has been created in an area of 80 hectares near the coast. It mainly handles petroleum products, fertilizers, iron-ore and general cargo. The major items of exports are rice, textiles, leather and leather goods, tobacco, coffee, manganese ore, fish and fish products, coconut, copra etc. The imports consist of coal, crude oil, paper, cotton, vehicles, fertilizers, machinery, chemical products etc. It has a capacity to handle traffic of 21.37 million tonnes and can accommodate as many as 21 vessels inside the harbour.

In the year 2002-03, it handled 19,605 thousand tonnes of imports and 14,082 thousand tonnes of exports. Chennai is often hit by cyclones in October and November and shipping becomes difficult during these months. It is ill-suited for large ships because of the lesser depth of water near the coast. The hinterland of the Chennai port encompasses the large part of Tamil Nadu, southern part of Andhra Pradesh and some parts of Karnataka. The port is gaining importance due to increased significance of its hinterland.

11. Ennore:

This port has recently been developed to reduce pressure of traffic on Chennai port. Located slightly in the north of Chennai on the Tamil Nadu coast, this is the country’s first corporate port. It envisages construction of two coal berths, one iron ore berth, one LNG berth, two POL/liquid chemicals berths and one crude oil berth for handling very large crude carriers.

It has also a perspective plan to build three multi-purpose berths, five POL/liquid-chemicals berths and five container berths. The major items of traffic on the port are coal, iron ore, petroleum and its products, chemicals, etc. Its hinterland is a part of the hinterland of Chennai port.

12. Tuticorin:

This port has also been recently developed at the Tamil Nadu coast about 8 km south-west of the old Tuticorin port. It has an artificial deep sea harbour which can accommodate vessels upto 8 metre draft in any season of the year. Two new berths are being developed.

There is a plan to increase the depth of the port from the present 10.7 metres to 12.8 metres so that larger vessels could be accommodated. A long-term plan to build an outer harbour in four stages is also envisaged. The idea is to handle containers up to 1.4 million TEUs by 2006 and 6.3 million TEUs by 2021.

The port handles the traffic of coal, salt, food grains, edible oils, sugar and petroleum products. Its main purpose is to carry on trade with Sri Lanka as it is very near to that country. Its hinterland is formed mainly by southern Tamil Nadu comprising districts of Madurai, Kanniyakumari, Ramnathpuram, Turunelveli and southern part of Tiruchchirappally. It is well connected by railways and roads.

Minor Ports

There are 185 minor ports, with a pronounced accent on the west coast. These ports are located in Gujarat (40), Maharashtra (53), Goa (5), Daman and Diu, (2) Karnataka (9), Kerala (13), Lakshadweep (10), Tamil Nadu (14), Pondicherry (1), Andhra Pradesh (12), Orissa (2), West Bengal (1) and Andaman & Nicobar (23).

SHIPPING AND PORT OPERATIONS IN INDIA

Over 90% of India's total trade volume (77% in terms of value and 97% of its international trade volume) is carried over sea. The Indian peninsula, situated in the Indian Ocean, is also strategically located between the Atlantic Ocean in the west and the Pacific Ocean in the east, with a 7000 km long coastline, and 12 major and 148 operable minor and intermediate ports. The 12 major ports handled about 75% of port traffic in 2003-04. Though most major ports handle containers, only 7 are considered as major container ports.

Indian maritime services sector not only facilitates the transport of national and international cargoes but also provides a variety of other services such as cargo handling services, ship repairing, freight forwarding, lighthouse facilities and training of maritime personnel.

Port operations in India are characterized by acute supply constraints. The major ports in India are overseen by the Port Trust Boards and are regulated by the Tariff Authority for Maritime Ports (TAMP). Minor ports are overseen by the state governments.

On the eve of independence in 1947, India had only 60 vessels with a tonnage of 0.192 million gross registered tonnage (GRT). By 2006, these figures increased to 313 vessels and 7.55 million GRT respectively. Nevertheless, the national flag carriers are fast losing their share of trade to major global players.

Shipping industry in India was fairly liberalized even before the 1990's and there were no major restrictions on the entry of private shipping companies. Indian shipping, as it exists today, is marked by the presence of a few large and medium sized national shipping companies and a host of private players who together carry around 30% of the country's overseas trade. The biggest player is the Shipping Corporation of India (SCI), a government owned company. The next two players Great Eastern Shipping Company and Essar Shipping are privately owned.

These companies enjoy special rights and privileges like tax breaks, and government has announced various measures to support the growth of the domestic shipping industry. Government-owned/controlled cargo is channeled by the chartering wing of the Ministry of Shipping called Transchart. As per this policy, the first right of refusal for carriage of such cargoes is given to Indian vessels. These regulations have resulted in barriers for entry for foreign shippers in select cargo. The contribution of the Indian shipping industry to the economy is positive. 1% change in GRT brings about a change of 0.0068% in GDP.

Indian shipping companies manage a variety of ships. India is heavily dependent on the imports of crude and hence one can find a large number of crude carriers and gas carriers. India also export certain grades of iron ore and import other grades of iron ore, coke, and grains leading to a fair share of bulk carriers. Note that Indian carriers operate very few container ships unlike the major global carriers.

Container Shipping and Port Operations in India

India has lagged behind others in adapting to containerization. Containerized cargo traffic is still poor when compared with the larger international ports. As of 2005, only 38 million tons out of 78 million tons of cargo was being containerized in India. The largest container port in the world in 2004, Hong Kong, processed 21.9 million TEUs. The 10th largest port, Dubai, processed 6.4 million TEUs. In contrast, Jawaharlal Nehru Port (JNPT) at Mumbai, India's largest container port, handled around 2.5 million TEUs in 2003-04.

Container shipping in India suffers from inefficient and unreliable infrastructure for container movement (ports, highways, railways), causing a gaping hole in the demand and supply. These bottlenecks results in huge lead times, costly transportation, port handling charges etc.

Due to the above reasons, 45% of container traffic to India is now transshipped via Colombo (15%), Klang/Singapore (16%), Dubai, Salalah etc (14%). There are cases where a cargo that takes 6 days from Singapore to Mumbai would sit in the port for 30 days before it is unloaded.

Nevertheless, India is keen to catch up with others. Recent initiatives by government to improve the transportation sector has resulted in the national highway program to upgrade the highways, the Sagar Mala (string of pearls) program [50] to upgrade the port infrastructure, the freight corridor railway upgradation plan to connect the manufacturing north to the western ports. Container terminals at JNPT were established as the gateway ports for container traffic to India only in 1999 and has a current market share of around 60% of the total container traffic within the country.

Success of Mumbai (JNPT) and the heavy congestion there, have led to substantial investments in recent times by private players in the ports of Mundra (Kandla), Tuticorin and Kochi (Cochin). P&O Ports operate one terminal at Mumbai, and have obtained the license to develop, operate and manage the container terminal at Chennai (Madras). DP World with United Liner Agencies developed Visakhapatnam (Vizag) as a deep-water eastern gateway terminal on the Bay of Bengal coast of India. In the last couple of years, several liner companies have started weekly and biweekly services linking India.

Following the increased container volume, Indian ports are trying to take on the role of a hub port (transshipment) to attract large size mother vessels. Kochi port has a unique geographical advantage of being close to international sea trade routes which connect Europe and Arabian Gulf to South East Asia and the Far East. In 2005, DP World formally signed an agreement with Kochi Port to construct, develop and operate an international container transshipment terminal. This transshipment terminal project is expected to be a unique project in infrastructure to boost containerization in India.

To summarize, the container operations in India were characterized by a surging demand for container traffic, modernization/upgradation/privatization of marine infrastructure, and the presence of three major players: P&O ports, DP World and AP Moller-Maersk. Container shipping in India is characterized by low participation by Indian companies, increasing number of liners calling directly at Indian container ports with vessels which are small or medium sized.

Bulk Cargo Shipping and Port Operations in India

India exports iron ore primarily to China. In addition Indian ports also handle specific bulk products like sulphur, fertilizer, cement, polymer, grains and coal in comparatively lesser quantities. India’s ocean going fleet consists of 90 bulk carriers carrying iron ore, fertilizers, cement, coke, grain and other commodities.

Liquid Bulk Shipping in India

India is not self-sufficient in energy and has to import crude. Before the economic reforms, Indian shipping firms were able to handle India's crude import requirements. Increased demand after the reform has led to foreign flags now accounting for more than 70% of the total crude imports. The primary reasons have been the insufficient number and capacity of crude tankers owned by the Indian companies and their involvment in more profitable cross-trades.

In 2005-06, India's total crude oil consumption was 129.84 million tonnes (mt), out of which 32.2 mt (24.8%) was domestic production and the balance 97.64 mt (75.2%) was imported. Demand for crude oil is estimated to grow at 7%, leading to a demand of 195 mt in 2011-12 of which 85% have to be imported.

In addition, India is building a huge refining capacity from the current level of 130 mt to 240 mt within the next few years to cater to the demand from developed economies (also domestic demand) withdrawing from refining due to environmental reasons. Hence, it is expected that the above increase will lead to a huge demand for liquid bulk cargo carrying capacity. Indian government expects domestic flag carriers to carry a significant part of the increased demand. A major share of the crude imports done by domestic companies is done by Shipping Corporation of India and Great Eastern Shipping.

LNG & LPG Shipping India

Liquefied gas shipping is characterized by being highly capital-intensive, low down time of ships (fast vessels), need to cater to the physical requirements of the contract, trade and ports. This makes operating and maintaining an LNG/LPG carrier much more intensive and requiring more skill and operational capabilities than an ordinary ship. The economic growth of India requires energy and LNG is seen as a green and socially accepted alternative. However, the domestic production of natural gas cannot satisfy the demand and has to be imported through LNG ships.

Thus in terms of tonnage, India is likely to import 62 million metric tones per annum (MMPTA) by 2012 (Japan's present import level) and 84 MMPTA by 2025. To handle this quantity of imports, India will require around 10 to 12 vessels over the next 5 years, 25 LNG vessels by 2012 and 34 vessels by 2025, assuming that one vessel can transport 2.5 MMPTA.

Under current Indian government regulations, LNG vessels importing gas must be Indian registered and at least 26% owned by an Indian company and the ships should employ Indian officers on board their LNG carriers. Foreign partners should also agree to transfer technology to the Indian partner such that within 5 years, tankers can be maintained and operated by the Indian company. If an existing vessel is used, the foreign company owning the LNG carrier should have an Indian partner. LNG users require permission from the Directorate General of Shipping for chartering a foreign flag vessel to ship the fuel.

India has two operating LNG terminals at Dahej (operated by Petronet LNG) and Hazira (operated by Shell). India is currently building two at Kochi and Dabhol and several others are on the anvil.

Currently there are two Indian vessels (Disha and Rahi) owned by Petronet LNG (Shipping Corporation of India and Mitsui O.S.K. each owns a 29% stake). Varun Shipping Company Limited owns the largest LPG fleet (11 vessels) in the country i.e. 76% of the total LPG tonnage (by DWT) operating under Indian flag. Other major national shipping companies like Great Eastern Shipping Company currently own smaller LPG crafts and plan to enter the LNG fray with joint ventures.

Coastal Shipping & Inland Water Transport in India

Waterborne freight transportation is broadly divided into inland water transport and shipping. Shipping, in turn, can again be divided into two categories coastal shipping and overseas shipping. Inland water transport and coastal shipping hold great promise mainly because it is the most energy efficient and cheapest mode of transport for carriage of bulky goods like iron and steel, iron ore, coal, timber, etc. Coastal shipping can reduce the stress on the already congested road and rail network in India.

The share of inland waterways and coastal shipping in the total domestic cargo is very low in India, compared to other maritime countries. EU has 43% of its cargo handled by coastal shipping while in India it represents only 7% of the domestic traffic.

In India, three inland waterways have been notated as national waterways, namely:

- <u>National Waterway 1:</u> Allahabad-Haldia stretch of the Ganga-Bhagirathi-Hooghly river system (1620 km).
- <u>National Waterway 2:</u> Saidiya-Dhubri stretch of the Brahmaputra river system (891 km).
- <u>National Waterway 3:</u> Kollam-Kottapuram stretch of West Coast Canal (168 km) along with Champakara canal (14 km) and Udyogmandal canal (23 km).

<u>SHIPBUILDING, SHIP REPAIR AND SHIP SCRAPPING IN INDIA</u>

Shipbuilding is characterized by high capital investments, cyclical business and low levels of automation with profitability coming from scale of operations. With rising labor costs in previously developed economies, shipbuilding has slowly moved towards countries with a lower wage structure. While Japan, Korea and now China have taken advantage of this situation, Indian shipbuilding has just not been able to cash in on this trend. This is in spite of the availability of technical expertise, geographical location and lower wage levels.

Major Shipbuilding & Ship Repair Yards in India

Government Owned: Major shipyards in India are all government owned and are listed below:

1. Cochin Shipyard Limited at Kochi
2. Hindustan Shipyard Limited at Vishakapatnam
3. Hooghly Dock and Port Engineers at Kolkata
4. Garden Reach Shipbuilders & Engineers Limited at Kolkata
5. Mazagon Dock Limited at Mumbai and Nhava
6. Goa Shipyard Limited at Vasco-Da-Gama

Privately Owned: In addition, India also have some recently started private shipbuilding yards:

1. ABG Shipyard at Surat
2. Bharati Shipyard Limited at Ratnagiri and Ghodbunder
3. Larsen & Toubro Shipyard and Offshore Works at Hazira
4. Dempo Shipyard at Old Goa and Zuari
5. Chowgule & Company Limited Shipbuilding Division at Margaon
6. Alcock Ashdown Company Limited at Bhavnagar

Shipbuilding industry in India is characterized by the presence of heavily subsidized government yards, lack of ancillary industry, lack of scale, endless bureaucracy and lack of experienced designers & R&D, and confined to building small to medium sized vessels and specialized crafts.

Ship Breaking in India

India is well known for its ship breaking industry. The biggest ship breaking yard in the world is located at Alang in India. In the year 2001, India handled 42% of the vessels while China handled 4% of the vessels.

INDIA AND GATS

India did not make any commitments in maritime services but submitted a draft conditional offer to the Negotiating Group on Maritime Transport Services on 27 June 1996, just before the suspension of the post-Uruguay Round of negotiations. India started participating in the Maritime Transport Services negotiation from July 1995 onwards (almost a year after the formation of the NGMTS) after a decision was taken by the MOST that joining NGMTS will help India to gain greater market access in this sector, and also possibly, help in trade offers during negotiations in other sectors. Since the negotiations were suspended in June 1996, the conditional offer made by India has no legal bindings.

The conditional offer submitted by India is, in certain respects, even more conservative and restrictive than India's existing policies in the maritime sector. For example, with respect to cross-border supply in liner shipping the offer shows that at least 40 per cent of cargo carried by liner shipping companies must be reserved for Indian flag ships. This is a limitation on market access but India, at present, does not have any regulation supporting such reservation. Moreover, under limitation on national treatment the offer stated that selected liner routes have been reserved for three national lines. In practice, this is not a restriction on national treatment because this restriction is only applicable to other Indian lines and foreign lines do not face any barriers in operating in the selected routes.

India did not make any commitment for commercial presence under auxiliary services although foreign companies are allowed to operate in this country subject to the existing laws of foreign investments and privatization (for instance, foreign companies are allowed to set up container freight stations and inland container depots, but India did not offer to bind this sub-sector. In the conditional offer, India also asked for certain MFN exemptions related to cargo sharing, cargo reservations (for all countries which are contracting parties to the UNCTAD Code of Conduct for Liner Conferences) and avoidance of double taxation. Cargo sharing implies equality in freight lifting originating in the ports of the partners in agreement and equality in freight earnings. India stated that bilateral agreements with Bulgaria, Poland, United Arab Republic, Russian Federation and any other countries with which a similar agreement is entered into in future will continue to be in force. India has agreements to avoid double taxation with more than 40 countries.

With respect to the third pillar that is, access to and use of port facilities, India made additional commitments to provide these facilities to international maritime transport suppliers on "reasonable and non-discriminatory" terms and conditions. Overall, the conditional offer was very restrictive and India did not even offer to bind the status quo.

Strategies for Current Negotiations

Negotiations on maritime transport services have proved to be difficult because of the complex and diverse nature of this sector, which involves several kinds of services, from shipping to port facilities, each organised in a completely different way. Thus, this services sector is a challenge for the liberalisation process.

Issues Related to Negotiations on Maritime Transport Services

One of the reasons for the failure of the previous round of negotiations was the inadequate commitment to liberalise by large countries. During the negotiations some countries found it difficult to overcome domestic resistance to open up their maritime sector in the absence of offers from major players. Hence, the success of the GATS 2000 negotiations in this sector depends on the strong willingness of both developed and developing economies to achieve free international trade in maritime services. If the negotiations are successful it will enhance the overall efficiency of the transportation process and reduce the operating costs and freight rates. Shippers will be the immediate beneficiaries, but the reduction in protection through reduced transport costs will also facilitate trade in other sectors.

The isolation of individual service sectors in the negotiating process has been cited as another reason for the failure of previous negotiations in this sector. If all modes of transport are placed on the table at the same time it would help to liberalise this sector where otherwise there is a resistance to change when dealing with one sector at a time. The USA is keen on inclusion of multimodal transportation in the proposed maritime agreement. During the previous round of talks, Australia suggested that “multimodal services” should be added as a shadow fourth pillar to the maritime schedule. Since door-to-door services are playing an increasingly important role in international shipping, multimodalism is likely to be a key issue at the current round of negotiations.

Many countries have expressed concern that since multimodal transport involves road, rail and air transport, the extension of maritime transport services to cover multimodal transport will be a “back-door” way of extending the negotiations to unrelated domestic activities. Therefore, for the success of the negotiations it is essential to clearly define the multimodal activities that should be included under maritime transport services. OECD suggested that only those multimodal transport operations that include a maritime leg should be considered for the WTO maritime services negotiations.

In the previous round of negotiations, almost all the WTO member countries had excluded cabotage from their shipping commitments. As most of the important maritime nations (Japan, United States, Norway, China, UK, Hong Kong, etc.) continue to reserve cabotage for national flag vessels, this sector is likely to be excluded from the current round of talks.

Although there has been considerable unilateral liberalization in maritime auxiliary services (since more and more countries have moved to corporatize and privatize a range of these services), there is a significant scope for further liberalization in this sector. It is likely that considerable attention will be given to this sector in the current round of negotiations since carriers have begun to integrate their services to a much greater degree, and are actively participating in the provision of services such as cargo handling and storage services, and providing services to ships while in their berths.

Even though there has been a significant improvement in technology, there has not been a commensurate decline in maritime transport costs. Some studies have pointed out that the anti-competitive practices of conferences and cartels are responsible for keeping the prices high. These conferences and cartels enjoy an exemption from competition rules in major maritime nations such as the USA and EU. In the Uruguay Round some countries had expressed their reluctance to strengthen Article IX of GATS which deals with anticompetitive practices. In the current round of negotiations Article IX of GATS needs to be strengthened which can be achieved through creation of two obligations. The first would require an end to the exemption of collusive agreements in the maritime sector from national competitive law. The second would create a right for foreign consumers to challenge anti-competitive practices by shipping lines in the national courts of countries whose citizens' own/control these shipping lines. In the GATS 2000 negotiations coalition of developing countries can put forward an offer to substantial liberalization conditional on the strengthening of Article IX.

Regional associations are playing an important role in the world trade. It is likely that in the current round of negotiations these regional bodies will become the driving force in pushing for liberalization of maritime services. After the suspensions of the previous negotiations, the OECD countries have initiated dialogues with non-OECD countries to discuss strategies and targets for the GATS 2000 negotiations and to strengthen the group's bargaining position. If the current round of negotiations fails, regional bodies, such as the OECD and EC may pick and choose countries or other regional bodies and negotiate separate agreements covering maritime transport between the region's countries and the countries concerned. This will lead to a proliferation of agreements in the sector that may not really serve the cause of liberalization especially in a global industry such as maritime transport.

Some countries have gained a strong position in the efficient supply of international maritime transport services, while others have yet to begin to build a credible capability and are encountering difficulties in doing so. To ask all countries to fully liberalize will mean that some countries will have a head start over others, as they will not all be in the same position to compete. This explains the reluctance on the part of weaker nations to liberalize. However, the WTO recognizes the need to allow some flexibility by considering a progressive liberalization of the three pillars. This will allow weaker nations more time to enable them to set in motion policies that will help them to compete effectively in the supply of these services. The weaker nations should realize the overall benefits of liberalization and gradually change their domestic regulations to facilitate the liberalization process. If the GATS 2000 negotiations fail, some powerful maritime nations may continue to unilaterally liberalize this sector. Also, countries which are very restrictive may be isolated from future negotiations. These developments will not serve the cause of the international maritime community for a truly liberalized sector.

India's Strategy for GATS 2000 Negotiations

India's strategy on liberalizing trade in maritime transport services has to be viewed from the perspective of the global competitiveness of her maritime sector, the likely gains to the economy from the liberalization process and the extent to which major trading partners are willing to liberalize. At present, India does not have comparative advantage (except in the case of supply of seafarers) in maritime transport services and her export possibilities in this sector are quite limited.

The following three sub-sections will discuss India's possible negotiating strategies on the three pillars: international shipping services, auxiliary services and access to and use of port facilities.

1. *International Shipping Services*

India has already opened up her shipping sector and foreign flag vessels are allowed to operate in this country on a competitive basis. In the GATS 2000 negotiations, India can make commitments in this sector with some limitations on market access and national treatment. One of the most visible limitations on market access under cross-border supply is the policy of providing cargo support for import of crude oil and dry bulk cargo belonging to public sector units through importing on FOB basis and exporting on CIF basis. In India, cargo support operates through "Transchart" which acts as a broker for the public sector cargo and provides the first right of refusal to Indian shipping companies. This policy of FOB imports and CIF exports enables India to have a greater control on transportation and thus reduces foreign exchange outflows. The main hitch with this policy is that India is not the only country to implement it. Thus finally, the policy of FOB or CIF would depend on the relative bargaining power of the two trading nations. In the event of negotiation for removal of such cargo support, India should only do so when there is a commitment from other nations for doing the same.

The most noticeable limitation on national treatment is the policy of giving preference to Indian flag vessels for the transportation of crude oil and petroleum products. Foreign flag ships can participate in the import of crude oil subject to non-availability of suitable Indian vessels and in accordance with relevant regulations/procedures.

The Indian Merchant Shipping Act (1958) imposes restrictions on market access and national treatment under Mode 3 (commercial presence). The Act states that for operating a ship or a fleet under the Indian flag, it is necessary to establish a registered company, or a cooperative society under any Central Act or State Act having its principal place of business in India.

In the last round of negotiations, the USA did not make any commitments on maritime transport services while others such as Japan, Canada and EC did not make any commitments on international shipping services. These countries are our major trading partners and in the absence of any commitments from them it would be extremely difficult for India to commit further liberalisation. In the current round of talks, India should urge these countries to make some commitments in this sector.

Many strong maritime nations reserve a part of the international cargo for their national shipping lines. For example, the US aid and defence cargo is reserved for the US flag vessels and, therefore, Indian vessels cannot participate in the carriage of the cargo. These are restrictions on market access under Mode 1. Since India has not implemented cargo reservation, it should push for the removal of such restrictions. In France, export cargo financed by French banks and insured by French underwriters is required to be carried by French vessels or under French B/L. If French vessels are not available, the next preference is allowed to third party carriers and not to vessels of recipient countries. This is a limitation on national treatment and India should push for the removal of such restrictions.

Many developed countries such as the USA, Japan, China and Russia provide direct and indirect subsidies to their national shipping lines. While such policy options can be justified on the ground of maintaining a minimum national fleet, widespread subsidisation has considerable negative effects on the international shipping market. These policies adopted by the developed countries keep the supply of shipping services at an artificially high level and prohibit capital movement to other countries that have comparative advantage in shipping. Owing to this, a substantial portion of world's shipping tonnage is now in the hand of shipowners belonging to developed countries and it is extremely difficult for developing countries, such as India to compete with these subsidised shipping services.

Furthermore, such policies can trigger off a subsidy race leaving behind those countries, particularly developing ones that are neither able nor willing to participate in them. In the current round of WTO negotiations, India should bargain for the removal of these restrictions on national treatment since it will enable the developing countries to increase their share of international ship owning and ship building.

India has a comparative advantage in manpower exports. This is evident from the fact that out of a total stock of around 20,000 Indian officers approximately 14,000 are serving on foreign ships world-wide. Indian officers are widely sought because of their technical skills and command of English language. India has the potential to export manpower and should proactively pursue liberalisation in this area. As discussed in section 1.2, the government has already taken steps to expand and upgrade the training facilities. Foreigners are allowed to train in Indian national institutes. India can also take initiative in exporting training services.

In the previous round of negotiations, major ship owning nations have shown reluctance to liberalise Mode 4 that is, movement of natural persons. Most countries did not bind this mode in their draft country schedules. Developing countries are the main supplier of labour for the world merchant fleet. It is estimated that about 50 per cent of crews on vessels flying flags of the OECD member countries are national of non-OECD countries. India ranks twelfth in the world in the global supply of officers and fourth in the supply of seamen. In the GATS 2000 negotiations, India can commit to open up Mode 3 that is, liberalise access to foreign investors in maritime transport services sector and in return ask for liberal access to Indian officers and seafarers in the labour markets of developed countries.

India has the potential of exporting consultancy services. The Indian maritime sector is staffed with experienced and highly skilled personnel and thus can assist Third World countries, in particular African countries, in developing their shipping, ports and related services. India has already taken steps in this direction and there are on-going talks with Mauritius, Angola and Tanzania regarding this issue.

Since most important maritime nations prohibit foreign maritime service suppliers from providing services around their coast, it is likely that cabotage will be excluded from the current round of talks. However, if there is any demand for opening up the coastal trade, India should continue to reserve cabotage for domestic flag vessels for national security and strategic reasons.

2. *Auxiliary Services*

In the case of auxiliary services, such as storage and warehousing services, container station and depot services, India has already opened up these sectors subject to the existing laws on foreign investments and privatisation. The decision regarding maintenance and repair of vessels are solely dependent on operational requirements, cost, efficiency and time parameters. The identification of suppliers is carried out based on demand and supply and quality of services rendered by them and Indian suppliers do not have any preference vis-avis foreign suppliers. In India, the custom clearance system is through a statutory act and all the duties levied, whether on a foreign or a national supplier, are as per the schedule of tariffs contained in the custom Act. Thus, in the current round of negotiations India can offer to bind these sectors under Mode 3 (commercial presence). The existing laws of foreign investment and privatisation would govern any commitments in this sector. Some auxiliary services (for example, storage and warehousing services) cannot be bound under Mode 1 (cross-border supply) since it is not technically feasible to do so. India does not have any restrictions on market access and national treatment under Mode 2 (consumption abroad).

With respect to Mode 4, that is, movement of natural persons, there are restrictions on employment of foreign nationals in India and foreign nationals are only given permission for employment as part of large turnkey projects, such as offshore platform operations, oil exploration, etc. In the GATS 2000 negotiations, India may consider some liberalisation in these restrictions provided its major trading partners among the developed countries undertake significant liberalisation in movement of natural persons, much beyond the present horizontal commitments and on sectoral basis.

3. *Access to and use of Port Facilities*

It is likely that in the current round of negotiations the OECD countries will make additional commitments to open up this sub-sector to international suppliers on nondiscriminatory terms and conditions. Since India does not have any limitations on market access and national treatment (there are no discriminatory port charges or non-tariff barriers) with respect to access to and use of port facilities, this sector can be covered under additional commitments.

Foreign companies are allowed to operate in India for the provision of shore- based operational services, such as construction, operation and maintenance of container terminals. Foreign companies are also allowed to provide anchorage berth and berthing services. However, at present, India does not have the potential of exporting these services owing to various domestic and external constraints, which are discussed in section 2.

In many countries there are discriminatory port tariffs. For example, Turkey levies a 7.26 per cent freight tax on shipment at Turkish ports by foreign flag vessels. Ukrainian ports charge discriminatory 70 per cent higher non-preferential tonnage dues and 6 per cent freight tax on vessels from countries that do not have MFN status with the country. In the current round of negotiations, India should push for the removal of these restrictions on national treatment.

As discussed earlier, many developed countries are interested in including various aspects of multimodal transportation within maritime transport services agreement since the responsibilities of the concerned parties involved in the maritime transportation now extend far beyond the scope of shipping transport. If multimodal transportation is raised as a part of the discussion, India could consider making commitments in this sector subject to restrictions on market access and national treatment as defined in the Multimodal Transport of Goods Act (1993).

<u>MODULE-VI</u>

International Maritime Trade and Dispute Settlement Mechanisms

The WTO Agreement provides for the discipline applicable to all dispute settlement procedures is the "Understanding on Rules and Procedures Governing the Settlement of Disputes" or Dispute Settlement Understanding (DSU). The WTO dispute settlement mechanism also contains provisions for special or extra procedures under agreements such as Articles XXII and XXIII of GATS (General Agreement on Trade in Services) as well as the procedures and rules of the Appellate Body. The mechanism covers the procedures for mediation, conciliation, good offices and arbitration, and the core part of those procedures includes "consultation" and "panel procedures" and a series of other procedures relevant to them.

The WTO dispute settlement system, as it has been operating since 1 January 1995, did not fall out of the blue. It is not a novel system. On the contrary, this system is based on, and has absorbed, almost fifty years of experience with the resolution of trade disputes in the context of the GATT 1947. Article 3.1 of the DSU states:

> *"Members affirm their adherence to the principles for the management of disputes heretofore applied under Articles XXII and XXIII of GATT 1947, and the rules and procedures as further elaborated and modified herein."*

GATT DISPUTE SETTLEMENT (1948-1995)

GATT 1947

As explained above, the GATT 1947 was not conceived as an international organization for trade. The GATT 1947 therefore did not provide for an elaborate dispute settlement system. In fact, the GATT 1947 contained only two brief provisions relating to dispute settlement: Articles XXII and XXIII.

Under the GATT 1947, a dispute, which parties failed to resolve through consultations, was in the early years of the GATT "handled" by working parties set up pursuant to Article XXIII:2. These working parties consisted of representatives of all interested Contracting Parties, including the parties to the dispute, and made decisions on the basis of consensus. From the 1950s however, a dispute was usually first heard by a so-called "panel" of three to five independent experts from GATT Contracting Parties not involved in the dispute. This panel then reported to the GATT Council, consisting of all Contracting Parties, which would have to adopt by consensus the recommendations and rulings of the panel before they would become legally binding on the parties to the dispute. The dispute settlement procedures and practices, which were developed over the years in a pragmatic ad hoc manner, were progressively codified and supplemented by decisions and understandings on dispute settlement adopted by the Contracting Parties. In 1983, a GATT Legal Office was established within the GATT Secretariat, to help panels, often composed of trade diplomats without legal training, with the drafting of panel reports. As a result, the legal quality of panel reports improved and the confidence of the Contracting Parties in the panel system increased. During the 1980s, previous panel reports were increasingly used as a sort of "precedent" and the panels started using customary rules of interpretation of public international law.

Legalization

In view of these developments in the GATT dispute settlement system since the 50s, Bob Hudec speaks of the increasing "legalization" of the GATT's "diplomat's jurisprudence". The GATT dispute settlement system evolved from a power-based system of dispute settlement through diplomatic negotiations into a system that had many features of a rules-based system of dispute settlement through adjudication.

Success & Failure

While the GATT dispute settlement has generally been considered as quite successful in fully or partially resolving disputes to the satisfaction of the complaining party, the system had some serious shortcomings, which became ever more acute in the 1980s and the early 1990s. The most important shortcoming of the system was that the decision on the establishment of a panel, the decision on the adoption of the panel report and the decision to authorize the suspension of concessions, were to be taken by the GATT Council by consensus. The responding party could thus delay or block any of these decisions and thus paralyse or frustrate the operation of the dispute settlement system. In particular, the adoption of panel reports became a real problem from the late 1980s onwards. The fact that the losing party could prevent the adoption of the panel report meant that panels were often tempted to arrive at a conclusion that would be acceptable to all parties. Whether that conclusion was legally sound and convincing was not a prime concern. Furthermore, the Contracting Parties regarded the dispute settlement process as unable to handle many of the politically sensitive trade disputes since the assumption was that the respondent would refuse to agree to the establishment of a panel or the losing party would prevent the adoption of the panel report. As a result, some Contracting Parties, and, in particular, the United States, resorted increasingly to unilateral action against measures they considered in breach of GATT law.

THE WTO DISPUTE SETTLEMENT UNDERSTANDING

Uruguay Round

The improvement of the GATT dispute settlement system was high on the agenda of the Uruguay Round negotiations. The 1986 Punta del Este Ministerial Declaration on the Uruguay Round stated with regard to dispute settlement:

> *"In order to ensure prompt and effective resolution of disputes to the benefit of all contracting parties, negotiations shall aim to improve and strengthen the rules and the procedures of the dispute settlement process, while recognizing the contribution that would be made by more effective and enforceable GATT rules and disciplines.*

> *Negotiations shall include the development of adequate arrangements for overseeing and monitoring of the procedures that would facilitate compliance with adopted recommendations."*

Already in 1989, the negotiators were able to reach agreement on a number of improvements to the GATT dispute settlement system. These improvements included the recognition of the right to a panel and strict timeframes for panel proceedings. No agreement was reached, however, on the most difficult issue of the adoption of panel reports by consensus. This issue was only resolved in the final stages of the Round and was linked to the introduction of appellate review of panel reports.

DSU

The Understanding on Rules and Procedures Governing the Settlement of Disputes, commonly referred to as the Dispute Settlement Understanding or DSU, is attached to the WTO Agreement as Annex 2 and constitutes an integral part of that Agreement. The DSU provides for an elaborate dispute settlement system and is often referred to as one of the most important achievements of the Uruguay Round negotiations. The most significant innovations to the GATT dispute settlement system concern: (1) the quasi-automatic adoption of requests for the establishment of a panel, of dispute settlement reports and of requests for the authorization to suspend concessions; (2) the strict timeframes for various stages of the dispute settlement process; and (3) the possibility of appellate review of panel reports. The latter innovation is closely linked to the quasi-automatic adoption of panel reports and reflects the concern of Members to ensure high-quality panel reports.

WTO DISPUTE SETTLEMENT TO DATE

Use made of the System

The WTO dispute settlement system has been operational for almost eight years now and in that period it has arguably been the most prolific of all international dispute settlement systems. Since 1 January 1995, a total of 268 disputes have been brought to the WTO system for resolution. In more than one fifth of the disputes brought to the WTO system, the parties were able to reach a mutually agreed solution through consultations or the dispute was resolved otherwise without recourse to adjudication. In other disputes, parties have resorted to adjudication and, to date, such adjudication procedures have been completed in some 80 disputes. There are currently 19 disputes pending before panels and, very exceptionally, none before the Appellate Body. With different degrees of intensity, pre-adjudication consultations between parties to a dispute are currently being held in 209 disputes at the time of writing.

OBJECT AND PURPOSE OF THE WTO DISPUTE SETTLEMENT SYSTEM

Article 3.2 of the DSU states: “The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.”

Article 3.7 of the DSU states in relevant part: “The aim of the dispute settlement mechanism is to secure a positive solution to a dispute. A solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred.”

WTO Members have explicitly recognized that the prompt settlement of disputes arising under the covered agreements “is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members.” The declared object and purpose of the WTO dispute settlement system is to achieve “a satisfactory settlement” of disputes in accordance with the rights and obligations established by the covered agreements. Furthermore, the object and purpose of the dispute settlement system is for Members to seek redress for a violation of obligations or other nullification or impairment of benefits through the multilateral procedures of the DSU, rather than through unilateral action.

Article 23.1 of the DSU states: “When Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreement, they shall have recourse to, and abide by, the rules and procedures of this Understanding.”

It should be recalled that concerns regarding unilateral actions by the United States against what it considered to be violations of GATT law, were one of the driving forces behind the negotiations of the DSU.

The DSU expresses a clear preference for solutions mutually acceptable to the parties reached through negotiations, rather than solutions resulting from adjudication. Article 3.7, quoted above, states in relevant part that a solution mutually acceptable to the parties to a dispute is “clearly to be preferred”.

Accordingly, each dispute settlement proceeding must start with consultations between the parties to the dispute with a view to reaching a mutually agreed solution. To resolve disputes through consultations is obviously cheaper and more satisfactory for the long-term trade relations with the other party to the dispute than adjudication by a panel.

JURISDICTION

Scope of Jurisdiction

The WTO dispute settlement system has jurisdiction over any dispute between WTO Members arising under what are called the covered agreements. The covered agreements are the WTO agreements listed in Appendix 1 to the DSU, including the WTO Agreement, the GATT 1994 and all other Multilateral Agreements on Trade in Goods, the GATS, the TRIPS Agreement and the DSU. Article 1.1 of the DSU establishes "an integrated dispute settlement system" which applies to all of the covered agreements. The DSU provides for a single, coherent system of rules and procedures for dispute settlement applicable to disputes arising under any of the covered agreements.

However, some of the covered agreements provide for a few special and additional rules and procedures "designed to deal with the particularities of dispute settlement relating to obligations arising under a specific covered agreement". Pursuant to Article 1.2 of the DSU, these special or additional rules and procedures prevail over the DSU rules and procedures to the extent that there is a "difference", i.e., a conflict, between the DSU rules and procedures and the special and additional rules and procedures.

Compulsory Jurisdiction

The jurisdiction of the WTO dispute settlement system is compulsory in nature. Pursuant to Article 23.1 of the DSU, quoted above, a complaining Member is obliged to bring any dispute arising under the covered agreements to the WTO dispute settlement system.

As a matter of law a responding Member, on the other hand, has no choice but to accept the jurisdiction of the WTO dispute settlement system. With regard to the latter, we note that Article 6.1 of the DSU states: "If the complaining party so requests, a panel shall be established at the latest at the DSB meeting following that at which the request first appears as an item on the DSB's agenda, unless at that meeting the DSB decides by consensus not to establish a panel."

Unlike in other international dispute settlement systems, there is no need for the parties to a dispute arising under the covered agreements to accept in a separate declaration or separate agreement the jurisdiction of the WTO dispute settlement system to adjudicate that dispute. Accession to the WTO constitutes consent to and acceptance of the compulsory jurisdiction of the WTO dispute settlement system. With regard the jurisdiction of the WTO dispute settlement system, it should also be noted that the system has only contentious, and no advisory, jurisdiction.

ACCESS TO WTO DISPUTE SETTLEMENT

Access to, that is, the use of, the WTO dispute settlement system is limited to Members of the WTO. The Appellate Body ruled in US – Shrimp: "It may be well to stress at the outset that access to the dispute settlement process of the WTO is limited to Members of the WTO. This access is not available, under the WTO Agreement and the covered agreements as they currently exist, to individuals or international organizations, whether governmental or non-governmental. Only Members may become parties to a dispute of which a panel may be seized, and only Members "having a substantial interest in a matter before a panel" may become third parties in the proceedings before that panel. Thus, under the DSU, only Members who are parties to a dispute, or who have notified their interest in becoming third parties in such a dispute to the DSB, have a legal right to make submissions to, and have a legal right to have those submissions considered by, a panel."

The WTO dispute settlement system is a government-to-government dispute settlement system for disputes concerning rights and obligations of WTO Members.

Causes of Action

Each covered agreement contains one or more consultation and dispute settlement provisions. These provisions set out when a Member can have recourse to the WTO dispute settlement system. For the GATT 1994, the relevant provisions are Articles XXII and XXIII. Of particular importance is Article XXIII:1 of the GATT 1994, which states:

> *"If any Member should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of*
>
> *(a) the failure of another Member to carry out its obligations under this Agreement, or*
> *(b) the application by another Member of any measure, whether or not it conflicts with the provisions of this Agreement, or*
> (c) *the existence of any other situation, the Member may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to the other Member or Members which it considers to be concerned."*

In India – Quantitative Restrictions, the Appellate Body held:

> *"This dispute was brought pursuant to, inter alia, Article XXIII of the GATT 1994. According to Article XXIII, any Member which considers that a benefit accruing to it directly or indirectly under the GATT 1994 is being nullified or impaired as a result of the failure of another Member to carry out its obligations, may resort to the dispute settlement procedures of Article XXIII. The United States considers that a benefit*

> *accruing to it under the GATT 1994 was nullified or impaired as a result of India's alleged failure to carry out its obligations regarding balance-of-payments restrictions under Article XVIII:B of the GATT 1994. Therefore, the United States was entitled to have recourse to the dispute settlement procedures of Article XXIII with regard to this dispute."*

The consultation and dispute settlement provisions of most other covered agreements incorporate by reference Articles XXII and XXIII of the GATT 1994. For example, Article 11.1 of the SPS Agreement, entitled "Consultations and Dispute Settlement", states: "The provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding shall apply to consultations and the settlement of disputes under this Agreement, except as otherwise specifically provided herein."

As was the case in India – Quantitative Restrictions, the nullification or impairment of a benefit or the impeding of the realization of an objective may, and most often will, be the result of a violation of an obligation prescribed by a covered agreement. Nullification or impairment or the impeding of the attainment of objectives may however, also be the result of "the application by another Member of any measure, whether or not it conflicts with the provisions" of a covered agreement. Nullification or impairment or the impeding of the attainment of objectives may equally be the result of "the existence of any other situation."

Unlike other international dispute settlement systems, the WTO system thus provides for three types of complaints: "violation" complaints, "non-violation" complaints and "situation" complaints. In the case of a "non-violation" complaint or a "situation" complaint, the complainant must demonstrate that there is nullification or impairment of a benefit or the achievement of an objective is impeded. With regard to a "violation" complaint, however, Article 3.8 of the DSU states:

> *"In cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered prima facie to constitute a case of nullification or impairment. This means that there is normally a presumption that a breach of the rules has an adverse impact on other Members parties to that covered agreement, and in such cases, it shall be up to the Member against whom the complaint has been brought to rebut the charge."*

Violation complaints are by far the most common type of complaints. To date, there have, in fact, been few non-violation complaints and no situation complaints. The difference between the WTO system and other international dispute settlement systems on this point may therefore, be "of little practical significance".

There is no explicit provision in the DSU requiring a Member to have a "legal interest" in order to have recourse to the WTO dispute settlement system. It has been held that such a requirement is not implied either in the DSU or any other provision of the WTO Agreement.109 In EC – Bananas III, the Appellate Body held:

> *"we believe that a Member has broad discretion in deciding whether to bring a case against another Member under the DSU. The language of Article XXIII:1 of the GATT 1994 and of Article 3.7 of the DSU suggests, furthermore, that a Member is expected to be largely self-regulating in deciding whether any such action would be "fruitful"."*

The Appellate Body explicitly agreed with the statement of the Panel in EC – Bananas III that: with the increased interdependence of the global economy, Members have a greater stake in enforcing WTO rules than in the past since any deviation from the negotiated balance of rights and obligations is more likely than ever to affect them, directly or indirectly."

In EC – Bananas III, the Appellate Body considered in deciding whether the United States could bring a claim under the GATT 1994, the fact that the United States is a producer and a potential exporter of bananas, the effects of the EC banana regime on the United States internal market for bananas and the fact that the United States claims under the GATS and the GATT 1994 were inextricable interwoven. The Appellate Body subsequently concluded that "[t]aken together, these reasons are sufficient justification for the United States to have brought its claims against the EC banana import regime under the GATT 1994." The Appellate Body added, however, that "this does not mean though, that one or more of the factors we have noted in this case would necessarily be dispositive in another case."

Involvement of Non-State Actors

As noted above, the WTO dispute settlement system is a government-togovernment dispute settlement system for disputes concerning rights and obligations of WTO Members. Individuals, companies, international organizations or non-governmental organizations, including environmental and human rights NGOs, labour unions and industry associations, have no access to the WTO dispute settlement system. They cannot bring claims of violation of WTO rights or obligations. Under the current rules, they do not have the right to be heard or the right to participate, in any way, in the proceedings. However, under Appellate Body case law, panels and the Appellate Body have the right to accept and consider written briefs submitted by individuals, companies or organisations. The acceptance by panels and the Appellate Body of these briefs, which are commonly referred to as amicus curiae briefs ("friend of the court" briefs), has been controversial and criticised by most WTO Members.

The WTO dispute settlement system provides for more than one dispute settlement method. The DSU allows for the settlement of disputes through consultations (Article 4 of the DSU); through good offices, conciliation and mediation (Article 5 of the DSU); through adjudication by ad hoc panels and the Appellate Body (Articles 6 to 20 of the DSU) or through arbitration (Article 25 of the DSU).

As discussed above, the DSU expresses a clear preference for solutions mutually acceptable to the parties to the dispute, rather than solutions resulting from adjudication. Therefore, resort to adjudication by a panel must be preceded by consultations between the complaining and responding parties to the dispute with a view to reaching a mutually agreed solution.

If consultations fail to resolve the dispute, the complaining party may resort to adjudication by a panel and, if either party to the dispute appeals the findings of the panel, the Appellate Body.

The dispute settlement methods set out in Articles 4 to 20 of the DSU (consultations and adjudication by panels and the Appellate Body) are by far the most frequently used methods. However, the WTO dispute settlement system provides for expeditious arbitration as an alternative means of dispute settlement. Pursuant to Article 25 of the DSU, parties to a dispute arising under a covered agreement may decide to resort to arbitration, rather than follow the procedure set out in Articles 4 to 20 of the DSU. In that case, the parties must clearly define the issues referred to arbitration and agree on the particular procedure to be followed. The parties must also agree to abide by the arbitration award. Pursuant to Article 3.5 of the DSU, the arbitration award must be consistent with the covered agreements. In the latter part of 2001, WTO Members used the Article 25 arbitration procedure for the first time.

The WTO dispute settlement system also provides, pursuant Article 5 of the DSU, for the possibility for the parties to a dispute — if they all agree to do so — to use good offices, conciliation or mediation to settle a dispute. To date, no use has been made of the dispute settlement methods provided for in Article 5 but in 2001 the Director-General reminded Members of his availability to help to settle disputes through good offices.

INSTITUTIONS OF WTO DISPUTE SETTLEMENT

Among the institutions involved in WTO dispute settlement, there is a distinction between the political institutions of the WTO and, in particular, the Dispute Settlement Body, and independent, judicial-type institutions such as ad-hoc dispute settlement panels and the standing Appellate Body. While the WTO has entrusted the adjudication of disputes to panels at the first instance level and the Appellate Body at the appellate level, the Dispute Settlement Body continues to play an active role in the WTO dispute settlement system. The Dispute Settlement Body, or DSB, is an alter ego of the General Council of the WTO. The General Council convenes as the DSB to administer the rules and procedures of the DSU.

Article 2.1 of the DSU states: “the DSB shall have the authority to establish panels, adopt panel and Appellate Body reports, maintain surveillance of implementation of rulings and recommendations, and authorize suspension of concessions and other obligations under the covered agreements."

Article 2.4 of the DSU stipulates that where the DSU provides for the DSB to take a decision, such a decision is always taken by consensus. It is important to note, however, that for most key decisions, such as the decision on the establishment of a panel, the adoption of panel and Appellate Body reports and the authorization of suspension of concessions and other obligations, the consensus requirement is in fact a "reverse" or "negative" consensus requirement. The "reverse" consensus requirement means that the DSB is deemed to take a decision unless there is a consensus among WTO Members not to take the decision. Since there will usually be at least one Member with a strong interest in that the DSB takes the decision to establish a panel, to adopt the panel and/or Appellate Body reports or to authorize the suspension of concessions, it is very unlikely that there will be a consensus not to adopt these decisions. As a result, decision-making by the DSB on these matters is, for all practical purposes, automatic. Furthermore, it should be noted that the DSU provides for strict "timeframes" within which decisions on these matters need to be taken.

The DSB meets as often as necessary to carry out these functions within the time frames provided in the DSU. In practice, the DSB has one regularly scheduled meeting per month and, in addition, a number of special meetings are convened when the need for a meeting arises.

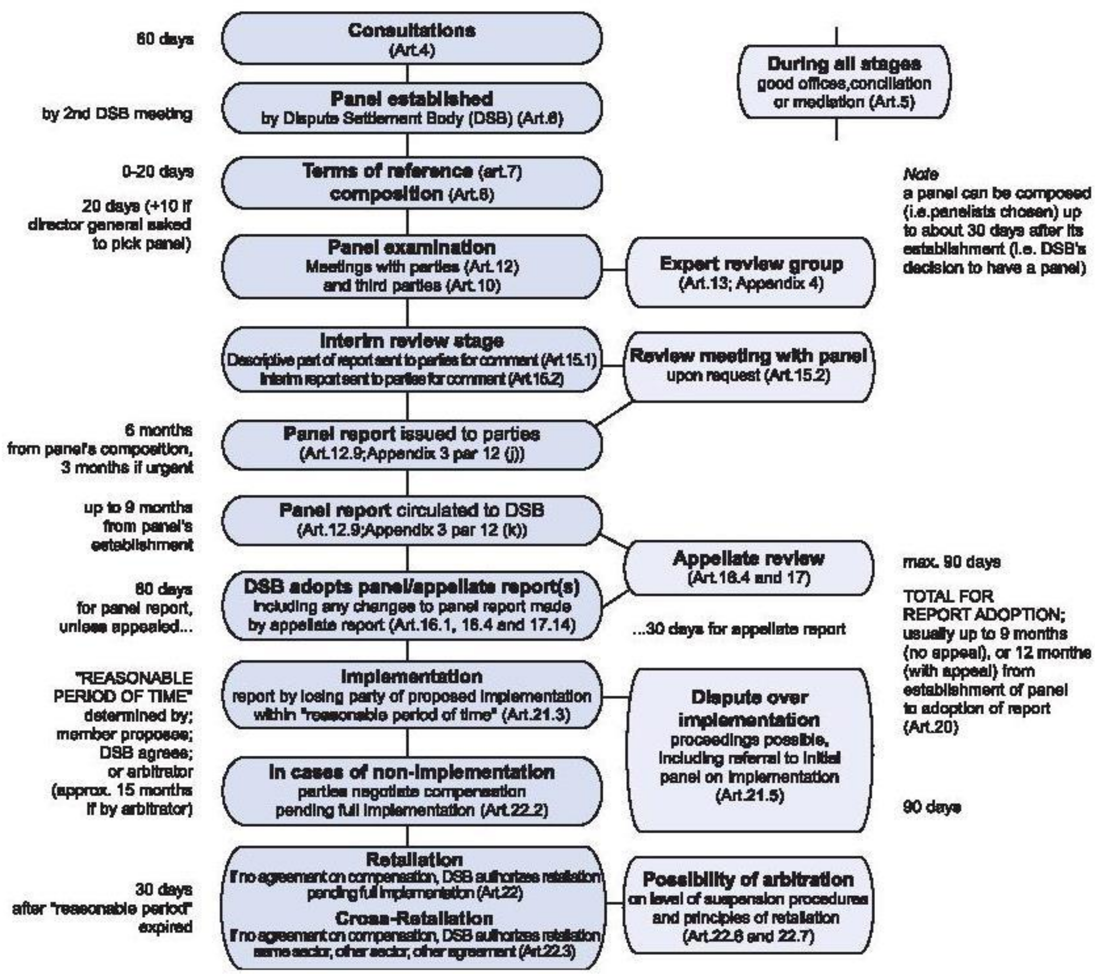
At the request of a complaining party, the DSB will establish a panel to hear and decide a dispute. The DSB will do so by reverse consensus. The establishment of a panel is therefore "automatic". As a rule, panels consist of three persons, who are not nationals of the Members involved in the dispute. These persons are often trade diplomats or government officials but also academics and practising lawyers regularly serve as panellists. The terms of reference of the panel are determined by the request for the establishment of a panel, which identifies the measure at issue and the provisions of the covered agreements allegedly breached. It is the task of panels to make an objective assessment of the matter, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements.

The Appellate Body hears appeals from the reports of dispute settlement panels. Unlike panels, the Appellate Body is a permanent, standing international tribunal. It is composed of seven persons, referred to as Members of the Appellate Body. Members of the Appellate Body are appointed by the DSB for a term of four years, once renewable. Only the complaining or responding party can initiate appellate review proceedings. Appeals are limited to issues of law covered in the panel report or legal interpretations developed by the panel. The Appellate Body may uphold, modify or reverse the legal findings and conclusions of the panel that were appealed.

Apart from the DSB, panels and the Appellate Body, there are a number of other institutions and persons involved in the WTO's efforts to resolve disputes between its Members. These institutions and persons include arbitrators under Articles 21.3, 22.6 or 25 of the DSU, the Textile Monitoring Body under the ATC, the Permanent Group of Experts under the SCM Agreement, Experts and Expert Review Groups under Article 13 of the DSU and Article 11.2 of the SPS Agreement, the Chairman of the DSB and the Director-General of the WTO. Furthermore, the WTO Secretariat and the Secretariat of the Appellate Body play important roles in providing administrative and legal support to panels and the Appellate Body respectively.

WTO DISPUTE SETTLEMENT PROCEEDINGS

The flow-chart below indicates the major steps in the WTO dispute settlement proceedings.



There are four stages in WTO dispute settlement proceedings: (1) consultations; (2) panel proceedings; (3) Appellate Body proceedings; and (4) implementation of the recommendations and rulings.

Consultations

Traditionally, GATT attached significant importance to bilateral consultation, and many disputes actually were settled in this manner. GATT provides for some special consultation and review procedures, such as the one mentioned in Article XIII at paragraph 2 (specifying that a contracting party shall, upon request by another contracting party regarding fees or charges connected with importation/exportation, review the operation of its laws and regulations), as well as in the "1960 GATT decision on arrangements for consultations on restrictive business practices" (specifying that a contracting party shall, upon request by another contracting party regarding the business practice by which international trade competitions would be limited, give sympathetic consideration and provide an adequate opportunity for consultation). However, paragraph 1 of Article XXII and paragraph 1 of Article XXIII of GATT play the central role in prescribing that "formal" consultation to take place prior to panel procedures.

1) *Consultation under Article XXII and Article XXIII, respectively*

Regarding the difference between the two provisions, consultation under Article XXII covers any matter affecting the operation of GATT, while the coverage of consultation under Article XXIII is limited to certain matters. Specifically, Article XXIII provides that a contracting party may make representations or proposals to another contracting party if the former party considers that any benefit accruing to it directly or indirectly under GATT is being nullified or impaired or that the attainment of any objective of GATT is being impeded as the result of:

(a) the failure of another contracting party to carry out its obligations under GATT, or
(b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of GATT, or
(c) the existence of any other situation.

Thus, disputes over "nullification or impairment of any benefit otherwise to accrue under GATT" may be brought to consultation under Article XXIII. Another point of difference between the two concepts of consultation is the participation of a third country; it is permitted only with respect to consultations under Article XXII. Similar differences can be seen in the relation between Article XXII and Article XXIII of GATS.

2) *Consultation under Article 4 of DSU*

The DSU specifies that it adheres to the principles of the management of disputes applied under Articles XXII and XXIII of GATT (paragraph 1, Article 3 of DSU). Article 4 of DSU provides for consultation procedures and rules and specifies that each party should give sympathetic consideration to any representations made by another party and should provide adequate opportunity for consultation. It provides that the parties which enter into consultations should attempt to obtain satisfactory adjustment of the matter concerned.

According to the DSU (paragraph 4, Article 4), a request for consultations shall be effective when such request is submitted in writing, gives reasons for the request, including identification of the measures at issue and an indication of the legal basis for the complaint and is notified to the DSB (Dispute Settlement Body of WTO). It provides that the party to which a request is made shall reply within 10 days after the date of its receipt and shall enter into consultations in good faith within a period of no more than 30 days after the date of receipt of the request, with a view to reaching a mutually satisfactory solution (paragraph 3, Article 4 of DSU).

WTO Members other than the consulting parties are to be informed in writing of requests for consultations, and any Member that has a substantial trade interest in consultations may request to join in the consultations as a third party. It is also provided that the party to which the request for consultations is addressed may reject the said third party's desire to join in the consultations when the party considers that "the claim of substantial trade interest is not well-founded" (paragraph 11, Article 4 of DSU).

Panel procedures

1) *Establishing a panel*

Paragraph 2, Article XXIII of GATT provides that if no satisfactory adjustment is effected through consultations between the contracting parties concerned, the dispute concerned may be referred to the DSB (Dispute Settlement Body, or "Contracting Parties" under the former GATT) with respect to alleged "nullification or impairment of any benefit otherwise to accrue under GATT" as mentioned above.

In the past, such disputes referred to the Contracting Parties were brought to a working group consisting of the disputing parties and neutral parties. The working group was supposed to confirm claims of the respective disputing parties and discuss them, but was not required to make a legal judgment. The function of the working groups was limited to the facilitation of negotiations and dispute settlement. Later, however, the "panel" procedure was introduced and has become the regular practice. A panel is composed of panelists (see Note) who do not represent a government or any organization, but are supposed to serve in their individual capacities. A panel is principally to make a legal judgment regarding the matters in dispute. Also, the WTO dispute settlement mechanism employs a two-tier appellate system, establishing the Appellate Body. GATT provides that consultations pursuant to paragraph 1 of its Article XXIII should precede the establishment of a panel in accordance with paragraph 2 of Article XXIII, but it was generally accepted that a panel could be established after consultations under Article XXII even if there had been no consultation under Article XXIII.

The WTO dispute settlement mechanism does not differentiate consultations under Article XXII from those under Article XXIII of GATT. If consultations fail to settle a dispute within 60 days after the date of receipt of a request for consultations, the complaining party may submit a written request to the DSB for the establishment of a panel (paragraph 7, Article 4 of DSU). It is provided that such written request should indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present clearly the problem of inconsistency with trade agreements in question (paragraph 2, Article 6 of DSU).

As a rule, decisions of the DSB are made by consensus, but the so-called "negative consensus method" is applied to the issues of "establishment of panels" (paragraph 1 of Article 6), "adoption of reports of a panel or Appellate Body" (paragraph 4 of Article 16 and paragraph 14 of Article 17) and "compensation and the suspension of concessions" (paragraph 6 of Article 22), the requested action is approved unless all participating Member countries present at the DSB meeting unanimously object. As far as the DSB's establishment of a panel is concerned, paragraph 2, Article 6 of DSU specifies that "a panel shall be established at the latest at the DSB meeting following that at which the request first appears as an item on the DSB's agenda, unless at that meeting the DSB decides by consensus not to establish a panel."

Parties other than the complaining party which requested the establishment of a panel are entitled to block the panel establishment but only once (paragraph 1, Article 6 of DSU). This veto is most frequently employed by the respondent. Therefore, in most cases, a panel is established at the second DSB meeting at which the request appears as an item on the DSB's agenda. Any Member that desires to be joined in the panel procedure as a third party because of having a substantial interest in the matter concerned is required to express such desire at the time of the establishment of a panel or within 10 days after the date of the panel establishment.

2) Composition of Panels

Once a panel is established, the next step is to select panelists. Selection of panelists is conducted through proposals by the WTO Secretariat on panelists (paragraph 6, Article 8 of DSU). Generally, the Secretariat summons the disputing parties and hears their opinions concerning desirable criteria for selecting panelists, such as home country, work experience and expertise.

Then, the Secretariat prepares a list of nominees (generally six persons) providing their names and brief personal record, and show the list to both parties. It is provided that citizens of the disputing parties or third parties joined in the panel procedure may not serve on a panel concerned with that dispute, unless the parties to the dispute agree otherwise (paragraph 3, Article 8 of DSU).

It is also provided that either disputing party "shall not oppose nominations except for compelling reasons" (paragraph 7, Article 8 of DSU). However, since the definition of a compelling reason is not very strict, frequently nominations made by the WTO Secretariat are not accepted by either party, and sometimes this happens several times. Also, it is provided that if there is no agreement on the panelists within 20 days after the date of the establishment of a panel, the Director-General, upon request of either party, shall determine the composition of the panel after consulting with the parties to the dispute (paragraph 7, Article 8 of DSU).

3) *Making written submissions*

After the composition of a panel is determined, the panel meets to determine the timetable for the panel process and the working procedures it will follow throughout the dispute. Then, after three to six weeks from the establishment of the panel, the complainant provides the panel a written submission containing all facts relating to the issue concerned and its claims. The respondent also provides a written submission to the panel in two to three weeks after the receipt of the complainant's written submission (paragraph 12 of Appendix 3 of DSU). Although there is no rule specifying the composition of a written submission, in many cases they are composed of five parts: 1) introduction; 2) facts behind the complaint; 3) procedural points at issue; 4) claims based on legal grounds; and 5) conclusion.

Regarding the disclosure of the written submissions, it is provided (in paragraph 3, Appendix 3 of DSU) that "deliberations of a panel and documents submitted to it shall be kept confidential. Nothing in the DSU shall preclude a party to a dispute from disclosing statements of its own positions to the public." Thus, disputing parties may disclose their own written submissions to the public. Actually, the United States and EU disclose many of their written submissions to the public, and Japan also releases some of its written submissions to the public on websites.

4) *Panel meeting*

A panel generally meets two times. Meetings of a panel are held in the WTO building, instead of a special facility such as a court. Traditionally, a panel meets in closed session, just like other meetings of WTO. Generally, panel meetings last one to three days.

The first meeting of a panel is supposed to be held in one to two weeks after the receipt of the written submission submitted by the respondent (paragraph 12, Appendix 3 of DSU). This first substantive meeting is to begin with a briefing made by the chairman of the panel on how to proceed with the meeting. Then, the compalinant and the respondent, respectively, give oral statements regarding their own written submissions. This is followed by questioning by the panel and in some cases a question-and-answer session between the disputing parties. Next, a third party session is held, where oral statements and a question-and-answer session occurs. As a rule, the presence of third parties is permitted only at these third party sessions, and third parties may not be present at substantive meetings. The second substantive meeting of a panel is supposed to be held after two to three months since the first substantive meeting.

The second meeting focuses mainly on counter-arguments against claims of the other party made during the first substantive meeting. Unlike the first substantive meeting, third parties are not permitted to attend the second substantive meeting. Unless otherwise agreed between the disputing parties, third parties may not make written submissions or obtain written submissions submitted by the disputing parties.

5) *Interim report*

Following the second substantive meeting, the panel issues an interim report to the disputing parties. The interim report describes the findings and conclusions of the panel. An interim report provides the first opportunity for disputing parties to tell whether their arguments are supported by the panel or not. Disputing parties are entitled to submit comments or submit a request for the panel to review and correct technical aspects of the interim report for correction.

6) *Final panel report*

The DSU provides (in paragraph 9 of its Article 12) that the period in which the panel conducts its examination, from the date that the composition and terms of reference of the panel have been agreed upon until the date the final report is issued to the disputing parties, "shall not exceed six months as a general rule." When the panel considers that it cannot issue its report within six months, it is supposed to inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will issue its report (paragraph 9, Article 12 of DSU). The recent trend is that cases requiring an examination period exceeding six months are increasing because of the difficulty in confirming facts due to the existence of a highly technical matter or difficult interpretations of a legal matter at issue.

Generally, a final panel report is issued shortly after the disputing parties comment on the interim report, first to disputing parties and then to all Members in the three official languages of the WTO (English, French and Spanish).

A panel report contains, in its conclusion, the judgment reached by the panel as well as recommendations regarding correction of the measures in question. This conclusion is referred to the DSB, where the "negative consensus method" is applied for the adoption of the panel report. The DSB adopts the "recommendation and rulings", which are legally binding the parties concerned. Adoption of a panel report is supposed to be completed between 21 and 60 days after the date the report has been circulated to the Members (paragraphs 1 and 4 of Article 16 of DSU).

Appeal (review by the Appellate Body)

If there is an objection to a panel report, disputing parties may request the Appellate Body to examine the appropriateness of the legal interpretations employed by the panel (paragraph 4, Article 17 of DSU). The Appellate Body is a standing group composed of seven persons of recognized authority with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally; the Appellate Body membership is broadly representative of membership in the WTO. Three persons out of the seven Appellate Body members are to serve on any one case. Persons serving on the Appellate Body are selected by a consensus of all Members at the DSB and serve for a four-year term. Each person may be reappointed once (paragraph 2, Article 17 of DSU).

A Notice of Appeal should be filed no later than the DSB meeting at which a panel report is scheduled to be adopted. Since it is provided that the adoption of a panel report should be completed within 60 days after the date of circulation of the panel report to the Members, an appeal is supposed to be made within 60 days after the date of circulation (paragraph 4, Article 16 of DSU).

It is provided (in paragraph 6 of Article 17 of DSU) that an appeal should be limited to issues of law covered in the panel report and legal interpretations developed by the panel. In principle, factual findings of a panel may not be challenged. Regarding legal interpretations and findings, there is a precedent that mentions: "To determine whether a certain incident occurred at a certain place/time is a matter of fact typically. However, to determine whether a certain fact or a series of facts complies with any given rule of a certain convention is a matter of law and requires legal interpretation." (EC-Hormone-Treated Beef Case (DS26))

After the filing of a Notice of Appeal, the Appellate Body shows the timetable for set out in its working procedures. The three major steps in the procedures are: (1) filing of a written submission by the appellant; (2) filing of written submissions by the appellee and third participants, respectively; and (3) meeting of the Appellate Body with the parties (oral hearing). It is provided that the appellant's filing of its written submission ((1) above) should shall be made within 7 days after the filing of a Notice of Appeal, that the appellee's filing of its written submission ((2) above) should be made within 25 days after the date of the filing of a Notice of Appeal, and that the meeting of the Appellate Body (oral hearing) ((3) above) is supposed to be held between 35 and 45 days after the date of the filing of a Notice of Appeal (paragraphs 21, 22, 24 and 27 of Working Procedures for Appellate Review "WT/AB/WP/5" issued on January 4, 2005). It is also provided that the participation of a third party in appellate review procedures may be accepted only if such party was joined in the panel procedure (paragraph 4, Article 17 of DSU). Third party participants may file written submissions and also may be present at the meeting of the Appellate Body.

During a meeting of the Appellate Body (1) the appellant, (2) the appellee and (3) third participant(s), respectively, make oral arguments in the order mentioned. This is followed by questioning by the Appellate Body of the disputing parties as well as of third party participants; and each party is required to address the questions. The Appellate Body takes the initiative in questioning, and either disputing party is generally not allowed to ask a question to the other party. In general, following the question-and-answer session, disputing parties and third party participants are provided with the opportunity to make oral statements again at the end of the meeting.

Following the meeting, the Appellate Body is to circulate its report to the Members within 60 days after the date of filing of a Notice of Appeal. The proceedings should not exceed 90 days in any case (paragraph 5, Article 17 of DSU). Unlike panel procedures, there is no rule concerning an interim report for appellate review procedures.

Adoption of reports

A report prepared by the panel or the Appellate Body following the review process becomes the formal written recommendations of the DSB when adopted by the DSB. Regarding the adoption of panel reports, the DSU provides (in paragraph 1, Article 16) that "In order to provide sufficient time for the Members to consider panel reports, the reports shall not be considered for adoption by the DSB until 20 days after the date on which they have been circulated to the Members." It is also provided (in paragraph 4, Article 16 of DSU) that "within 60 days after the date of circulation of a panel report to the Members, the report shall be adopted at a DSB meeting." Regarding the adoption of reports of the Appellate Body, the DSU provides (in paragraph 14, Article 17) that "a report shall be adopted within 30 days after the date of circulation of the report to the Members." Together with a panel report, a report of the Appellate Body becomes the official written recommendations and rulings of the DSB once it is adopted at a DSB meeting.

Implementation of recommendations

The DSU provides that at a DSB meeting held within 30 days after the date of adoption of the panel or Appellate Body report, the Member to which the recommendations are directed is supposed to express its intentions with respect to implementation of the recommendations mentioned in the report. If it is impracticable to comply immediately with the recommendations, the Member is given a reasonable period of time to do so. Such reasonable period of time may be decided by mutual agreement between the disputing parties concerned. However, in the absence of such mutual agreement, the parties may refer the decision to arbitration. In principle, an arbitrator usually is one of the three Appellate Body members who conducted the appellate review of the case concerned. The mandate of the arbitrator is to determine the "reasonable period of time" within 90 days after the date of the adoption of report. It is provided (in paragraph 3, Article 21 of DSU) that the reasonable period of time to implement the recommendations mentioned in a panel or Appellate Body report should, as a general rule, not exceed 15 months from the date of adoption of the report. It is also provided that the DSB should keep under surveillance the implementation of adopted recommendations and that the Member concerned should provide, after a certain period of time following the date of establishment of the reasonable period of time, the DSB with a status report in writing of its progress in the implementation of the recommendations until the issue of implementation is resolved (paragraph 6, Article 21 of DSU).

In general, a panel or the Appellate Body recommends that the Member concerned bring a measure determined to be inconsistent with a covered agreement into conformity with that agreement. It does not usually give any specific instruction on how to implement the recommendations. Therefore, it is not unusual that disagreement arises between disputing parties as to the existence or consistency with the WTO Agreement of measures taken to comply with the recommendations. In this respect, the DSU provides (in paragraph 5, Article 21) that "such disagreement as to the existence or consistency with a covered agreement of measures taken to comply with adopted recommendations or rulings" may be referred to a panel. Such panel established for the purpose of determining whether there has been implementation of adopted recommendations or rulings ("compliance panel") is supposed to be composed of those panelists who served on the original panel. The panel is required to issue a report within 90 days after the date when disagreement is referred to the panel. Unlike regular panel procedures, establishment of the compliance panel does not have to be preceded by consultations. Generally, such panels meet only once. When the complaining party doubts that there has been appropriate implementation of adopted recommendations or rulings, it may request review by a compliance panel repeatedly without limitation. In addition, there is a precedent that compliance panel decisions may be appealed to the Appellate Body for review, although DSU does not have any provision providing for such process.

Countermeasures

With the approval of the DSB, the complainant may take countermeasures, such as suspension of concessions, against the party who respondent's interests also in cases where it fails to implement the recommendations adopted by the DSB within a given reasonable period of time, provided that no agreement on compensation is reached between both parties. Specifically, it is provided that the complainant may request the DSB to suspend the application, to the Member concerned, of concessions or other obligations under covered agreements ("countermeasures") when such Member fails to bring the measures found to be inconsistent with a covered agreement into compliance therewith within the said "reasonable period of time" or that a panel or the Appellate Body confirms a failure of such member to fully implement adopted recommendations (paragraph 2, Article 22 of DSU).

There are rules as to the sectors and level of countermeasures to be taken. For instance, it is provided (by Article 22 of DSU) that the complainant, when taking countermeasures, should first seek to target sector(s) that are the same as that to which the dispute concerned is associated, and also that the level of countermeasures should be equivalent to the level of the "nullification or impairment" caused. If the complainant considers that it is not practicable or effective to suspend concessions or other obligations with respect to the same sector(s), it may seek to suspend concessions or other obligations in other sectors under the same agreement (item (b), paragraph 3, Article 22 of DSU).

In addition, if that party considers that it is not practical or effective to suspend concessions or other obligations with respect to other sectors under the same agreement, and that the circumstances are serious enough, it may seek to suspend concessions or other obligations under another covered agreement (item (c), paragraph 3, Article 22 of DSU). The latter practice is called "cross retaliation," and it can be represented by a case where retaliation for a violation of TRIPS (Agreement on Trade-Related Aspects of Intellectual Property Rights) involves the suspension of customs-related concessions under GATT. Such cross retaliation is one of the unique measures employed in the WTO dispute settlement mechanism, and was introduced as a result of the coverage of the WTO Agreement over not only goods but also services and intellectual property rights (However, GPA sets special provisions on prohibition of "cross retaliation." Paragraph 7, Article 22 stipulates that "any dispute arising under any Agreement …other than this Agreement shall not result in the suspension of concessions or other obligations under this Agreement, and any dispute arising under this Agreement shall not result in the suspension of concessions or other obligations under any other Agreement.").

In the case that the respondent objects to the contents or level of the countermeasures for which the complainant requested authorization, the matter may be referred to arbitration (paragraph 6, Article 22 of DSU). When arbitration is conducted, the resulting decision is taken into consideration for the authorization of countermeasures. The negative consensus method is applied to finalize the authorization of the DSB (paragraph 7, Article 22 of DSU).

Time-frame for the Proceedings

One of the most striking features of the WTO dispute settlement system is the short time frames within which the proceedings of both panels and the Appellate Body must be completed. The period in which a panel shall conduct its examination, from the date that the composition and terms of reference of the panel have been agreed upon until the date the final report is issued to the parties to the dispute, shall, as a general rule, not exceed six months. When a panel considers that it cannot issue its report within six months, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within with it shall issue its report. In no case should the period from the establishment of the panel to the circulation of the report to the Members exceed nine months. Much shorter still is the time frame within which a panel has to rule on the WTO-consistency of measures taken to comply with the recommendations and rulings under Article 21.5 of the DSU. In such proceedings, the panel must circulate its report within 90 days after the date of referral of the matter to it.

With regard to the Appellate Body proceedings, the DSU provides that, as a general rule, the proceedings shall not exceed 60 days from the date a party to the dispute formally notifies its decision to appeal to the date the Appellate Body circulates its report. When the Appellate Body believes that it cannot render its report within 60 days, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will submit its report. In no case shall the proceedings exceed 90 days.

No other international court or tribunal operates under such severe time limits. These time limits, and in particular the time limits for the Appellate Body, have been criticized as excessively short and too demanding for both the parties to the dispute and the Appellate Body. As a result of these time limits, however, there is no backlog of cases either at the panel or appellate level. While panels frequently go beyond the time limits imposed on them by the DSU, the Appellate Body has thus far been able to complete all but four appeals within the maximum period of 90 days.

Confidentiality of the Proceedings

The WTO dispute settlement proceedings are also characterized by their confidentiality. Consultations, panel proceedings and appellate review proceedings are all confidential. Meetings of the DSB and panels and the oral hearing of the Appellate Body take place behind closed doors. All written submissions to a panel or to the Appellate Body by the parties and third parties to the dispute are confidential. Parties may make their own submissions available to the public. While a few Members do so in a systematic manner (e.g., the United States), most parties choose to keep their submissions confidential. The DSU provides that a party to a dispute must, upon request of any WTO Member, provide a non-confidential summary of the information contained in its submissions to the panel that could be disclosed to the public. However, this provision does not provide for a deadline by which such non-confidential summary must be made available and is, therefore, not very effective.

The interim report of the panel and the final panel report as long as it is only issued to the parties to the dispute are also confidential. The final panel report only becomes a public document when it is circulated to all WTO Members. In reality, however, the interim report and the final report issued to the parties do not remain confidential very long and are usually “leaked” to the media. Unlike panel reports, Appellate Body reports are not first issued to the parties and then, weeks later, circulated to all WTO Members. In principle they are issued to the parties and circulated to all WTO Members at the same time and are as of that moment a public document.

REMEDIES FOR BREACH OF WTO LAW

What can or should be done if a panel and/or the Appellate Body conclude that a measure is inconsistent with WTO law?

Article 3.7 of the DSU states: "In the absence of a mutually agreed solution, the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements. The provision of compensation should be resorted to only if the immediate withdrawal of the measure is impracticable and as a temporary measure pending the withdrawal of the measure, which is inconsistent with a covered agreement. The last resort which this Understanding provides to the Member invoking the dispute settlement procedures is the possibility of suspending the application of concessions or other obligations under the covered agreements on a discriminatory basis vis-à-vis the other Member, subject to authorization by the DSB of such measures."

Article 19.1 of the DSU provides: "Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement. In addition to its recommendations, the panel or Appellate Body may suggest ways in which the Member concerned could implement the recommendations."

Article 21.1 of the DSU adds to this: "Prompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members."

However, if it is impracticable to comply immediately with the recommendations and rulings of the DSB, the Member concerned shall have a reasonable period of time in which to do so. This reasonable period of time can either be agreed upon by the parties or be determined through binding arbitration. In those cases in which the reasonable period of time for implementation has been determined through arbitration, it has been set between six months and 15 months and one week.

With respect to compensation (for future damages) and retaliation in case of non-compliance, Article 22.1 states: "Compensation and the suspension of concessions or other obligations are temporary measures available in the event that the recommendations and rulings are not implemented within a reasonable period of time. However, neither compensation nor the suspension of concessions or other obligations is preferred to full implementation of a recommendation to bring a measure into conformity with the covered agreements." The DSU does not explicitly provide for the compensation of damage suffered.

DEVELOPING COUNTRY MEMBERS AND DISPUTE SETTLEMENT SYSTEM

Use Made of the Dispute Settlement System

The WTO dispute settlement system has been used intensively by the major trading powers, and, in particular, the United States and the European Communities. Developing country Members, however, have also had frequent recourse to the WTO dispute settlement system, both to challenge trade measures of major trading powers and to settle trade disputes with other developing countries. During the first six years of the WTO dispute settlement system (1995-2000) in 26 per cent of all cases brought to the WTO system for resolution developing countries were complainants and in 40 per cent they were respondents. In 2000 and 2001, developing countries brought more disputes to the WTO system than did developed countries. The most active users of the dispute settlement system among developing country Members are Brazil, India, Mexico, Thailand and Chile. To date, no least-developed country has ever brought a complaint to the WTO or has been a respondent in WTO dispute settlement proceedings.

Special and Differential Treatment

The DSU recognizes the special situation of developing and least-developed country Members. There are a number of DSU provisions that grant special rights to developing countries in the consultation and panel processes. Special rules for developing country Members are found in Article 3.12, Article 4.10, Article 8.10, Article 12.10, Article 12.11, Article 24 and Article 27 of the DSU. For the most part, these special rules and procedures have not been much used to date.

Legal Assistance

The WTO Secretariat assists all Members in respect of dispute settlement when they so request. However, the DSU recognizes that there may be a need to provide additional legal advice and assistance to developing country Members. To meet that additional need, Article 27.2 of the DSU requires the WTO Secretariat to make available qualified legal experts to help any developing country Member which so requests. The extent to which the Secretariat can assist developing country Members is, however, limited both by lack of manpower and by the requirement that the Secretariat's experts should give assistance in a manner "ensuring the continued impartiality of the Secretariat". The experts can thus not act on behalf of a developing country Member in a dispute with another Member and their assistance is necessarily limited to the preliminary phases of a dispute.

Effective legal assistance to developing country Members in dispute settlement proceedings is given by the newly established, Geneva-based Advisory Centre on WTO Law. At the occasion of the official opening of the Advisory Centre on WTO Law on 5 October 2001, Mr. Mike Moore, the then WTO Director-General, said that with the establishment of the

Advisory Centre for "the first time a true legal aid centre has been established within the international legal system, with a view to combating the unequal possibilities of access to international justice as between States". The Advisory Centre is an independent intergovernmental organization (fully independent from the WTO), which will function essentially as a law office specialized in WTO law, providing legal services and training exclusively to developing country and economy-in-transition Members of the Advisory Centre and all least-developed countries. The Centre will provide support at all stages of WTO dispute settlement proceedings at discounted rates for its developing country Members and all least-developed countries. The current 32 Members (nine developed countries, 22 developing countries and one economy-in-transition) have pledged in total US$ 9.8 million for the endowment fund and US$6 million for the multi-year contributions. In the summer of 2001, the Advisory Centre assisted for the first time a WTO developing country Member in a dispute settlement procedure when it assisted Pakistan in the Appellate Body proceedings in United States – Cotton Yarn.

NEGOTIATIONS ON THE DISPUTE SETTLEMENT SYSTEM

At the time of adoption of the WTO Agreement, it was agreed that the WTO Ministerial Conference would complete a full review of the DSU within four years after the entry into force of the WTO Agreement, and subsequently take a decision on whether to continue, modify or terminate the DSU. In the context of this review of the DSU, which took place in 1998 and 1999, Members made a large number of proposals and suggestions for further improvement of the dispute settlement system. In the run-up to and during the Seattle Session of the Ministerial Conference in December 1999, Members made a considerable but eventually unsuccessful effort to agree on modifications to be made to the DSU.

In 2000 and 2001, informal efforts outside the DSB to reach agreement on DSU amendments were continued. Also these efforts, intensified in the run-up to the Doha Session of the Ministerial Conference in November 2001, did not lead to an agreement. At the Doha Session of the Ministerial Conference, it was agreed, however, to open in January 2002 formal negotiations with the aim of concluding by May 2003 an agreement on changes to the DSU. The negotiations are based on the work done so far and on new proposals by Members. The Ministerial Declaration states that the negotiations on the Dispute Settlement Understanding will not be part of the single undertaking — i.e. that they will not be tied to the overall success or failure of the other negotiations mandated by the Ministerial Declaration.

Among the proposals for reform currently under negotiation, there is a proposal to introduce a system of permanent panelists, proposals regarding the composition and mandate of the Appellate Body, proposals concerning the transparency of the proceedings, proposals concerning the special and differential treatment for developing country Members and proposals to improve the WTO mechanism to ensure implementation of recommendations and rulings adopted by the DSB.

CASES ON MARITIME TRANSPORTATION UNDER WTO DSU

KOREA – COMMERCIAL VESSELS (DS273)

PARTIES		AGREEMENT	TIMELINE OF THE DISPUTE	
Complainant	*European Communities*	*ASCM Arts. 3.1(a),3.2, 4.7, 5(c) and 6.3(a)*	Establishment of Panel	*21 July 2003*
			Circulation of Panel Report	*7 March 2005*
Respondent	*Korea*		Circulation of AB Report	*NA*
			Adoption	*11 April 2005*

Measure and Industry at Issue

- Measure at issue: Korea's various measures relating to alleged subsidies to its shipbuilding industry.
- Industry at issue: Korean shipyard industry.

Summary of Key Panel Findings

ASCM Art. 3.1(a) and 3.2 (export subsidies)

- Measures as such: Having found that the KEXIM legal regime ("KLR"), APRG and PSL programmes did not "mandate" the conferral of a "benefit," the Panel rejected EC claims that these measures as such were inconsistent with Art. 3.1(a) and 3.2.
- Measures as applied: The Panel found that certain "KEXIM guarantees" under the APRG programme were prohibited export subsidies (specific subsidies contingent upon export performance) under Art. 3.1(a) and 3.2 and rejected Korea's argument that item (j) (i.e. export credit guarantee) of the Illustrated List could work as an affirmative defence, on the ground that item (j) does not fall within the scope of footnote 5 of ASCM. The Panel also found that certain "KEXIM loans" under the PSL programme were prohibited export subsidies and rejected Korea's defence under item (k) (export credit grants) since the PSLs (as credits to shipbuilders rather than foreign buyers) were not export credits.

ASCM Part III (actionable subsidies)

- Subsidies (debt restructurings): The Panel rejected the EC claims that the debt restructurings of Korean shipyards involved subsidization or that shipyards received subsidies through tax concessions, after having found: (i) that the European Communities had not demonstrated the existence of a benefit or subsidization in respect of the restructuring of DHI; (ii) that the European Communities had not demonstrated that either the decision to restructure or the terms were "commercially unreasonable" for Halla; (iii) that the European Communities had not argued that the determination that the going concern value for Daedong exceeded its liquidation was not proper; and (iv) in respect of Daewoo, as the assets were allocated at book value as part of the spin-off, there was no gain and thus no basis for any tax exemption.

- ASCM Arts. 5(c) and 6.3(c) (serious prejudice): The Panel rejected the EC claim that the subsidized APRG and PSL transactions at issue seriously prejudiced its interests by causing significant price depression within the meaning of Art. 6.3(c), finding that the evidence or arguments did not demonstrate that the subsidized transactions had such an aggregate effect.

ASCM Art 4.7 (recommendation)

- The Panel recommended that Korea withdraw the individual APRG and PSL subsidies within 90 days.

EC – COMMERCIAL VESSELS (DS301)

PARTIES		AGREEMENTS	TIMELINE OF THE DISPUTE	
Complainant	*Korea*	*GATT Arts. III:4, I:1 and III:8(b)* *DSU Art. 23.1* *ASCM Art. 32*	Establishment of Panel	*19 March 2004*
			Circulation of Panel Report	*22 April 2005*
Respondent	*European Communities*		Circulation of AB Report	*NA*
			Adoption	*20 June 2005*

<u>Measure and Product at Issue</u>

- Measure at issue: The European Communities' Temporary Defensive Mechanism for Shipbuilding (the "TDM Regulation") of 2002, under which contract-related operating aid provided by EC member States for the building of certain ships were considered compatible with the common market.
- Product at issue: Container ships, product and chemical tankers as well as LNG carriers.

<u>Summary of Key Panel Findings</u>

- GATT Art. III:4 (national treatment - domestic laws and regulations) and III:8(b) (national treatment - subsidies exception): The Panel concluded that the state aid subject to the TDM Regulation was covered by GATT Art. III:8(b) because it provided for "the payment of subsidies exclusively to domestic producers", and therefore the TDM Regulation, the national TDM schemes (in this case, Denmark, France, Germany, the Netherlands and Spain) and the EC decisions authorizing the schemes were not inconsistent with GATT Art. III:4.

- GATT Arts. I:1 (most-favoured-nation treatment) and III:8(b) (national treatment - subsidies exception): Based on its conclusion that the TDM Regulation was covered by GATT Art. III:8(b) and that, as a result, the subsidies under the TDM Regulation were not covered by the expression "matters referred to in paras. 2 and 4 of Article III" in Art. I:1, the Panel concluded that the TDM Regulation and the national TDM schemes were not inconsistent with GATT Art. I:1.
- ASCM, Art. 32.1 (specific action against a subsidy): The Panel found that the TDM Regulation was a specific action because it had a strong correlation and inextricable link with the constituent elements of a subsidy but it was not taken against a subsidy of another member (Korea in this case) within the meaning of Art. 32.1. The Panel concluded that, in addition to the measure's (TDB Regulation in this case) impact on the conditions of competition, there must be some additional element for the measure to be considered an action "against" a subsidy: an element inherent in the "design and structure" of the measure that serves to dissuade, or encourage the termination of, the practice of subsidization. Therefore, the Regulation and the national TDM schemes mentioned above were found not to be in violation of Art. 32.1.

Other Issues

- Prohibition on unilateral determinations (DSU Art. 23.1): The Panel concluded that since "it is undisputed that the European Communities adopted the TDM Regulation without having recourse to the DSU," the European Communities acted inconsistently with DSU Art. 23.1. As a consequence, the national TDM schemes were also inconsistent with DSU Art. 23.1.

COLOMBIA – PORTS OF ENTRY (DS366)

PARTIES		AGREEMENT	TIMELINE OF THE DISPUTE	
Complainant	*Panama*	*GATT Arts. XI:1, XIII:1, V:2 V:6 and I:1* *CVA Arts. 1, 2, 3, 5, 6 and 7*	Establishment of Panel	*22 October 2007*
			Circulation of Panel Report	*27 April 2009*
Respondent	*Colombia*		Circulation of AB Report	*NA*
			Adoption	*20 May 2009*

Measure and Product at Issue

- Measure at issue: Colombian customs regulations establishing the use of indicative prices and restrictions on ports of entry.

- Product at issue: Certain textiles, apparel and footwear classifiable under HS Chapters 50-64 of Colombia's Tariff Schedule, which were re-exported and re exported from the Colon Free Zone ("CFZ") and Panama to Colombia.

Summary of Key Panel Findings

- CVA Arts. 1, 2, 3, 5, 6 and 7.2(b) and (f) (sequential use of valuation methods): The Panel found that Colombia's use of indicative prices constituted customs valuation and that the measures establishing indicative prices, by mandating their use for customs valuation purposes, were inconsistent as such with the obligation established in the CVA to apply, in a sequential manner, the methods of valuation provided in Arts. 1, 2, 3, 5 and 6 of the Agreement. The Panel further found that, by mandating the use of the higher of two values, or a minimum price as the customs value of subject goods, the measures were inconsistent as such with Art. 7.2(b) and (f).
- GATT Art. XI:1 (prohibition on quantitative restrictions): The Panel found that Colombia's prohibition of the importation of textiles, footwear and apparel from Panama or the CFZ except at the ports of Bogota and Barranquilla, was a prohibited restriction on importation within the meaning of Art. XI:1.
- GATT Art. I:1 (most-favoured-nation treatment): The Panel found that, by subjecting textile, apparel and footwear imports arriving from Panama and the CFZ to an advance import declaration requirement, which thereby requires payment of customs duties and sales tax in advance and prevents importers from inspecting goods on site upon arrival in order to verify the accuracy of the declaration, Colombia confered advantages to like products from all other WTO Members that were not extended immediately and unconditionally to textile, apparel and footwear imports from Panama and the CFZ in violation of Art. I.1.
- GATT Art. V:2 (freedom of transit): By requiring that goods undergo trans-shipment in order to proceed in international transit, the Panel found that Colombia failed to extend freedom of transit via the most convenient routes to goods arriving from Panama in international transit within the meaning of Art. V:2, first sentence, as informed by Art. V:1. The Panel also found that Colombia made distinctions based on the place of origin or departure of textiles, apparel and footwear arriving from Panama or the CFZ, in violation of Art. V:2, second sentence.
- GATT Art. XX(d) (exceptions - necessary to secure compliance with laws): The Panel found that Colombia failed to establish that the ports of entry measure was necessary to ensure compliance with Colombian customs laws and regulations under Art. XX(d).